ADVISORY COMMITTEE
ON
CIVIL RULES

October 16, 2020

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 16, 2020

OPENING BUSINESS

ACTION ITEMS

INFORMATION ITEMS

Matters Carried Forward

UPDATE

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(Standing Committee)

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Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date		End Date
Robert M. Dow, Jr.	D	Illinois (Northern)	Member: Chair:	2013 2020	---- 2023
Jennifer C. Boal	M	Massachusetts		2018	2021
Ethan P. Davis*	DOJ	Washington, DC		----	Open
Joan N. Ericksen	D	Minnesota		2015	2021
Kent A. Jordan	C	Third Circuit		2018	2021
Thomas R. Lee	JUST	Utah		2018	2021
Sara Lioi	D	Ohio (Northern)		2016	2022
Brian Morris	D	Montana		2015	2021
Robin L. Rosenberg	D	Florida (Southern)		2018	2021
Virginia A. Seitz	ESQ	Washington, DC		2014	2020
Joseph M. Sellers	ESQ	Washington, DC		2018	2021
A. Benjamin Spencer	ACAD	Virginia		2017	2020
Ariana J. Tadler	ESQ	New York		2017	2020
Helen E. Witt	ESQ	Illinois		2018	2021
Edward H. Cooper Reporter	ACAD	Michigan		1992	Open
Richard Marcus Associate Reporter	ACAD	California		1996	Open

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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. A. Benjamin Goldgar *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. James C. Dever III *(Criminal)* Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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Senior Research Associate
(Standing)

TAB 1

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

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

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

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

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

Advisory Committee on Civil Rules
Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Evidence Rules
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. "Testimony" as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees' response to the CARES Act directive to consider emergency rules.

MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court's decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee's work to determine whether any rule change is needed. This process will take time.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

Action Items

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal "may [be] dismiss[ed]" by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase "if provided by applicable statute" to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as "well taken" but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys' responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word "mere" was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule's statement that a court "must" dismiss. He noted that several circuits' local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit's local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a "simple, non-substantive act." Consistent with *Garza*, the proposed amendments seek to simplify an

d make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an expressio unius conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that "and limit" be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term "trap" in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding "inadvertently" to the first sentence using the word "trap" in the committee note – thus: "These decisions inadvertently create a trap . . . ." Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

Publication of Proposed Amendment to Rule 25 (Filing and Service). The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public's right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee's mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

Information Items

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

Suggestion Regarding Decision on Grounds Not Argued. Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

Suggestion Regarding In Forma Pauperis Standards. Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

Suggestion Regarding Rule 4(a)(2). Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

Suggestion Regarding Rule 43 (Substitution of Parties). Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

Review of Recent Amendments. Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court's electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee's clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge's disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

Action Items

Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims). Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for "insured depository institution[s]." "Insured

depository institution" has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for "insured depository institution" from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines "insured depository institution," in 11 U.S.C. § 101(35), and the Code's definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement). Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from "Corporate Ownership Statement" to "Disclosure Statement." The Advisory Committee received two comments in response to publication. One comment suggested that the word "shall" in Rule 7007.1 be changed to "must." While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to "corporate ownership statement." The comment offered two reasons: (1) "disclosure statement" is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title ("Corporate Ownership Statement") retained and the word "disclosure" in subparagraph (b) changed to "corporate ownership," with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally). Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee's ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee's revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act's public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1. Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of "debtor" for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from $2,725,625 to $7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most $2,725,625; (2) a debtor with debts over $2,725,625 but not more than $7,500,000; and (3) a debtor that doesn't meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of "current monthly income" in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Publication of Restyled Parts I and II of the Bankruptcy Rules. Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

Publication of SBRA Rules and Official Forms. The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim). Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal). Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

Information Items

Amendment to Interim Rule 1020. As previously noted, the CARES Act altered the definition of "debtor" under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

Director's Forms for Subchapter V Discharge. The Advisory Committee approved three Director's Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

Actions Items

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify "file" or "attributed." Professor Cooper responded that the provisions are intended to qualify "attributed." A different member shared concerns about the "or" structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as "if ordered by the court or if an alternative situation applies." He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of "unless the court orders otherwise" earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): "is attributed to that party or intervenor at the time that controls the determination of jurisdiction." Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties' obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding "unless the court orders otherwise." The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify "file" or "attributed." This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify "attributed." A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state "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 at the time provided in subdivision (b) of this rule." A second sentence would then state that the disclosure statement must name and identify 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." Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – "unless the court orders otherwise" – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

Publication of Proposed Amendment to Rule 12(a)(4). Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

Information Items

Report of the Subcommittee on Multidistrict Litigation (MDL). Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – "opt outs"

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases. The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading). The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

Suggestion Regarding Rule 17(d) (Public Officer's Title and Name). The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

Action Items

Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony). Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its "case-in-chief." Following Judge Campbell's suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence "at trial" or in a party's "case-in-chief." The Advisory Committee concluded that "case-in-chief" was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use "during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C)." Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26's much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to "prompt notice" of any "modification, expansion, or contraction" of the party's expert testimony. She suggested that "contraction" might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is "correction." The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the "contraction" language could lead to a party being penalized for disclosing too much. This member recommended removing "contraction" from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word "modification," which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

Information Items

Proposals to Amend Rule 6 (The Grand Jury). The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee's role to provide advisory opinions on what a court's power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to "occupy the field" or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee's intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer's previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at $30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office's COVID-19 Task Force to inform the future work of this Committee.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee's members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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Agenda E-19 (Summary)
Rules
September 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 5-8

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to "designate the judgment—or the appealable order—from which the appeal is taken." The proposed amendment further provides that "[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal." The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

Information Items

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word "may" in the current rule with "must.") The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment's effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to "the provisions and policies of title 18, U.S.C., § 3146(a) and (b)" – sections that have been repealed

– with a reference to "the relevant provisions and policies of title 18 U.S.C. § 3142" – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)'s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology "corporate ownership statement" because "disclosure statement" is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court's authority to provide notice or make service through the Bankruptcy Noticing Center ("BNC") to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): "It is the recipient's responsibility to keep its electronic address current with the clerk."

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes*. Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.

2. *Respect Defined Terms*. Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms "equity security holder," "small business case," "small business debtor," "health care business," and "bankruptcy petition preparer." On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as "personal financial-management course," "credit-counseling statement," and "patient-care ombudsman."

3. *Preserve Terms of Art*. When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was "meeting of creditors."

4. *Remain Open to New Ideas*. The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.

5. *Defer on Matters of Pure Style*. Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee's delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income). The instructions to that form currently require that it be filed "if you are an individual and are filing for bankruptcy under Chapter 11." This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

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

Rule 3002 (Filing Proof of Claim or Interest). Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if "the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim." The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

Rule 5005 (Filing and Transmittal of Papers). The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Rule 7004 (Process; Service of Summons, Complaint). The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the "Chief Executive Officer," "President," "Officer for Receiving Service of Process," or "Officer" (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the "Managing Agent," "General Agent," or "Agent" (or other similar titles) suffices, whether or not a name is also used or such name is correct.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments' implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

Information Items

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act.

Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of "debtor" for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of "current monthly income" and "disposable" income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

Interim Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee's recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

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

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) 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 the United States' behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

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

A subcommittee was formed to consider the suggestion. The subcommittee's first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference's study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

Information Items

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

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

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

Information Item

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

OTHER ITEMS

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

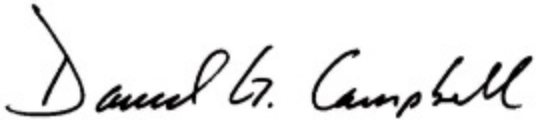
The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

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

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TAB 3

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Effective December 1, 2019

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

Effective (no earlier than) December 1, 2020

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Approved by Judicial Conference (Sept 2020)

REA History:

- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

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

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if "the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim."	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(*i*) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 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 the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

TAB 4

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Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	**H.R. 76** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf **Summary (authored by CRS):** This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	**H.R. 77** *Sponsor:* Biggs (R-AZ) *Co-Sponsors:* Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	**Bill Text:** https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. **Report:** None.	• 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security • 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	**S. 471** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	**Bill Text:** https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." **Report:** None.	• 2/13/19: introduced in the Senate; referred to Judiciary Committee

Due Process Protections Act	**S. 1380** *Sponsor:* Sullivan (R-AK) *Co-Sponsors:* Booker (D-NJ) Cornyn (R-TX) Durbin (D-IL) Lee (R-UT) Paul (R-KY) Whitehouse (D-RI)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf **Summary:** This bill would amend Criminal Rule 5 (Initial Appearance) by: 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: "(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." **Report:** None.	• 5/8/19: introduced in the Senate; referred to Judiciary Committee • 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent • 5/22/20: received in the House • 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member • 9/21/20: passed House without amendment by voice vote
Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)	**S. 1411** *Sponsor:* Whitehouse (D-RI) *Co-Sponsors:* Blumenthal (D-CT) Hirono (D-HI)	AP 29	**Bill Text:** https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf **Summary:** In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief. **Report:** None.	• 5/9/19: introduced in the Senate; referred to Judiciary Committee

	H.R. 3993 *Sponsor:* Johnson (D-GA) *Co-Sponsors:* Cohen (D-TN) Lieu (D-CA)	AP 29	Identical to Senate bill (see above)	• 7/25/19: introduced in the House; referred to Judiciary Committee • 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet
Back the Blue Act of 2019	**S. 1480** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf **Summary:** Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." **Report:** None.	• 5/15/19: introduced in the Senate; referred to Judiciary Committee
	H.R. 5395 *Sponsor:* Bacon (R-NE) *Co-Sponsors:* Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)		Identical to Senate bill (see above).	• 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security

Justice in Forensic Algorithms Act of 2019	**H.R. 4368** *Sponsor:* Takano (D-CA) *Co-Sponsors:* Evans (D-PA) Johnson (D-GA)		**Bill Text:** https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf **Summary:** The stated purpose of the bill is, in part, "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings . . . ." The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H): • Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software. • Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence. • Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software,	• 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology • 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet

			necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include— (i) the name of the company that developed the software; (ii) the name of the lab where test was run; (iii) the version of the software that was used; (iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs; (v) documentation of procedures followed based on procedures outlined in internal validation; (vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and (vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards. **Report:** None.	

CARES Act	**H.R. 748**	CR (multiple)	**Bill Text (as enrolled):** https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf **Summary:** Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencings. Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act. **Report:** None.	• 3/27/20: became Public Law No. 116-136 • Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations
Abuse of the Pardon Prevention Act	**H.R. 7694** *Sponsor:* Schiff (D-CA) *Co-Sponsor:* Nadler (D-NY)	CR 6	**Bill text:** https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf **Summary:** Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with "all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned." Subsection (b) states that "Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section." **Report:** None. **Related Bills:** H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19)	• 7/21/20: introduced in House; referred to Judiciary Committee • 7/23/20: mark-up session held; reported out of Judiciary Committee

TAB 5

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
APRIL 1, 2020

The Civil Rules Advisory Committee met by Zoom teleconference on April 1, 2020. The meeting was originally noticed for an in-person meeting in West Palm Beach, Florida, but was renoticed in the Federal Register for a remote meeting by Zoom, with the opportunity for public access by audio feed. Participants included Judge John D. Bates, Committee Chair, and Committee members Judge Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin Spencer; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Allison A. Bruff, Esq., S. Scott Myers, Esq., and Bridget M. Healy, Esq., represented the Administrative Office. Zachary Prorianda, Esq., staff of the Committee on Court Administration and Case Management, also attended. Dr. Emery G. Lee, Tim Reagan, Esq., and Bridget M. Healy, Esq., represented the Federal Judicial Center. Seth Fortenberry, Supreme Court fellow, also attended.

Observers are identified in the attached Zoom attendance list.

Judge Bates noted that more than fifty participants and observers had joined the new adventure of meeting by Zoom, "a platform made popular in these trying times." He expressed thanks to the Administrative Office staff for the untiring efforts that had set up the meeting and provided practice sessions to facilitate easy participation by Committee members. He noted that Brittany Bunting, a new member of the Administrative Office staff, had lead responsibility for planning this meeting, and will be planning future meetings.

Judge Bates also extended a welcome to Susan Y. Soong, Clerk for the Northern District of California, Laura Briggs's successor as clerk representative. She was unable to participate in this meeting because of emergency demands at her court.

Judge Bates also noted the conclusion of rules committee terms for several veterans. Judge Campbell served for many years as a member and then Chair of the Civil Rules Committee, and this year will conclude four years as Chair of the Standing Committee. "No individual has had a greater impact on the Rules Enabling Act

process in the last 15 to 20 years." Judge Dow is completing his second term. His work as chair of the class-action and then MDL Subcommittees has made him perhaps the second most influential member in this year's graduating class. Virginia Seitz, who has served on several subcommittees and worked with the pilot projects has been an essential member. Judge Goldgar, who is completing his second term as a member of the Bankruptcy Rules Committee, has helped with many aspects of the Civil Rules work, including e-filing.

Finally, Judge Bates said that his term as Committee Chair is concluding this year. He has greatly enjoyed working with all members of the Committee and support staff, and will miss the work and engaging company.

Judge Bates also noted that draft minutes for the Standing Committee's January meeting are in the agenda materials, and reflect a generally positive reaction to the prospect that this Committee may advance a recommendation to publish for comment a set of Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The Judicial Conference held its March meeting by remote means of communication, with no Civil Rules business on the agenda.

Looking forward to new Civil Rules, amendments of Rule 30(b)(6) have been advanced from the Judicial Conference to the Supreme Court. If the Court prescribes them and Congress does not act, they will go into effect on December 1, 2020. Amendments of Rule 7.1 are on today's agenda. If the Committee recommends them for adoption and the Standing Committee approves, they will be on track to take effect no earlier than December 1, 2021.

October 2019 Minutes

The draft Minutes for the October 29, 2019 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Judge Bates said that there is not much present action in Congress on bills that would affect the Civil Rules. The CARES Act includes some small funding for the judiciary. It also includes provisions for video teleconferencing for some proceedings that were much improved with the help of Judge Campbell and the Criminal Rules Committee and its Reporters.

Judge Campbell prefaced his report on the CARES Act by saying that he will miss participating in the Civil Rules work, recalling

the observation made by Peter Keisler that although there are term limits on committee membership, there are no limits on friendship. He feels pride for all Committee members.

Involvement with the CARES Act began two weeks ago when the Southern District of New York, and particularly Judge Furman — a member of the Standing Committee — became concerned about how the court could function in a time of pandemic. The CARES Act in its original form would have inserted direct amendments of the Criminal Rules that had no sunset provisions. The Criminal Rules Committee worked with Judge Campbell, Judge Furman, and Judge Bates to formulate statutory provisions, not Rules amendments, for video and teleconferencing in twelve categories of criminal proceedings. These provisions include "sunset" clauses. The provisions take effect upon findings made by the Judicial Conference, and then take effect in a particular district for ten categories of proceedings on authorization of the chief judge. They take effect for felony pleas and sentencing only if the chief judge finds a threat to public health and safety, and the presiding judge finds that sentencing cannot be deferred without injustice. An example of injustice would be the prospect of a sentence to time served that would result in immediate release. Consent of the defendant is required for all twelve categories. Initial reports are that defense counsel around the country are consenting. The Act also directs the Judicial Conference and the Supreme Court to consider rules provisions that would enable similar emergency measures in the future.

Judge Bates said that the Civil Rules Committees and others will be considering rules that would authorize emergency measures. He will appoint a subcommittee, looking for progress that is expedited by extending over a period of months, not years. Volunteers are welcome. There will be technology issues, including public access and the presence of a detained defendant.

Social Security Disability Review Subcommittee

Judge Bates introduced the report of the Social Security Disability Review Subcommittee, noting that it had been working for nearly three years with Judge Lioi as chair. They have produced a modest but thoughtful draft of Supplemental Rules. The question at this meeting is whether to recommend publication of these rules for comment. The risks and problems tend to collect around issues that are characterized as transsubstantivity. "This is not an easy question. The views of the players are not uniform." But encouragement may be found in the reactions of several Standing Committee members that favored publication, at least as a means of gathering more information.

Judge Lioi introduced the Subcommittee Report. The Subcommittee has received extensive input from the Social Security Administration, representatives of the Administrative Conference, the National Organization of Social Security Claimants Representatives, the American Association for Justice, magistrate judges and a few district judges, and academics. The Style Consultants have reviewed the current draft.

The Subcommittee proceeded cautiously, working to develop neutral rules that will be easy to understand and follow. Rule 1 defines the scope of the rules. Rule 2 establishes simplified pleading standards for the complaint. Rule 3 adopts a procedure that replaces Civil Rule 4 service of the summons and complaint with electronic notice from the court. Rule 4 authorizes an answer limited to the administrative record and any affirmative defenses, and describes motion practice. Rule 5 is in many ways the central feature, providing for an appeal-like procedure that presents the action for decision on the briefs. Rules 6 through 8 address the sequence of the briefs. The Subcommittee deliberately chose to omit any page limits for the briefs.

The Committee decided at the meeting last October to ask for Standing Committee discussion about the transsubstantivity question. Several members suggested that it would be useful to publish proposed rules as a means of gathering additional information.

The Subcommittee decided that the transsubstantivity question cannot be avoided by developing a set of rules for all administrative review actions in the district courts. There is too much variety of agencies and substantive law, and too many different mixtures of reliance on an administrative record with independent court proceedings. But the Committee Note for the proposed rules observes that, apart from the Rule 3 provision for electronic notice to SSA, a court might find it useful to adapt the social security review practice to other administrative review proceedings.

The Rules draft is nearly ready for publication. A few minor drafting issues remain, and will be addressed by the Subcommittee.

The reasons for moving forward to publication should be considered alongside the reasons for abandoning the work.

Good, nationally uniform rules for social security review cases are intrinsically desirable. The project began with a request addressed by the Administrative Conference of the United States to the Judicial Conference, supported by an extensive empirical study and analysis by Professors Jonah Gelbach and David Marcus. The

Social Security Administration continues to offer strong support, even after its proposed draft rules were ruthlessly revised and trimmed back by the Subcommittee. SSA litigates these actions in all district courts, and encounters difficulties both with attempts to process them through the general Civil Rules and with some of the local practices and local rules that have been adopted to modify or displace the Civil Rules. The draft is neutral as between claimants and SSA. The Department of Justice has developed a model local rule that closely reflects earlier Subcommittee drafts and recommends it for adoption by district courts. These review actions are just that — proceedings for review on an administrative record that should be recognized and treated as appeals, not original trial proceedings. Judges who have reviewed successive Subcommittee drafts have been receptive; some of them already adopt practices closely similar to the draft rules, while others express frustration with the effort to provide review within the framework of the general Civil Rules. The sheer volume of these cases makes it appropriate to adopt substance-specific rules; the common figures are that they number between 17,000 and 18,00 actions a year, accounting for 7% to 8% of the federal civil docket. Finally, publishing the proposals does not commit the rules committees to recommending adoption; it would provide additional information to support the decision whether to recommend adoption.

The arguments against advancing to publication begin with the tradition that the Civil Rules should be transsubstantive, designed to apply equally to all actions. One of the concerns that underlie this tradition is that substance-specific rules may favor one identifiable set of interests over competing interests, or at least be perceived in that light. These rules may be perceived in that way, in part because one SSA hope is that the uniform and efficient procedure they embody will provide some measure of relief to an inadequately funded and overworked legal staff. Claimants' representatives express a fear that district and magistrate judges like the particular procedures they have worked out, and will be unhappy and thus less efficient if forced into a uniform national procedure. The affection for local practices, moreover, may present an insurmountable obstacle in some districts that persist in their established habits, ignoring new national rules. And the Department of Justice fears that adopting this set of substance-specific rules will prompt requests by special interest groups for their own favorable sets of rules.

One way of framing these competing arguments is to recognize a presumption against substance-specific rules. We have some substance-specific rules now. There is no absolute prohibition. But it is wise to adhere to something of a presumption that can be overcome only by strong reasons for adopting a new set of substance-specific rules. On this approach, the question is whether

the reasons that support a set of supplemental rules for § 405(g) review actions are strong enough to overcome the general presumption as well as the specific negative arguments.

This initial presentation was followed by a reminder that the Subcommittee is proposing publication. A potential recommendation to adopt is not yet an issue. Publication will yield additional information on the wisdom of adoption. It is reasonable to be concerned that adding yet another and significant set of substance-specific rules will be seen as a precedent supporting adoption of still other sets under pressure from interest groups. But that concern is offset by the fact that there are other specialized rules, both broad and narrow. In a different direction, it is also wise to remember the prospect that new national rules may not be fully successful in driving out eccentric local practices. At a minimum, local practices are likely to continue to regulate such matters as the length of briefs. And some critics may believe that the rules "were pushed by one side of the 'v,' and were pushed to make life easier for SSA lawyers."

General discussion began with a reiteration of the Department of Justice concerns that adoption of these rules would perhaps influence others to seek specialized rules. A close parallel might be found in arguing for rules for all Administrative Procedure Act cases. That could be a real problem. And local rules will persist; concerns about diverse practices will not be fully addressed. Publication, moreover, "implies imprimatur," a thumb pushing the scales toward eventual adoption.

Professor Coquillette said that the Subcommittee has done a great job. "I'm an apostle of transsubstantive rules." There have been a number of efforts to get specialized rules. Fighting them off at times is hard work — pressure in Congress for rules to address perceived problems with "patent troll" litigation provides a recent example. But the Subcommittee draft is really good work, particularly in the choice to frame the rules as a new set of Supplemental Rules, not as rules inserted into the body of general Civil Rules. They are worthy of publication.

A committee member expressed continuing concern about departing from transsubstantivity, but suggested that a further articulation of the reasons why the general Civil Rules are not well suited to § 405(g) actions would help. Might the Subcommittee help?

Judge Lioi responded that it is significant that the proposal originated in the Administrative Conference, an independent body that has no self-interest in these questions, as well as winning support from SSA.

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But it was observed that it may be better not to plead the case in the Committee Note. There is often a temptation to draft a Note as in part a work of advocacy during the publication process, adding provisions that go beyond explaining the purpose and working of new rules provisions. But that temptation is better resisted. Carrying forward words of advocacy may generate a risk of over-eager implementation as litigants and courts adjust to new provisions.

It also was observed that many courts process § 405(g) review actions through summary-judgment procedures. That can work well if it means presentation through briefs that, in the manner of point-counterpoint motions for summary judgment, present the positions of the claimant and SSA through competing but specific references to the administrative record. But Rule 56 itself does not fit. It could generate confusion if a party is misdirected by an attempt to follow the inapposite Rule 56(c) procedures for presenting materials for decision. Far worse, it would be flat wrong to invoke the standard for summary judgment, that there is no genuine dispute of material fact. A genuine dispute defeats summary judgment, but mandates affirmance of an SSA decision as supported by substantial evidence on the record. Apart from Rule 56, SSA counts nine districts that insist that the claimant and SSA provide a joint statement of facts to provide a basis for decision. Claimants and SSA alike agree that this procedure is at best a great deal of unnecessary work, and at worst provides an unsatisfactory basis for decision.

Another committee member provided a reminder that the summary-judgment procedures of Rule 56 do not work well. And rather than joint statements of fact, some courts demand individual statements of fact in forms that also do not work well.

The committee member who asked for further advice found these remarks helpful, but then asked how are § 405(g) review actions different from other administrative proceedings that come to the district courts? The fact that SSA supports the proposal is not of itself sufficient to distinguish § 405(g) actions from other administrative review actions.

A committee member responded that it is not only SSA that supports the proposal. The project was initiated by the Administrative Conference, a disinterested and neutral body. More importantly, half of his court's docket is comprised of administrative review actions. There is a great variety among those cases, often involving specific substantive statutes. There are big cases and small cases. There are cases that require something more for decision than the administrative record. The Freedom of Information Act is a source of many cases that are largely

standardized in some dimensions, but that require processing before they are ready for decision. A general rule for all administrative review actions in the district courts "would be a big undertaking."

A different committee member recalled the volume of these cases, rising to 17,000 or 18,000 a year and accounting for 7% to 8% of the federal civil docket. Can the fear of stimulating other proposals for substance-specific rules be reduced by the lack of any other category of administrative decisions that mount to like numbers?

The first response was that the Department of Justice concern is not limited to special rules for specific categories of administrative review. It extends to all types of civil actions. More narrowly, the Subcommittee considered this question but was unable to identify any category of administrative review actions with anything like comparable numbers. And reviewing the Administrative Office annual accounting of the types of cases that fill district-court dockets suggests that there is no room left for anything like comparable numbers of any particular category of administrative review actions.

Concerns returned about the reactions of some claimants' attorneys who fear that the rules favor SSA. What basis is there for these concerns? Judge Lioi responded that there is no basis. The reaction seems to be based on no more than suspicions based on the long and very detailed draft rules that SSA proposed at the beginning of the project. Some provisions drew particular ire, such as one that limited a claimant's brief to fifteen pages. Another example was a proposed rule for determining awards of attorney fees for services in the district court. The rule was long and complex, addressing many details in ways that suggested an attempt to resolve disputed matters by rule provisions that could be adopted, if at all, only after deep inquiries into matters specific to social security review actions. The Subcommittee has pared away all of the complexities, leaving a compact set of rules that establish efficient procedures for the core of an appellate review process. All sides, claimants, SSA, and the courts will benefit from the efficiencies.

Similar observations followed. There is not much more to explain such suspicions as persist. The fact that SSA is pushing the project makes some claimants reluctant, fearing that somehow the rules will confer unintended benefits on SSA. These fears may draw in part from the fact that one of SSA's hopes is that SSA will achieve some efficiencies in the staff attorney resources devoted to complying with the wide variety of local procedures.

Another committee member agreed that increased efficiency

should not disadvantage claimants. It will work to the advantage of all sides.

Discussion turned to more specific questions.

Rule 1(a) defines the scope of the supplemental rules. They apply to a § 405(g) action "that presents only an individual claim." An action that extends beyond this bare model falls outside the supplemental rules and is governed in all matters by the ordinary Civil Rules. But are there cases that present only an individual claim where this is not the right model for the procedure? A plaintiff is allowed to plead more than the bare bones elements that identify the claimant and SSA proceeding. But may there be a need for discovery? Rule 1(b) is intended to invoke all of the Civil Rules, including discovery. Discovery is not inconsistent with the provisions for pleading, motions, notice of the action to the Commissioner, or presentation on the briefs. It was suggested that the Committee Note should be expanded to explain that discovery is available if needed, perhaps as an addition to the paragraph that notes that the Civil Rules continue to apply.

Rule 1(b) says that the Civil Rules "also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules." Why does it say "also," and why does the Committee note say that the Civil Rules "continue" to apply? Why not just say that they apply? The wording of Rule 1(b) was taken directly from Supplemental Admiralty Rule A(2), one of the Supplemental Rules that has benefited from the style process when it was amended. It has seemed appropriate to borrow this language for a new set of supplemental rules; the different formula in Civil Rule 71.1 — "except as this rule provides otherwise" — might have been chosen if the social security rules were instead framed as new Civil Rules. "also" will carry forward.

The question was renewed whether the provision of proposed Rule 1(b) that the Civil Rules also apply except to the extent that they are inconsistent with the Supplemental Rules permits resort to the discovery rules? The answer was that discovery is almost never used in § 405(g) actions. If the record is insufficient, the cure is remand to SSA for further administrative proceedings, not adding to the record in the district court. Remands, indeed, are quite common. The Gelbach & Marcus study found wide variations in the remand rate from one district to another, ranging from a low of around 20% in some districts to a high of around 70% in some. But discovery may be appropriate in some situations, and is permitted under the general Civil Rules when not inconsistent with administrative review practices. Examples that have been noted in Subcommittee discussions include ex parte communications with an administrative law judge, and one shocking example of routine

bribery of an administrative law judge on a vast scale. Another concern is that the record filed by the SSA at times is not complete — an example often offered is failure to include materials excluded from evidence by the administrative law judge. Discovery may be necessary to compile a complete record. It was agreed that the Subcommittee should consider adding to the Committee Note a brief observation about the availability of discovery.

A second question asked why Rule 2.2(b) permits a plaintiff to add to the required elements of the complaint "a short and plain statement of the grounds for *review*." This formula tracks the familiar language of Rule 8(a)(2), but substitutes "review" for "relief." "[R]eview" was chosen because it emphasizes the appellate character of a § 405(g) action, as compared to an action that seeks independent adjudication on the merits including a remedy that at times may be determined by a specific formula but often is more open-ended than a determination of social security benefits. But the reference to "review" might lead some readers to mistake this as a provision for more elaborate pleading of jurisdiction. The Committee agreed to change "review" to "relief."

A related question addressed the structure of Rule 2(b)(1). It is divided as first (A), a statement that the action is brought under § 405(g). That corresponds to a Rule 8(a)(1) statement of the grounds for the court's jurisdiction. Then come (B)(i) and (ii), identifying the person for whom benefits are claimed and the person on whose wage record benefits are claimed. That corresponds to a Rule 8(a)(2) statement of the grounds for relief. (C) comes last, stating the type of benefits claimed, corresponding to a Rule 8(a)(3) demand for the relief sought. The correspondence of this three subparagraph structure with the three-paragraph structure of Rule 8(a) seemed an attractive contrast to remind the plaintiff of both the familiar structure and the simplified requirements of Rule 2. But a few words could be saved by eliminating the items and establishing a four-subparagraph structure, a change approved by the Committee:

(1) The complaint must state:
  (A) ~~state~~ that the action is brought under § 405(g) and identify the final decision to be reviewed;
  (B) ~~state (i)~~ the name, the county of residence, and the last four digits of the social security number of the person for whom benefits are claimed~~, and~~;
  (C) ~~(ii)~~ the name and last four digits of the social security number of the person on whose wage record benefits are claimed; and
  (~~C~~D) ~~state~~ the type of benefits claimed.

Rule 3 provides that the court must send electronic notice of

the action to the Commissioner "and to the United States Attorney for the district [in which the action is filed]." The final words are set off by brackets to indicate that they are unnecessary — no one would expect that the court would send notice to the United States Attorney for a different district. But they were included to see whether some observers would think them necessary. They will be carried forward in brackets.

Brackets also were suggested to set off a new sentence that the Subcommittee recently added to Rule 3: "If the complaint was not filed electronically, the court must notify the plaintiff of the transmission." This sentence was added in response to a fear that a pro se plaintiff who is not allowed to file electronically might not get notice that the required transmission actually occurred. Adding this provision to rule text is designed to provoke comment on the practical questions: Will CM/ECF systems automatically generate a prompt for paper notice when the complaint was filed on paper? If not, will clerks' offices develop protocols to make that happen? It was agreed to add brackets as a means of prompting public comment.

Another drafting question asked whether Rules 6, 7, and 8 should say only that plaintiff or Commissioner must serve a brief? The Appellate Rules call for filing. Although Civil Rule 5(d)(1)(A) directs filing within a reasonable time of any paper after the complaint that must be served, it would be useful to provide a reminder of the filing obligation. One drafting goal for the Supplemental Rules has been to make them accessible to pro se claimants. "File and serve" would help. The Committee adopted this change.

Changes in the Committee Note also were explored.

The addition of a sentence stating that discovery is available when appropriate is noted above.

Rule 5 provides that the action is presented for decision by the parties' briefs. The Committee Note states that reliance on Rule 56 summary-judgment procedures and directing submission of a joint statement of facts are inconsistent with Rule 5. The problem, however, is more general than these two specific and common examples. The problem is that some districts love their own district practices, and may persist in practices that thwart the efficient appeal procedure embodied in Rule 5. The Committee agreed that the Note should be expanded to include a statement that other practices that thwart this appeal procedure also are inconsistent with Rule 5.

The Committee voted 11 yes, one no, to recommend to the

Standing Committee that the draft Supplemental Rules, as revised by the Committee, and the Committee Note, also as revised, be published for comment.

Judge Bates thanked all participants for a thorough and helpful discussion.

MDL Subcommittee Report

Judge Bates introduced the report of the MDL Subcommittee chaired by Judge Dow. He noted that the Subcommittee had returned the topic of third party litigation financing to the full Committee as a matter for ongoing study, without any immediate plan to develop possible rules. Committee members who come across interesting information should send it to Professor Marcus, who will act as a clearing house and send the information on to the Administrative Office.

Of the many items that the Subcommittee has considered, three have become the focus of current deliberations.

Early Vetting. One ongoing topic is "early vetting." A recent development has been characterized as an "initial census," a concept that is evolving in practice. Plaintiffs and defendants may hold different views of the purposes of an initial census, but they are cooperating to develop this approach in big MDLs. It might be seen as a device for plaintiffs to get a hand on efficient conduct of the litigation; or as a device for defendants to weed out unsupported claims; or as a means for the court to establish a basis for managing the proceedings, including support for designating leadership. The Subcommittee is exploring how judges use the initial census, how lawyers use it, and whether the initial favorable views endure. Professor Marcus noted that it is not clear how long it will take to find out how this practice works as it evolves.

Judge Rosenberg described her early experience with an initial census in the Zantac MDL. Measures taken to combat the current pandemic have forced some delay in organizing the proceedings as communications switch from live hearings to remote means. A 2-page initial census form has been put together that meets with agreement by plaintiffs and a 4-lawyer initial defense firm. Professor Jaime Dodge reports that the lawyers have worked well together. By April 30 the vendor will report on everything in the system. The initial census form must be filled out for every case that has been filed. All lawyers who apply for leadership positions must also fill out census forms for cases not yet filed. That will help in managing the proceedings, will provide a jump-start for discovery, and will remove some cases. There also is a 5-page initial census "plus"

form that may at least delay the need to follow up with a plaintiff fact sheet process. This form will be due 60 days after appointment of lead counsel, an event that is scheduled for April 30. On this schedule, the time from the census order to receiving the census-plus forms will be 90 days. The information will include how many cases there are and who are prospective defendants, and perhaps supply records. Tolling provisions also are included. The census-plus form will include the case name and number; identify counsel; provide plaintiff's personal information, including Zantac usage information, where the drug was purchased, and the reasons that prompted usage; and what type of cancer is alleged. The form must be certified for truth and accuracy. A place is provided to attach medical documents, or to explain why they are not attached. The order provides that a plaintiff who attaches the documents need not file a plaintiff fact sheet "at this time." The plaintiff must attest to usage and to the injuries suffered.

The line between a plaintiff fact sheet and an initial census form with this much detail may be wavering. Plaintiff fact sheets have been tailored to the needs of individual MDLs, and are not uniform. The purpose of the initial census has been quicker development and responses because they seek less information than many plaintiff fact sheets demand.

Professor Marcus reflected that this discussion shows how difficult it would be to draft a rule that describes what an initial census should look like. The Subcommittee has learned from many sources, including rigorous research by the Federal Judicial Center, that plaintiff fact sheets commonly are developed through months of negotiation specific to a particular MDL, and seek a lot of information, even though generally they do not include "Lone Pine" orders to produce evidence to support the answers.

Judge Dow noted that the impetus is to get a consensus of plaintiffs and defendants on a census form. "Not even plaintiffs want bad cases" — it is not only MDL lead counsel that shun them. Judge Fallon has observed that the first two pages of plaintiff fact sheets are all that are needed to know how to organize an MDL. It remains a question whether the census form should be designed to winnow out unfounded cases as well as to support organization of the proceeding. Further experience may show that initial census practices are indeed desirable. If desirable, it will remain a question whether to attempt to capture the practice in a Civil Rule, or whether to leave it instead to the categories of best practices that are fostered by the JPML, Federal Judicial Center programs for judges, the Manual for Complex Litigation, and like means. Judge Dow and Professor Marcus expressed favorable impressions of what has been heard about initial census developments and surprise at how fast the concept has evolved in

practice.

Interlocutory Appeals. Judge Dow began discussion of the Subcommittee's work on interlocutory appeals by expressing thanks to the JPML and the FJC for providing useful data. It is difficult to get full data on experience with interlocutory appeals and attempted interlocutory appeals in MDL proceedings. And it is likely impossible to develop reliable data on the phenomenon described by lawyers who report that they do not even attempt to win certification for what would be useful interlocutory appeals because they fear antagonizing the MDL judge.

The inquiry has been narrowed. At the beginning, defendants argued that appeals should be made available as a matter of right from specified categories of orders. The questions that remain are whether the MDL judge should have a "veto" by refusing to certify an interlocutory appeal, or whether the judge should be either permitted or required to offer advice to the court of appeals but not to veto an attempted appeal; whether any new appeal rule should be available in all MDLs, or only in a specified subset; whether there is an advantage in developing new criteria for MDL appeals that supplant the three criteria specified in 28 U.S.C. § 1292(b); and whether there should be some direction that the court of appeals must promptly decide any accepted appeal to address the risk that substantial delay on appeal will disrupt ongoing progress in the MDL court.

The Subcommittee has heard about appeal opportunities from lawyers involved in "mega-MDLs." They remain divided. Defendants insist there is a great need for immediate appeal on questions that may resolve central issues that either simplify or even conclude the proceedings. Plaintiffs respond that § 1292(b) appeals are available, and that MDL judges recognize the need to apply the § 1292(b) criteria in light of the needs of complex MDL proceedings. Experience shows that most orders reviewed on interlocutory appeal are affirmed, as in other § 1292(b) appeals, and that § 1292(b) appeals generally inflict long delays on the proceedings.

These questions were reviewed by suggesting that a central question is whether to adopt the model of Civil Rule 23(f), which provides for interlocutory appeal in the sole discretion of the court of appeals. Rule 23(f) is focused on a narrowly defined category of orders that grant or deny class certification. It would be difficult, and probably counterproductive, to attempt to identify categories of orders that alone are eligible for a new MDL appeal rule. Still, placing sole discretion in the court of appeals might reduce the reluctance of lawyers to offend the MDL judge by asking for permission to appeal. If the MDL judge retains power to veto an appeal, it remains possible that some help would be

provided by establishing a new MDL-specific criterion for certifying an appeal. Some judges may be deterred from certifying an appeal by generally narrow circuit interpretations of the criteria that ask for a controlling question of law as to which there is substantial ground for difference of opinion and whose resolution may materially advance ultimate disposition of the litigation. A frequent example has been a Daubert ruling on the admissibility of expert testimony that, if reversed, could terminate the proceedings. Daubert rulings involve application of settled law in the district court's discretion: how is there a controlling question of law with substantial grounds for a difference of opinion? A criterion that asks whether an immediate appeal would advance the purposes of the MDL consolidation might prove liberating. But that is an uncertain prospect. Eliminating the MDL judge veto would at least create a possibility of more frequent appeals. Even then, it will remain important to provide for advice from the MDL judge on the desirability of an immediate appeal, in light of the importance and uncertainty of the issues underlying the challenged order and the impact that an appeal would have on continuing MDL proceedings. The advice could include an observation that an appeal might advance the proceedings if it is promptly decided, but would disrupt the proceedings if much delayed. The burden of providing advice ordinarily should not be great, at least if permission to appeal is sought soon after the ruling is made. And advice that an appeal would thwart orderly progress is likely to defeat permission by the court of appeals in most cases.

Judge Bates added that as with other MDL rules questions, the scope of an appeal rule must be decided. An attempt could be made to provide for appeals in some, but not all, MDLs. But it seems likely that any rule would apply to all MDLs, relying on common-sense application. "Changing § 1292(b) is a big step. We have authority under § 1292(e), but we should be cautious." Expansion seems attractive on its face, but careful examination is needed.

Judge Bates added that exploration of the appeal question will require an expansion of the Subcommittee's work in gathering information. So far we have heard only from lawyers and judges involved in mass-tort MDLs.

A committee member said that delay is a major concern. Plaintiffs are especially worried about delay, and suspect that defendants may appeal for the purpose of winning delay. Some help may be found in the MDL judge's advice about the desirability of an immediate appeal, including the delay factor. "We should look for other creative input."

Judge Dow agreed that the Subcommittee hopes for more input.

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Professor Dodge has agreed to arrange a conference that will bring together lawyers and judges from MDL proceedings that do not involve mass torts, and will add appellate judges. The conference was scheduled for April 14, but has been postponed. The tentative plan is to hold it in mid-June if travel and general distancing protocols are relaxed soon enough to make final planning possible. A committee member expressed approval of the plan to bring in the perspective of appellate judges.

Settlement. Judge Dow began the discussion of settlement by noting that a rule addressing MDL judges' involvement with settlement may well be framed by addressing other issues as well. The origins of this work lie in the protests of many academics that MDL proceedings frequently evolve toward settlement through a process that has the same effect as settlement of a class action but lacks the safeguards that protect class members. In an MDL virtually all plaintiffs are represented by a lawyer, but settlement terms often are negotiated by a subset of plaintiffs' lawyers. The focus is on negotiations by lawyers who have been formally appointed to leadership positions, acting very much as class counsel appointed under Rule 23. Defendants negotiate for terms and practices that will bring "global peace" by winning settlement with at least a very large swath of plaintiffs. Lawyers outside the leadership structure may not fully understand what settlement alternatives may be possible, and may encounter terms that make it difficult to accept the settlement for some or many clients while rejecting it for others.

One possibility would be to focus a rule solely on encouraging MDL judges to be involved in settlements. Judicial involvement happens now. Some judges justify their involvement by invoking inherent authority, or by relying on authority implied by the structure and purpose of § 1407 transfer and consolidation. But a Civil Rule could provide a stronger foundation, and could encourage greater involvement.

The first question is whether this is a solution in search of a problem. It may be asked why there is any need for judicial involvement when every plaintiff has a lawyer. And if there is a need, it can be addressed, as it often is addressed, by detailed provisions in the order appointing lead counsel. The order may specify which lawyers can negotiate, and on whose behalf they negotiate. But again, an explicit Civil Rule might encourage more frequent use of detailed appointment orders, and perhaps greater detail.

The Subcommittee explored these questions in some detail in its March 10 conference call. The gist of the call is set out in the original agenda materials, and detailed notes were circulated

before today's meeting.

Judge Bates observed that both the plaintiffs' bar and the defense bar have reported that they do not need help on settlements. They assert that they can work out fair settlements without the supposed help of any rule. MDL judges also report that they do not need the support of any rule. They say they know what to do. A rule would contribute nothing, and might interfere with flexible and creative response to the needs of a particular MDL. Only one or two of them — albeit an especially experienced one or two — think a rule would provide useful guidance and support. But the universe of MDL lawyers has been pretty much a closed club. Deliberate efforts have been made by MDL judges in recent years to increase the diversity of the MDL plaintiffs bar, with some success and the prospect of increasing success. The world of MDL judges also has been something of a closed club, but here too efforts have been made to open the doors, even in the large-scale MDLs. The academics continue to be the primary voices calling for constraining the role of lead counsel by increased judicial involvement.

Professor Marcus noted that Professor Burch has been prominent in the ranks of those who protest the closed and cozy social network of insiders who are content with the status quo, both in a recent book and in law review writing.

Professor Marcus went on to recall that when the basic form of current Rule 23 was adopted in 1966 there was no considerable discussion of settlement. The rule required judicial approval for settlement of a class action, but said nothing more. In 2003 Rule 23(e) expanded the provisions for settlement and Rules 23(g) and (h) were added to address appointment of class counsel and attorney fees. Rule 23(e) was further elaborated by amendments in 2018.

Nothing similar to the evolution of Rule 23 has occurred for multidistrict proceedings. The lack of any formal rules most likely stems from the conceptual difference between class actions and MDL consolidations that are resolved without certifying a class. A class-action settlement binds all members who remain in the class at the time the settlement is approved. Settlement terms negotiated by MDL leadership do not bind anyone — even clients of lead counsel must consent to individual settlements. But informal pressures may remain quite direct and powerful. Individually retained plaintiffs' attorneys who are not part of the MDL leadership may feel powerless to resist. And academics fear that leaders are feathering their own nests, perhaps even by negotiating terms more favorable for their own clients than the terms offered to others. Conceptual distinctions may dissolve in the cold bath of reality.

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All of that leaves the question whether to attempt to embody in a rule the creative things some judges are doing. How far should judicial authority and responsibility extend? Is a rule helpful?

The direct question of settlement leads to other questions. Many practices have grown up over the years since § 1407 was enacted. Appointment of lead counsel and leadership teams has become common, and indeed has roots extending far back before § 1407. These orders frequently restrict what individually retained plaintiffs' attorneys (IRPAs) can do in the consolidated proceedings. Appointment orders commonly establish common benefit funds, seeking to compensate leadership for the time and money devoted to conducting the litigation on behalf of all. Common benefit funds usually are fed by "taxes" on the fees nonlead counsel win under contracts with their individual clients. And a court that fears that contract fees are unreasonable in light of the limited effort and risk borne by nonlead counsel, even as reduced by contributions to the common benefit fund, may cap individual attorney fees. These are strong measures. Perhaps it is useful, even important, to provide a secure foundation for these practices in a civil rule.

The interdependence of these phenomena suggests that a rule that addresses judicial involvement with settlement might best begin by focusing on the court's role in appointing and supervising lead counsel. The order can establish the roles of lawyers who are in the leadership team and the roles of lawyers who are not. That can include the establishment and terms of common benefit funds. It can include regulation of fees for leadership lawyers and for all other lawyers with cases in the MDL. And it can define roles in negotiating for settlement terms to be extended to any plaintiff that is not a client of a member of the negotiating team.

There are many pressure points for the lawyers involved in an MDL. Lead lawyers put up a lot of cash and time. IRPAs want to represent their clients, and may resist both paying a common-benefit tax and having their fees further reduced in an effort to protect against amounts that the court thinks unreasonable in light of the court's perception of the risk and effort involved. As roles become more complicated, and in some measures uncertain, questions of professional responsibility arise that cannot be addressed through the relatively less ambiguous questions that arise from the role of class counsel who represent not only representative class members but the entire class as well. There may be an increased risk of professional liability claims against lead counsel or IRPAs.

The March 10 Subcommittee meeting identified six questions that will be a focus of its further work:

(1) Is there a need for rules that formalize well established practices?

(2) Do MDL judges refrain from taking steps they think would advance the purposes of the proceeding because of uncertainty about their authority?

(3) Is it important that any formal rulemaking would be vigorously opposed by plaintiffs' and defense lawyers, and likely would meet resistance among MDL judges?

(4) Can effective rules be crafted that do not improperly interfere with attorney-client relationships?

(5) Would a rule that formalizes common benefit funds and perhaps authorizes limitations on attorney fees for individual representation modify substantive rights in ways that § 2072 prohibits? The fact that courts do this now, relying on inherent authority and authority implied by § 1407 does not provide a complete answer.

(6) Can we be confident that a rule for designating MDL lead counsel would not impede the progress that is being made in diversifying the ranks of lawyers who take on leadership roles? This concern may relate to third-party funding: newcomers to leadership positions may need to rely on outside funding to be able to bear the investment required to support what often are years-long commitments of money and time.

This set of questions prompted the observation that a rule could be designed in ways that do not inhibit MDL-specific flexibility and creativity in developing new practices. A rule that firmly establishes the basic authority to do things that now rest on uncertain concepts of inherent and § 1407-implied authority could be authorizing and liberating, not confining. All details would be avoided. Authority to appoint leadership entails authority to define their roles in relation to counsel for other plaintiffs, including their role in negotiating settlement terms to be offered to plaintiffs not directly represented by leadership lawyers; to establish a process for determining lead counsel fees and for funding the fees; and to consider the often complicated ways in which what may be quite limited roles left open for nonlead counsel may bear on the reasonableness of fees charged to individual plaintiffs.

A committee member found it striking that all the players, lawyers on all sides and MDL judges, resist the idea of a formal MDL rule. "That should make us very cautious." The idea deserves continuing study, but we should respect the repeated pleas that

formal rules should not interfere with the process by which things are worked out by means that are exported by many practices that keep both lawyers and judges at the leading edge of new and successful practices.

A subcommittee member observed that the Subcommittee recognizes that it has heard only from lawyers and judges in mass-tort MDLs. "We want to hear from all the MDL bar." So far, Judge Fallon is the only judge we have heard to say that a rule would be welcome. It will help to hear more from him and from other MDL judges.

Another subcommittee member expressed agreement with the MDL judges who believe we do not need formal rules. This question was explored with a number of MDL judges at the annual JPML conference. They agreed unanimously that rules are not needed. The academic concern about representation of plaintiffs whose lawyers are not leaders can be addressed by care in establishing the structure of the leadership. To the extent that the concern is that some plaintiffs are represented by lawyers who are not competent, the concern is common to all litigation, and is not something to be addressed by rules of procedure. The JPML is good at advising MDL judges on how to get non-lead counsel involved. Courts of appeals have blessed what's going on. Oversight of settlement is blessed by § 1407. Some statutes establish additional specific support. And we should be reluctant to have judges step on attorney-client relationships, even in the special structure of MDLs.

These views were echoed by another judge. Many of these issues are magnified in MDL proceedings, but are not unique to them. Across all litigation, judges confront questions of how far to become involved in settlement — indeed one of the agenda items for this meeting goes straight to those questions. In a large-scale MDL in his court, his judicial assistant gets calls from plaintiffs whose lawyers have forgotten about them, but clients of those firms probably have the same problems in non-MDL actions. In this MDL he gave notice to the parties of the point at which he would begin remanding cases to the courts where they were filed. The defendants reacted by retaining separate counsel to negotiate individual settlements, a process that has worked well. "Settlements are being reached."

Judge Bates agreed that these are difficult issues. And we should remember that many MDLs include actions that were filed as class actions. Settlement negotiations may produce agreement on terms for a class-action settlement that are approved by the court after certifying a class. The protections of Rule 23 are frequently available.

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Judge Dow underscored the desire to expand Subcommittee inquiries beyond mass-tort MDLs. His MDL proceedings have involved at most 40 actions, not the thousands or more that are brought together in some mega-MDLs.

Judge Dow went on to suggest that the Subcommittee's work has already had an impact on MDL practices without even developing rules proposals. Early vetting practices have evolved, including the recent development of initial census orders. There is more explicit recognition that the MDL context should be taken into account in determining whether an interlocutory order is so important to the further progress of proceedings that it should be certified for appeal under § 1292(b). And the Subcommittee has seen examples of lead-counsel appointment orders that provide excellent models for other proceedings. These can be used to educate other MDL judges. And "of course the in groups do not want to have rules that may disrupt their good thing." The Subcommittee may, in the end, conclude that there is no need to recommend a new Civil Rule. But it will continue to work hard.

Judge Bates thanked the Subcommittee for its work, and also thanked the JPML and FJC for contributing to the Subcommittee's work.

Appeals after Rule 42 Consolidation

Judge Bates introduced the report of the joint Appellate-Civil Rules Subcommittee that has been established to study the effects of the decision in *Hall v. Hall*, 138 S.Ct. 1818 (2018). The Court ruled that complete disposition of all claims among all parties in what began life as an independent action is a final judgment that can and must be appealed then even though the action was consolidated under Rule 42 with another action that has not reached final judgment. The Court also suggested that the rules committees could suggest a different rule if this approach causes problems.

Judge Rosenberg chairs the Subcommittee. She explained that the Subcommittee or smaller groups have held several calls to get the work started. Dr. Emery Lee is leading a detailed study by the FJC. He has established a data base of all 843,996 civil actions filed in the 94 United States District Courts in the years 2015, 2016, and 2017. That count includes actions that have been consolidated in MDL proceedings, but those actions will not be included in counting Rule 42 consolidations. Among the non-MDL proceedings, a total of 20,730 cases have been involved in Rule 42 consolidations. The total includes 5,953 "lead" cases; the rest are "membership" cases. They account for 2.5% of the civil-action total, and a greater share of the non-MDL cases. The data show that ten nature-of-suit codes account for 58% of all Rule 42

consolidations. Patent actions alone count for 13%, tracking on down through consumer-credit cases at 3%.

The ways in which courts have disposed of the consolidated actions have been counted. Eighty-four percent of the lead cases have terminated in the district court. Thirty-two percent were coded as settled. Another 22% were "other dismissal"; ten percent were "voluntary dismissals," likely for the most part reflecting settlements. Thirteen percent were dismissed on motion. Only 2% were disposed of at trial.

The next step will be to determine how to sample this large number of cases for detailed analysis. Some case types might be deliberately under-sampled because they seem less likely to lead to potential *Hall v. Hall* problems. Bankruptcy appeals, for example, accounted for 6% of the cases, but they often involve proceedings distinct from most civil actions and invoke special and more expansive concepts of interlocutory and final-order appeals. The means of disposing of the cases also may be distinguished. Settlements, for example, are less likely to involve final-judgment appeal problems than other dispositions.

Once the sample is established, the next steps will be to identify dispositions that may lead to problems in applying the *Hall v. Hall* rule. One problem may be confusion about the time to appeal. Additional problems may be appeals taken at times that disrupt trial-court proceedings or threaten to lead to multiple appeals presenting similar or identical questions to the court of appeals. How often is there a complete disposition of all of one of the original actions in the consolidation without disposing of all the others? How often is an appeal taken at that point? How often is an untimely appeal taken at a later point? If an untimely appeal is attempted, how often is untimeliness noticed and followed by dismissal? And how often is untimeliness disregarded and followed by decision of the appeal?

So many cases are involved in the years selected for study that it will not be practicable to extend the study to include actions first filed after the decision in *Hall v. Hall*. But looking to cases filed before then has an advantage because it will include cases filed in every circuit, and thus cases that for appeals decided before *Hall v. Hall* were governed by the *Hall v. Hall* rule in the few circuits that had already established that approach but, in other circuits, were governed by one of the three other approaches that had been adopted by different circuits.

The FJC work will proceed apace. The Subcommittee will resume its deliberations when the work has reached a suitable point.

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e-Filing Deadline

Judge Bates reminded the Committee that Rule 6(a)(4) defines the end of the last day for computing a time period for electronic filing as midnight in the court's time zone. Identical provisions appear in all but the Evidence Rules. A joint Subcommittee has been established to study the question whether the end of the day might be shortened to the time when the clerk's office closes. The FJC is gathering a great deal of empirical information that bears on this question, including actual filing practices under the current rule; variations in filing times among types of firms, types of litigation, courts, and other dimensions; the hours clerk's offices are open, and the use of drop boxes for after-hours filings; the experience of pro se litigants that are permitted to use e-filing; problems confronting lawyers who file across multiple time zones; and still other questions. "This is a big data project." The Subcommittee will resume active work when the accumulation of data supports further consideration.

Rule 7.1: Intervenor Disclosure and Diversity Jurisdiction Disclosure

Judge Bates described two proposed amendments to Rule 7.1 that were published for comment in 2019. The questions now are whether they should be recommended for adoption.

Intervenor Disclosure: The first amendment would expand present Rule 7.1(a) to require disclosure by any nongovernmental corporation that seeks to intervene on the same terms as the rule requires for a nongovernmental corporate party. This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Publication of the intervenor amendment drew three comments. Two expressed approval. The third suggested several expansions of the present disclosure requirement for parties and intervenors alike. These changes would require study and then publication for comment. The question whether disclosure statements should be expanded to include other information that may bear on recusal has been explored recently. The MDL Subcommittee has considered proposals by lawyer groups for disclosure of third-party litigation financing. Other committees have considered other expansions of disclosure. These explorations have not led to any recommendations for amendments.

The Committee unanimously approved a recommendation that the Standing Committee approve the intervenor disclosure amendment for adoption.

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Diversity Jurisdiction Disclosure: The second proposed amendment would add an entirely new provision that applies only in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a). This provision requires a party to file a disclosure statement "that names — and identifies the citizenship of — every individual or entity whose citizenship is attributed to that party at the time the action is filed."

Diversity disclosure was proposed to meet problems that arise in satisfying the complete diversity requirement. The problems have been multiplied by the emergence of limited liability companies as a common means of organizing business enterprise. The established rule attributes the citizenship of each owner to the LLC. If an owner is itself an LLC, the citizenship of all of its members is likewise attributed to it and through it to the LLC that is a party to the action. The chain of attribution can reach even higher. There is a real risk that a diversity-destroying citizenship exists somewhere. Prompt recognition that there is no diversity jurisdiction is important. If the case goes through to final judgment without recognizing the problem, the damage may seem conceptual, but remains a disruption of the allocation of authority for adjudicating state-law disputes with the attendant risk of a non-authoritative interpretation and application of state law. If the lack of diversity jurisdiction emerges while the action is still pending, perhaps after heavy investment by the parties and trial court or even for the first time on appeal, the required dismissal can impose heavy costs. Many federal judges respond to this problem now by requiring initial disclosure.

The proposed rule extends beyond LLCs to require disclosure as to any other "entity" whose citizenship is attributed to a party. Some of these entities have played familiar roles in determining diversity for many years, including partnerships, limited partnerships, some forms of trusts, and the like. Others are more exotic, and include such vague concepts as "joint ventures" that may not have existence as an "entity" for any other purpose. What counts as an "entity" for disclosure is any thing that is not an individual but that must be examined in determining a party's citizenship.

Public comments on this proposal were generally favorable. A substantial share of them observed that actions are often removed from state courts without adequate inquiry into the full details required to determine diversity jurisdiction. Some comments offered anecdotes about the misery created by belated discovery that diversity does not exist. Many offered an optimistic view that disclosure will impose only a small burden, a view that may well be true for most LLCs.

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Other public comments opposed the proposal. Two of these comments came from groups that have participated frequently and helpfully in the Committee's work, the American College of Trial Lawyers and the New York City Bar. Both comments said, in different ways, that the better solution for LLC diversity problems would be for the Supreme Court or Congress to treat an LLC in the same way as a corporation.

Beyond resisting the current attribution rule for LLCs, the negative comments suggested that expansive disclosure of ownership interests might prove overwhelming, distracting attention from the particular parts of the disclosure that should bear on judicial recusal. Rule 7.1 should continue to be confined to disclosure of information that bears on recusal. The comments also said that disclosure can impose heavy burdens of inquiry that should not be routinely imposed in all cases. The information can be obtained by targeted discovery in the subset of actions in which a party challenges diversity or seeks to establish a firm jurisdictional foundation at the outset. Disclosure also threatens interests in privacy that often account for establishing an LLC. A variation on the privacy concern addressed the privacy of "non-citizens."

An added problem was noted. There may be circumstances in which a party is not able to identify and determine the citizenship of everyone whose citizenship may be attributed to it. Interests in some forms of entity may be traded in a market or pass through other channels that are difficult to trace.

The comments also suggested a problem that may prove more difficult to resolve than it seems. The published proposal calls for disclosure of citizenship "at the time the action is filed." Those words were added to reflect that in most circumstances the citizenships that establish or defeat diversity jurisdiction are those set at the time the action is filed. The time of filing corresponds to that purpose, looking to the time the action is filed in federal court. If the action is removed from state court, citizenship is determined at the time the notice of removal is filed in the district court. These comments suggested this point should be made clear by adding "at the time the action is filed <u>in, or removed to, the federal court</u>." The difficulty with adding these words is that they may distract attention from the need to assess diversity jurisdiction anew if the parties are changed after the action is first filed or removed.

Judge Bates followed this introduction by noting that many federal judges are requiring disclosure now, either on their own or under local rules. There is no burden in cases that do not involve attributed citizenships. When there is a burden, it is often encountered now. Establishing a uniform practice by a national rule

may not add much burden. And the difficulties that may arise in rare situations that make it impossible to determine all attributable citizenships seem likely to be rare enough that they should not stand in the way of a general rule.

Initial discussion provided support for adding "filed in, or removed to, the federal court." A complication was noted. 28 U.S.C. § 1447(e) provides that if after removal a plaintiff seeks to join a party that would destroy diversity jurisdiction, the court may deny joinder or may permit joinder and remand to state court. But requiring disclosure of attributed citizenships at the time of removal does not stand in the way of this statute. If anything, implementing the statute is supported by providing better information to determine whether joinder would destroy diversity. A related observation suggested that complexities are added by the need to work through arguments about fraudulent joinder designed to defeat diversity removal.

One suggestion was to add "at the time the court's jurisdiction is invoked." Concerns were expressed that litigants might not understand this. An alternative might be "at the time the disclosure is made," but that could be a time different from the controlling date for determining diversity. There are two separate concepts. One is the date that controls the determination of diversity, recognizing that some events may change the date — joining or dropping parties after the day the action is originally filed or is removed is a clear example. The other is the time for making the disclosure of citizenships as of the date that controls the existence or nonexistence of diversity jurisdiction. The time when the disclosure must be made is governed by Rule 7.1(b). A party that seeks to add another party has the usual burden of pleading jurisdiction, but the new party is responsible for making the diversity disclosure at the time directed by Rule 7.1(b).

Another suggestion was "at the time [or times] relevant to the determination of the court's jurisdiction." A further variation was suggested: "at the time the action is filed in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction." This gives better guidance. The time of filing in or removing to federal court will control the vast majority of diversity determinations. In removed cases the plaintiff who filed in state court will, after removal, become obliged to disclose attributed citizenships. A disclosure that defeats diversity may disappoint the removing defendant, and it may disappoint a plaintiff who would rather have concealed an attributed citizenship that destroys diversity, but that serves the need to enforce complete diversity. But another time may become relevant. It was pointed out that a state-court defendant who is a co-citizen of a plaintiff at the time the action is filed in state

court cannot manufacture diversity by establishing a diverse citizenship and then removing. The lack of diversity is then established by the time of filing in state court, not the time of removing to the federal court. The expanded language also conforms to another rule that permits a federal court to retain an action that was removed at a time when diversity was defeated by the citizenship of a party that is dropped from the action after removal. And, although "such other" often seems vague or indeterminate, it refers back to an antecedent time in this use and does not defeat the primacy of the time of original filing or the time of removal.

The Committee voted to approve the longer version, subject to a final style determination whether to refer to a "federal" or the "district" court. The Rules regularly refer to a district court, but refer to a "federal" court in contexts that embrace both state and federal courts. Rules 32(a)(8) and 41(a)(1)(B) are examples. Because Rule 7.1(a)(2) involves a similar emphasis on both state and federal courts, "federal" seems the appropriate word. The rule will go forward with "in or removed to federal court, or at such other time as may be relevant to determine the court's jurisdiction."

Attention turned to the problem of a party who finds it difficult or impossible to determine all attributed citizenships. An initial suggestion was that language should be added to the text of Rule 7.1(a)(2) to limit the disclosure to information that can be gathered without undue effort. An alternative suggestion was that the paragraph in the Committee Note describing the court's authority to "order otherwise" might be expanded to recognize that the court can order that a party that has exercised due diligence to uncover attributed citizenships need do no more. Tangential support was found in Rule 11(b), which sets a standard of an inquiry reasonable under the circumstances to support legal contentions and factual contentions in any paper submitted to the court. But the standard for avoiding sanctions does not carry directly over to the obligation that may be placed on a party to determine its own citizenship. Disclosure may be closer to discovery of jurisdictional facts, and to invoke the proportionality standard in Rule 26(b)(1). But that does not answer what discovery burden is proportional to the need to determine subject-matter jurisdiction. A judge opposed these suggestions as inconsistent with the command to insist on complete diversity. "People ask me all the time to assume jurisdiction because establishing the actual controlling facts is too difficult." We should not do anything in the rule that will encourage that approach. Neither the language of Rule 7.1(a)(2) nor the Committee Note will be changed on this account.

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Other changes in the rule text were discussed. A motion to intervene should be brought within diversity disclosure, remembering the § 1367(b) limits on supplemental jurisdiction for claims by or against intervenors. So the text will read "a party or intervenor * * * must file * * * whose citizenship is attributed to that party or intervenor * * *." The tag line will be changed to conform: "Parties or Intervenors in a Diversity Case."

The discussion of supplemental jurisdiction raised a question about Rule 7.1(b), which sets the time for making Rule 7.1(a) disclosures. Paragraph (b) requires that a disclosure be supplemented "if any required information changes." A concern was expressed that it may be important to require a supplemental diversity disclosure of facts that may defeat supplemental jurisdiction. Meaningful illustrations proved hard to come by, however, and this topic was dropped.

Discussion of Rule 7.1(b) did lead to recognition that bringing intervenors into the text of Rule 7.1(a)(1) requires a parallel addition at the beginning of Rule 7.1(b): "A party or intervenor must: (1) file the disclosure statement * * *." The Committee agreed that this is a technical amendment that can be recommended for adoption without publication. It is consistent with what was published and ensures implementation without a technical gap in Rule 7.1(b).

The Committee Note was discussed. The Federal Magistrate Judges Association Rules Committee suggested two additions. First, words would be added to this sentence: "The rule recognizes that the court may limit the disclosure upon motion of a party * * *." The purpose is to avoid any implication that the court has an independent duty to limit disclosure. But a nonparty may wish to limit disclosure, usually a nonparty whose citizenship is attributed to a party. And there is no apparent reason to limit the court's authority to act on its own. An obvious circumstance would be disclosure by one party of a diversity-destroying citizenship; the court could readily suspend further disclosures, pending a determination whether to dismiss the action or instead to allow a change of parties that might make further disclosures necessary. The Committee decided not to add these words.

The second suggestion by the magistrate judges was to add words to ensure that the court may seal the disclosure: "the names * * * might be protected against disclosure to the public or to other parties * * *." On balance, this suggestion also was rejected. It is difficult to imagine circumstances in which a court might wish to permit disclosure to the public, or even a particular nonparty member of the public, and at the same time arrange measures that would prevent the disclosure from leaking back to a

party. In any event, the general authority to "order otherwise" does not require this degree of elaboration in the Note.

The Committee Note will be changed to reflect the changes in the rule text. For Rule 7.1(a)(2) the Note will add "or intervenor" where appropriate after references to a party's duty to disclose.

The final paragraph of the Committee Note on Rule 7.1(a)(2) will be expanded to describe the revised rule text that ties what must be disclosed both to the usual circumstances that determine diversity at the time of filing in, or removal to, the federal court and also to the unusual circumstances that may call for determining diversity at a different time.

And one further paragraph will be added to the Committee Note to reflect expansion of Rule 7.1(b) to include intervenors as well as parties in the provisions governing the time to disclose.

The Committee voted to recommend that the Standing Committee propose adoption of the Rule 7.1 text with the revisions adopted in this meeting, 10 yes and 1 no. It further agreed to consider the revisions that will be made in the Committee Note by electronic exchanges.

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

Judge Bates described the question whether to recommend publication for comment of an amendment that would clarify the relationship between the times to respond set by Rules 12(a)(1), (2), and (3) and other times that may be set by statute.

The question arises from what may be seen as an ambiguity in the text of Rule 12(a)(1):

(a) TIME TO SERVE A RESPONSIVE PLEADING.
(1) *In General.* Unless a different time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows * * *.

The exception for times specified by this rule or a federal statute is not repeated in paragraphs (2) or (3). Paragraph (2) sets the time to respond at 60 days in an action against the United States, a United States agency, or a United States officer or employee sued only in an official capacity. Paragraph (3) sets the time at 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 called to the Committee's attention by a

frustrated lawyer is that at least two federal statutes, the Freedom of Information Act and the Sunshine Act, set a 30-day time to respond. Paragraph (2) does not seem to recognize the possibility that a different time is set by these, and perhaps other, statutes.

It is possible to read the present rule to extend the "different time" provision from paragraph (1) to paragraphs (2) and (3). That is not an obvious reading. The Style Consultants agree that if it had been intended to recognize statutes that set a different time than paragraphs (2) and (3), the rule would have been structured differently as presented in the agenda materials:

> Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:
> (1) * * *.
> (2) * * *.
> (3) * * *.

The proposed amendment is surely free from ambiguity. It does present a question whether clarity is appropriate when the Committee does not yet know of any statute that sets a different time than the 60 days of paragraph (3) for an action against a United States employee sued in an individual capacity. But little harm is done if there is no such statute. At worst, it may sidetrack some parties into a futile quest for a statute that does not exist. Most lawyers for an employee sued in an individual capacity, however, are likely to rest content with any statute that may bear immediately on the particular claims. And at best, a form that includes paragraph (3) in the different time provision will include any statutory time period now on the books or that may be enacted in the future. There is no reason to wish to supersede either a present or a future statute.

Discussion began with a report that the Department of Justice views the proposed amendment as "well intended," but there is no problem that needs to be addressed. The Department is capable of meeting deadlines, and of seeking extensions to align the times to respond when a single case advances claims that are governed by different times. Amending the rule might imply that the court should be reluctant to grant an extension even when warranted.

The next comment suggested that the second paragraph of the draft Committee Note is confusing to anyone who does not understand the background. It attempts to explain the reason for including paragraph (3) even though there may not be any statutes that set a different time to respond when an official is sued in an individual capacity. But a reader pretty much has to know the answer to comprehend the explanation. Apart from that, Rule 12(a)(3) applies

both when the officer or employee is sued only in an individual capacity and also when sued in both an official and individual capacity. "only" should be deleted. A response was that this paragraph could be deleted entirely. The rule text gives a clear answer if there is a statute setting a different time to respond, and will not be invoked if there is no such statute.

Two comments suggested that there is no indication that even paragraph (2) presents a real problem. The question was brought to the committee by a lawyer who was frustrated by the need to persuade a court clerk to issue a summons setting out the 30-day period to respond in the Freedom of Information Act. The problem was in fact resolved. There is no indication that this problem is widespread, nor that it cannot be resolved by pointing the clerk to the statute when it does arise. This is not reason enough to crank up the Enabling Act process.

The absence of evidence of a practical problem was met by the reply that the rule is incorrect on its face, at least if it is given the more obvious reading supported by the Style Consultants. This reply rekindled the argument that the present rule can and should be read to recognize different times set by statute for all of (a)(1), (2), and (3).

A distinct question was raised as to the relationship between all of Rule 12(a)(1), (2), and (3) and Rule 81(c)(2). The times for a defendant to answer after an action is removed from state court are independent of the times set in Rule 12. Rule 81(c)(2) does not on its face recognize any exceptions for different times set by statute or, for that matter, Rule 12. This possible tension between Rule 81 and Rule 12 will persist no matter whether Rule 12 is amended to provide a clear exception for different statutory response times in paragraphs (2) and (3). There seems little reason to add this complication to the project.

The discussion concluded with a decision to carry these questions forward. Some committee members are attracted to the value of correcting rule text that at best is ambiguous and at worst is incorrect. There is no urgent need for action. Time for further consideration will be welcome.

Rule 12(a)(4)

Judge Bates introduced a suggestion by the Department of Justice that Rule 12(a)(4) should be revised to add time to respond when a United States officer or employee is sued in an individual capacity:

(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 rests in part on the same considerations that persuaded the Committee to adopt the 2000 amendment that established the Rule 12(a)(3) time to respond in such actions at 60 days. These considerations persuaded the Appellate Rules Committee to adopt the 2011 amendment of Appellate Rule 4(a)(1)(B)(iv) that establishes the time to file a notice of appeal in such actions at 60 days. The United States may or may not have been involved with defending its officer or employee at the time the Rule 12 motion was made, and may need the 60 days to respond just as much as it needs 60 days to frame an answer after the later of service on the officer or employee or service under Rule 4(*i*)(3) on the United States Attorney.

The ordinary need for 60 days to respond is enhanced by the complications that arise when the officer or employee moves to dismiss on the ground of official immunity. Denial of the motion often provides a basis for an interlocutory appeal under the collateral-order doctrine. The determination whether to appeal must be made by the Solicitor General. Serious confusions and inconveniences can arise if the officer or employee is required to file an answer within 14 days after the motion is denied or postponed. The burden of filing an answer, moreover, is one of the burdens of litigation that official immunity and the opportunity for collateral-order appeal are meant to alleviate.

The style consultants have reviewed the proposed rule text.

It was pointed out that Rule 12(a)(4) allows a court to set a different time. If there is an urgent need to proceed, the court could set the time to respond at less than 60 days. Account also can be taken of the provisions in Appellate Rule 4(a)(4) that defer the moment when appeal time starts.

The Committee voted, 11 yes and zero no, to recommend that the Standing Committee approve the proposed amendment of Rule 12(a)(4) for publication.

Rule 4(c)(3)

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Judge Bates pointed out that the perceived ambiguity in the Rule 4(c)(3) provision for service by the United States Marshal in cases brought in forma pauperis or by a seaman was first on the agenda a year ago.

The question is whether the rule means that the plaintiff must request that the court "must so order," or whether the court must enter the order automatically in every i.f.p. or seaman case. The Style Consultants believe there is no ambiguity — the court must make the order even without a request by the plaintiff. But not every court has found the rule so clear.

It is easy to eliminate any possible ambiguity. But it would remain necessary to decide what the clear provision should say. At least three choices are apparent: The plaintiff must request the order; the court must enter the order without a request; or the marshal is obliged to make service in every case without bothering with the formality of an automatically entered order, a formality that might accidentally be omitted in some cases. More adventuresome possibilities could be added, such as an experiment with electronic service in cases where the marshal believes that would be effective.

The choice among these alternatives will depend on practical information. The Marshals Service has been consulted, but as yet has provided no clear guidance. It is clear that the marshals would prefer to avoid the burden of making service, particularly in sparsely populated districts that may require distant travel. But the forma pauperis statute imposes the duty. It also is clear that at least in cases where an i.f.p. plaintiff has counsel the plaintiff may prefer to make service without relying on the marshal. Service by the plaintiff seems fully consistent with Rule 4(c)(3) as it stands, but if it is to be amended that point might be added.

Discussion led to the conclusion that this subject should be carried forward to the October meeting, with the expectation that a decision will be made then. Efforts will be made to get additional advice from the Marshals Service.

Rule 17(d): Naming Public Official Sued in Official Capacity

Rule 17(d) has long provided that a public officer who sues or is sued in an official capacity may be designated by official title rather than name. Sai has proposed that permission should be changed to mandate: the officer must be designated by the relevant official title (or titles if the same officer holds two or more relevant offices) if the title is unique and capable of succession.

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A major purpose of the proposal is to avoid the annoyance of remembering to substitute a successor official, even though Rule 25(d) provides automatic substitution when the original officer ceases to hold office. A secondary purpose is to ease the task of following events in the action; Sai cites an action that has migrated through nineteen names for the United States Attorney General and remains active.

Designating the party by title rather than the name of the incumbent office-holder has obvious advantages. That is why Rule 17(d) authorizes this practice. But it is not clear that the rule should prevent a plaintiff officer from proceeding under a personal name, or prevent a plaintiff from naming an officer defendant by individual name.

As a general problem, there may be cases in which it is not clear whether substantive law authorizes an action by or against a "title," or, more realistically, against the office that is designated by the title. That can easily hold true for countless numbers of federal employees, beginning with the question whether a particular employee is an "officer" within the meaning of Rule 17(d), and then progressing to the question whether every "officer" occupies an office that is capable of being sued as an office. Titles proliferate, perhaps without pausing to consider whether the title is attached to an office.

The difficulty of determining whether suit can be brought by or against a title or office is enhanced when the public officer is a state officer. It may be unwise to force litigants — and at times the courts — to wrestle with what may be obscure and uncertain questions of state law.

State officials pose a still greater caution when they are sued as defendants. The fiction that permits actions against state officials as a way to circumvent the Eleventh Amendment is vital, but still a fiction. It may be better to avoid entangling Rule 17(d) with disputes whether the official is a defendant in an individual capacity or an official capacity.

The value of amending Rule 17(d) may turn in part on pragmatic considerations. How great are the burdens it imposes? How can the Committee gather useful information?

Discussion began with a judge's observation that "the annoyance factor is a minor, but not a major, issue." Substitution is done routinely by law clerks or court clerks.

The Department of Justice observed that substitution "works seamlessly," and often is accomplished by the court acting on its

own. Still, there is no harm in studying this proposal further.

The Committee decided to carry this subject forward.

Consent Agenda

Judge Bates reported that the reporters for the several rules committees have launched a still incomplete discussion of the question whether the advisory committees might establish a practice of placing some business on a consent corner of the agenda.

An analogy could be found in the consent calendar of the Judicial Conference. The Judicial Conference handles many matters, including many Enabling Act rules topics. The calendar is established by the Executive Committee, with advice from the Director and staff of the Administrative Office. But the work of the Judicial Conference comes from committees that have thoroughly prepared their recommendations. The rules advisory committees are the first line in Enabling Act work.

Obvious questions go to defining the way in which a consent calendar would work. What would be the criteria for selecting consent-calendar subjects? Who would make the selection — most likely some combination of the advisory committee chair and the reporters? What would be required to move a subject from the consent calendar for plenary discussion? Most likely any single committee member could effect the transfer. What provision should be made to ensure adequate notice to facilitate thorough preparation of the subject by committee members?

The agenda for this meeting includes three rules proposals that are offered to illustrate the variety of considerations that might point toward placing an item on a consent agenda. Discussion of the merits of these proposals may illuminate the general question.

The first member to comment suggested that it would be better not to have a consent agenda. The items most likely to be placed on it would be some of those that come in from public suggestions. The need for committee consideration may begin with the prospect that some of these suggestions include useful kernels of information that may not be apparent when reviewed by only two or three persons responsible for constituting the agenda. And "we don't want to create an impression that some proposals receive 'short shrift' treatment."

Another judge agreed that public perception is an important consideration. But the reporters and chair would look for items "on which no one would want discussion." If even a single member wants

discussion, full Committee treatment will be provided.

Another judge observed that the Bankruptcy Rules Committee has maintained a consent agenda for a few years now. "It has worked well for us." Occasionally a committee member asks to take up an item from the consent calendar. The criteria for selecting consent agenda topics remain unclear, but revolve around a determination that the topic is unlikely to raise any interest.

The possible advantages of a consent agenda were noted. It could reduce the amount of time committee members devote to some agenda topics, freeing time for topics that seem to demand greater attention. Advance notice that an item will be moved to the discussion agenda will ensure an opportunity to prepare for full deliberation. "Some proposals require a lot of digging. Some seem off the wall. We do not want to dilute consideration of the serious matters." Full consideration of all items could be too much work. Providing one week of advance notice that a topic has been moved to the discussion agenda reduces the value of the practice that seeks to provide agenda materials to committee members three weekends before the committee meeting, but it is not likely that more than one, at most a few, items would need to be studied a second time.

A committee member suggested that "matters come up with twists and turns that are not foreseen" when preparing an agenda. It is better to keep all items on a single agenda, "hoping for discipline on matters that do not require a lot of time."

Judge Bates suggested that this discussion provided a useful beginning, but that the question should be carried forward for further discussion at the October meeting. The three proposals offered to illustrate the general question remain for discussion.

Rule 16: Settlement Conferences

This topic suggests three changes with respect to settlement conferences, two in Rule 16 and a third evidently aimed at local rules or the Evidence Rules.

The first suggestion is that trial judges should be excluded from participating in settlement conferences. The fears include the possibility that the parties will feel coerced, that parties will engage in strategic behavior by presenting incomplete and misleading information, and that the judge may imbibe wrong views of the case. The Committee considered these problems in depth in November, 2017, and concluded that judges are well aware of them. Federal Judicial Center programs regularly explore the problems. And different approaches may be appropriate for different judges and different cases.

June 17, 2020

The second suggestion is that objective standards should be established to protect against undue sanctions under Rule 16(f)(1)(B), which authorizes sanctions "if a party or its attorney * * * is substantially unprepared to participate — or does not participate in good faith — in the conference." Examples are cited of sanctions imposed for "failing to bargain sufficiently, failing to make a reasonable offer, and failing to have a representative present at the settlement conference with 'sufficient settlement authority.'" Brief discussion suggested that although these examples sound extreme, it does not seem likely that there are widespread abuses of discretion, nor does it seem likely that amended rule language would be effective in constraining such abuses as are likely to occur.

The third set of suggestions seek to add "substantive and procedural safeguards" to be included in district court local ADR rules, or in the Evidence Rules. Two of them address the topics suggested in the sanctions section.

The Committee determined to remove these topics from the agenda.

Time Limits in Subpoena Enforcement Actions

This suggestion relies on impatience with the time courts take to decide actions brought by Congress to enforce subpoenas directed to executive officials. But the suggestion appears to be framed in general terms that would address all proceedings to enforce subpoenas of every type, including discovery subpoenas, trial subpoenas, and subpoenas or similar commands issued by administrative agencies.

Brief discussion focused on congressional subpoenas. Consideration of this topic was thought ill-advised. There was some discussion of the uncertain status of present law on enforceability. There was no thought that the specific and very tight time limits proposed for action by district courts, the courts of appeals, and the Supreme Court were sensible.

Discovery subpoenas also were noted. Not long ago the Committee devoted years of work to revising Rule 45. No problems were identified with respect to the time taken to reach decision on motions to enforce. At least as to discovery subpoenas, the proposal is a "nonstarter."

The Committee determined to remove this topic from the agenda.

Rules 7(b)(2), 10

June 17, 2020

This proposal suggests that Rules 7(b)(2) and 10 be amended to correct several "paradoxes" in their present relationship.

The paradox is said to begin with Rule 7(b)(2)'s direction: "The rules governing captions and other matters of form in pleadings apply to motions and other papers." Rule 7(a) lists the only "pleadings" that may be allowed. Motions are not pleadings.

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."

How, the suggestion asks, can a motion bear a Rule 7(a) designation? It cannot be called a complaint, an answer to a third-party complaint, or by the name of any other pleading.

And how, the suggestion asks, can it have any other name, since the "title" referred to in Rule 10(a) manifestly refers to the title of the action, not the name to be fixed to a motion?

The examples proliferate. The submission recognizes that the problems are quite technical, and that "In practice, litigants and counsel simply ignore the problematic language, if they notice it at all."

Brief discussion suggested that the relationship between Rules 7(b)(2) and 10 "is a process of analogy, not literal reading." There is no practical problem, as the submission recognizes. There is no reason to undertake a revision project.

Judge Bates closed the meeting by stating that his term as Committee Chair has been a good time, expressing thanks to all Committee members and the others who worked in the common enterprise.

Respectfully submitted,

Edward H. Cooper
Reporter

June 17, 2020

TAB 6

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PROPOSED AMENDMENT TO RULE 7.1

For Final Approval

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 amendment to Rule 7.1(b) will be discussed first.

Proposed new Rule 7.1(a)(2) provides for a disclosure statement that names and identifies the citizenship of every individual or entity whose citizenship is attributed to a party in an action in which jurisdiction is based on diversity. The several versions that follow may seem complex. The questions that remain arise from the occasional complications in the rules determining the dates of the citizenships used to determine whether there is complete diversity. A modest attempt to address these questions was included in the published proposal: the parties must disclose citizenships "at the time the action is filed." Public comments suggested that defendants frequently remove actions filed in state courts without adequately thinking about actual diversity. The version initially discussed at the April Civil Rules Committee meeting expanded this provision to "the time the action is filed in, or removed to, the federal court." The discussion, as summarized below, showed that diversity occasionally must be determined at a time different from the initial filing or notice of removal. New language was proposed to provide notice of this possibility. The Standing Committee found the language was likely to cause confusion and remanded for further consideration. The new version set out below would eliminate any reference to time. The rule text would require disclosure without any reference to the rules that set the occasion, or plural occasions, for measuring the citizenships that determine complete diversity. The revised Committee Note simply notes that the diversity rules may be complex, without attempting to sketch any of the complications.

The more complicated questions raised by Rule 7.1(a)(2) are illustrated by the three versions set out below. First is the proposal as published. Next is the revised text that was recommended to the Standing Committee for adoption, marked to show changes since publication in a complex format. Single underlining is used for everything that is new to present Rule 7.1. Double underlining indicates new provisions recommended to the Standing Committee after reacting to public comments and further consideration. Subparagraphs (A) and (B) would be deleted from the version now recommended to advance for adoption. The third version is the clean text now advanced for a recommendation for adoption.

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.

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

* * * * *

Version Recommended to Standing Committee in June 2020

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.

(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 * * *.

Proposed Clean Rule Text

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.

* * * * *

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

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

Proposed Committee Note Showing Changes From April

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 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 such other time as may be relevant to determining the court's jurisdiction~~. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of 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. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. If events in the litigation arising after initial filing or removal change the time of the citizenship that controls, a supplemental statement is required by Rule 7.1(b)(2). And even if the time that controls does not change, a supplemental statement is required when additional relevant information becomes known. ~~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.

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 Committee recommended approval of the amendment to Rule 7.1(a)(1) at the April meeting.

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 was recommended for adoption without publication. The Standing Committee has voiced no concerns about the amendments to Rules 7.1(a)(1) and 7.1(b).

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). Last April, the Advisory Committee recommended that it be approved for adoption with changes suggested by the public comments. The Standing Committee remanded for further consideration of one of those changes, which attempted to provide a reminder that diversity is not in all circumstances determined at the time the action is first filed in, or removed to, federal court. The recommendation to omit any reference to the complicated rules that set the moment at which complete diversity must exist is explained below after a review of the core proposal.

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 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, including 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 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 prompted Committee discussion of 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 <u>in federal court</u>." Committee 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. These rules can become arcane in some circumstances. An attempt to add a nondiverse party, for example, may encounter an inquiry whether the original omission was a ploy to evade complete diversity, whether the new party is a Rule 19(b) "indispensable" party, and into the details of supplemental jurisdiction. 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. One of the challenges that arose from the published rule's direction to disclose citizenships "at the time the action is filed" was misreading the antecedent. Some readers thought these words referred to the time for making the disclosure, a matter governed by rule 7.1(b), rather than the time of the citizenships that must be disclosed. That potential confusion might well be one of the illustrations of the wisdom of redundant drafting. It might be cured by something like "must, unless the court orders otherwise, file <u>at the time provided by Rule 7.1(b),</u> a disclosure statement * * *." That potential fix, however, does

not alleviate the erroneous implication in the published rule that complete diversity is always determined "at the time the action is filed."

These concerns led the Advisory Committee to revise 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 Advisory Committee by post-meeting submission. This part of the rule text proposed for adoption read:

> (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.

This formulation provides accurate notice to the parties that complete diversity may be controlled by citizenships as they exist at a time different from the time of filing or removal. It makes no attempt to describe what the different time, or even times, may be. Rule text should not, and almost certainly could not, capture all of the variations that have grown up over the centuries of diversity jurisdiction. If notice is to be given, it must be as vague as the "may be relevant" formulation, however it might be varied.

The Standing Committee was uncomfortable with this vague attempt to imply that the rules for determining diversity are not limited to the basic concepts familiar to all lawyers. A range of responses, good and not so good, could be triggered by the bare suggestion that some other time may be relevant, without any clue as to the circumstances that may complicate the inquiry. A good response would be to research the diversity rules when an action is complicated by events that occur after initial filing or removal. Less good responses would be to ignore the hint or to engage in unnecessary research in cases that are, after all, quite straight forward.

It seems best to abandon the effort to provide rule text that does not mislead and also provides warning that the diversity calculation is not always determined by citizenships at the time the action is filed or removed. It seems safe to predict that the complications will not often arise, and will usually be identified when they do. Rule 7.1(b) requires a supplemental statement "if any required information changes." That should suffice to prompt inquiry and, when appropriate, supplemental disclosures when events in the litigation require that diversity be measured by citizenships as they exist at a time after initial filing or removal.

With this change, the disclosure rule can again be 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.

Changes Since Publication

Rule 7.1(a) 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 deleted.

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.

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TAB 7

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RULE 12(a): FILING TIMES AND STATUTES

Suggestion 19-CV-O

The problem presented by this matter arises from the uncertain drafting of Rule 12(a)(1) as it relates to paragraphs (2) and (3). As explained in the agenda materials for the April meeting, the natural reading of the three paragraphs together is that the 60-day times to answer set by paragraphs (2) and (3) are not subject to a federal statute that specifies another time. At least two federal statutes set a 30-day time to answer in cases otherwise within paragraph (2). No statute has yet been identified that sets a different time for cases otherwise within paragraph (3).

As reflected in the draft April minutes, discussion worked toward several tentative conclusions. There is little reason to believe that significant practical problems have been encountered. The lawyer who suggested a clarifying amendment encountered some initial difficulty, but eventually persuaded the clerk to issue a summons that specified the statutory 30-day time to answer. The Department of Justice has encountered no difficulty; when different times are set by statute and rule, it either complies with the shorter time or asks for an extension of the shorter time. In addition, the Department expressed concern that if the rule were amended to expressly accommodate different statutory times courts might become more reluctant to extend those times to match the longer times set by paragraphs (2) and (3).

The lack of any apparent problems in practice moved some participants to conclude that there is no sufficient need to amend the rule.

Other participants, however, thought that it is embarrassing to have a poorly drafted rule on the books. The amendment suggested by the April agenda materials is clear. And it is difficult to believe that many judges would be moved by clarity to deny extensions of the time to answer. Current Department of Justice practice focuses on the statutory periods, either by honoring them or by requesting an extension. The statutes figure in present practice.

It seems unlikely that deferring this question will yield any new insights. The time may have come either to recommend publication of the draft rule set out below or to remove this matter from the agenda.

Excerpt from April 2020 Agenda Book

> Rule 12 sets the time to serve a responsive pleading. Rule 12(a)(1) sets the presumptive time at 21 days. Paragraph (2) sets the time at 60 days for "The United States, a United States agency, or a United States officer or employee sued only in an official capacity."

Paragraph (3) sets the time at 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."

Rule 12(a)(1) 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 * * *." It is possible to read this qualification as applying not only to the times set by paragraph (1), but also to the times set by paragraphs (2) and (3). (The Style Consultants reject this reading of the rule text as it was revised in the Style Project.) Many readers, however, will find it more natural to read the exception for a statutory time to apply only within paragraph (1). The exception for another time specified by this rule appeared for the first time in the Style Project, and seems to make explicit what had been only implicit —— that the 60-day periods in (2) and (3) supersede the 21-day period in (1). If federal statutes set times different than 60 days for cases covered by (2) and (3), it seems desirable to make the rule clear.

Suggestion 19-CV-O points to the 30-day response time set by the Freedom of Information Act. The proponent recounts experience with a clerk's office that initially refused to issue a summons substituting the 30-day period for the Rule 12(a)(2) 60-day period. Further discussion persuaded the clerk to incorporate the 30-day period, but the incident demonstrates the opportunity for confusion.

The Department of Justice complies with the 30-day time set by the Freedom of Information Act, but asks for an extension in cases that combine FOIA claims with other claims that are governed by the 60-day period in Rule 12(a)(2).

The Freedom of Information Act is, of itself, reason to amend Rule 12(a)(2) to bring it into parallel with (a)(1) by adding: "Unless another time is specified by a federal statute, * * *."

The Advisory Committee has not yet found any statute that sets another time for actions against a United States officer or employee sued in an individual capacity. If such a statute is found, Rule 12(a)(3) should be amended to make it parallel to (1) and (2). If no statute is found, the amendment might make sense as a precaution to protect against later discovery of a current statute or future enactment of a statute. There is a risk that the amendment might be not only unnecessary but a source of confusion for litigants who go about searching for possible statutory exceptions. But failing to make the amendment could lead to an

implication that, because of the contrast with paragraphs (1) and (2), paragraph (3) is intended to supersede different statutory provisions. There is no reason to attempt to supersede statutes enacted before the rule is amended, much less to create a patchwork scheme in which the rule is in turn superseded by later-enacted statutes.

There seems to be an effective resolution of the problem posed by paragraph (3). Amendment can be achieved with a minimal shift in the structure of present Rule 12(a), moving the "unless" clause up to become a preface for the three separately numbered paragraphs:

Rule 12. * * *

(a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time is specified by ~~this rule or~~[1] a federal statute, the time for serving a responsive pleading is as follows:

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

(A) A defendant must serve an answer:

(I) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the court specifies a different time.

(2) *United States and its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a

[1] The new structure clearly separates paragraphs (1), (2), and (3). "[B]y this rule" is no longer needed.

complaint, counterclaim, or crossclaim within 60 days after service on the United States Attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* 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 must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States Attorney, whichever is later.

* * *

Committee Note

Rule 12(a) is amended to make it clear that the times set for serving a responsive pleading in all of paragraphs (1), (2), and (3) are subject to different times set by statute. Provisions in the Freedom of Information Act and the Government in the Sunshine Act supply examples. *See* 5 U.S.C. §§ 552(a)(4)(c) and 552b(h)(1).

TAB 8

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MULTIDISTRICT LITIGATION SUBCOMMITTEE

The MDL Subcommittee has been busy since the full Committee's last meeting. It has had conference calls on September 10, 2020 and August 18, 2020. Notes on these conference calls are attached as an appendix to this report.

The subcommittee has recently had three issues pending before it. One of them —— screening claims —— is still under study, and awaiting further information. The second issue was whether to provide by rule for expanded interlocutory appellate review in MDL proceedings. On this issue, after much study, the subcommittee has come to a consensus that rulemaking should not be pursued at this time. The third issue —— judicial supervision of the selection of leadership counsel and of settlement in MDL proceedings —— remains under study.

(1) Screening and the "Census" Idea

The subcommittee's consideration of the "screening" issue began in response to assertions that often a considerable portion of the claims asserted in MDL mass tort situations were unsupportable. Problems with these claims included that the claimant in question did not use the drug or the medical device involved in the litigation, or that the claimant did not have the health condition allegedly caused by the product, or that the claimant used the product too briefly for it to cause the problem, or that the claimant developed symptoms too long after discontinuing the product for the product to be a cause of the symptoms. It seemed generally agreed that such unsupportable claims were presented, though there was debate about whether they often constituted a large proportion of the cases. In addition, there was debate about why such claims would appear in MDL proceedings.

The initial proposal was that the court impose a rigorous automatic requirement that every claimant submit proof of use of the product and development of pertinent symptoms promptly at the commencement of litigation. For example, under the Fairness in Class Action Litigation Act passed by the House of Representatives in 2017 but not acted on in the Senate, not only would each claimant be required to provide proof of use and injury shortly after filing the suit, but the court would itself have the duty within a brief period to scrutinize each such submission on its own initiative (not in response to a motion by a defendant). If it determined that certain submissions were not sufficient, the court would then have to direct that the claimant either submit augmented disclosures or suffer dismissal with prejudice. For courts presiding over MDLs containing hundreds or thousands of claims, that could have been a major burden had it been adopted.

But early conferences showed that often Plaintiff Fact Sheets (PFSs) were obtained in the early stages of MDL proceedings. The subcommittee obtained research assistance from the FJC that indicated that in almost all very large MDLs the court did in fact

employ a PFS, and that courts also often required Defendant Fact Sheets (DFSs) as well. But unlike the proposal that such early submissions all adhere to a form prescribed in a rule, in fact these fact sheets were ordinarily keyed to the case before the court and took a good deal of time to draft. So it was not clear that any rule could meaningfully prescribe what should be in each one. And some of these documents became fairly elaborate, meaning that providing responses was often burdensome. Some experienced transferee judges questioned the utility of these detailed documents, commenting that the first page or few pages of a PFS or a DFS often will suffice. Moreover, courts did not undertake to review the submissions on their own motion, but defendants could call to the court's attention deficiencies in some submissions, and dismissal could result with little investment of court time if the deficiencies were not cured. Given the divergences among PFS regimes for differing MDLs, it seemed difficult to devise a rule formula that would improve practice generally.

As these discussions moved forward, parties in various cases began to develop a simplified alternative to a PFS that came to be called a "census" of claims pending in the MDL court. Variations of that method are in use in as many as four major MDL matters, including one pending before Judge Rosenberg, a member of the subcommittee.[2] The "census" technique may serve several

[2] The four proceedings are:

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 members 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

purposes in mass tort MDLs, including organizing the proceedings, providing a "jump start" to discovery, and possibly contributing to the designation of leadership counsel.

It remains unclear how effective the "census" technique has been in serving any of those purposes. When more is known about it,

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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): 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 Panel order for transfer was entered in February 2020. The litigation is still in the early stages of organization, but much has been done, particularly with regard to the use of census methods. There are 645 filed cases, of which 27 are putative class actions, and a substantial number (in the thousands) of unfiled cases on a registry. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There were 63 applicants for leadership positions. The court received initial census forms for all of the filed cases, including personal injury, consumer, medical monitoring claims among other claims. The Court indicated that this was helpful to her consideration of leadership applicants, which have since been appointed. The Court also created a registry, which allowed for the filing of a 4-page "census plus" form for unfiled claimants; in broad terms, registry claimants received tolling of the statute of limitations from participating defendants and certain assistance with medical/ purchase records. The census plus form, which was also required for all filed plaintiffs, required information on which product(s) were used, the injuries alleged, and a certification by the plaintiff/claimant. In addition, the form required plaintiffs/claimants to either attach documents showing proof of use and injury, state that they were already ordered privately or through the registry but not yet received, or indicate that no records are expected to exist. The census plus forms are due on a rolling basis, with the first due date (for filed plaintiffs) having passed in July; the second tranche of forms were due in August, but this was extended for certain claimants due to a technical error with a private vendor to September, and will be followed by the third main tranche in November.

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.

it may appear that it is not something appropriately included in a rule, but instead a management technique that could be included in the Manual for Complex Litigation, or disseminated by the Judicial Panel. So this first topic remains under study.

(2) Interlocutory Appellate Review ––
Recommendation Not to Pursue at This Time

The original proposal for a rule providing an additional route to interlocutory review in MDL proceedings, perhaps limited to mass tort proceedings, called for a right to immediate review without the "veto" that 28 U.S.C. § 1292(b) provides the district court by permitting review only when the district judge certifies that the three criteria specified in the statute are met. Under § 1292(b), the court of appeals has discretion whether to accept the appeal. But the original proposal was to remove that discretion with regard to interlocutory appeals in MDL proceedings, and require the court of appeals to accept the appeal.

From that beginning, the discussion evolved. The notion of mandatory review was dropped relatively early on, and proponents of a rule instead urged something like Rule 23(f), giving the court of appeals sole discretion whether to accept the appeal, and including no provision for input from the transferee district judge on whether an immediate appeal would be desirable. In addition, proponents of a new rule made considerable efforts to provide guidance on distinguishing among MDL proceedings (limiting the new appellate opportunity to only certain MDLs), and on distinguishing among orders, to focus the additional opportunity for interlocutory review on the situations in which it was supposedly needed.

The proponents of expanded interlocutory review came mainly from the defense side, and principally from those involved in defense of pharmaceutical or medical device litigation. The basic thrust of those favoring an additional route for interlocutory review was that interlocutory orders can sometimes have much greater importance in MDL proceedings, which may involve thousands of claims, than in individual litigation. So there might be greater urgency to get key issues resolved, particularly if they were "cross-cutting" issues that might dispose of many or most of the pending cases. One example of such issues was the possibility of preemption of state law tort claims.

Another concern was that some transferee judges might resist § 1292(b) certification when it was justified in order to promote settlement. On the other hand, some suggested that permitting expanded interlocutory review might actually further settlement; defendants unwilling to make a substantial (sometime very substantial) settlement based on one district judge's resolution of an issue like preemption might have an entirely different attitude if a court of appeals affirmed the adverse ruling.

In addition, it was urged that the final judgment rule leads to inequality of treatment. Should defendants prevail on an issue

such as preemption, or succeed in excluding critical expert testimony under *Daubert*, plaintiffs often could appeal immediately because that would lead to entry of a final judgment in defendants' favor. But when they failed to obtain complete dismissal of plaintiffs' claims, defendants urged, they would not get a similar immediate route to appellate review.

There was strong opposition from plaintiff-side lawyers. One argument was that the existing routes to interlocutory review suffice in MDL proceedings. 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.*, 2020 WL 1875174 (6th Cir., Apr. 15, 2020) (granting writ of mandamus on defendants' petition); *In re General Motors LLC Ignition Switch Litig.*, 427 F. Supp. 3d 374 (S.D.N.Y. 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.

Both sides provided the subcommittee with extensive submissions, including considerable research on actual experience with interlocutory review in MDL proceedings. There was very serious concern, including among judges, about the delay consequences of such review.

In addition, the Rules Law Clerk provided the subcommittee with a memorandum. Some conclusions seem to follow from these materials:

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.

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 has received a great deal of input and help in evaluating these issues. Representatives of the subcommittee have attended (and often spoken at) at least fifteen conferences

around the country (and one in Israel) dealing with issues the subcommittee was considering. Two of them were full-day events organized by Emory Law School to focus entirely on the interlocutory review issues.

The most recent conference —— on June 19, 2020 —— involved lawyers and judges with extensive experience in MDL proceedings more generally, not only "mass tort" litigation. In particular, it included ten district judges and four court of appeals judges. Both the current Chair of the Judicial Panel and the previous Chair participated. Two former Chairs of the Standing Committee participated, as well as a number of other judges with experience on rules committees. There were also two judicial officers from the California state courts —— a Superior Court judge who is in the Complex Litigation Department of Los Angeles Superior Court (and is presently a member of the Standing Committee) and a Justice of the California Court of Appeal who provided the Subcommittee with a memorandum on a 2002 statute adopted in California that provided for interlocutory review on grounds very similar to those in § 1292(b).

On August 18, the subcommittee met by conference call to discuss its recommendation to the full Committee on whether to pursue a rule for expanded interlocutory review. The discussions are reflected in the extensive notes on that conference call, which are included in this agenda book, with an Appendix listing the participants in the June 19 online conference on these issues.

The many events attended by members of the subcommittee, entirely or largely addressed to the appellate review question, have provided a thorough examination of the subject. And the starting point for the subject was that the existing routes to interlocutory review provide meaningful review in at least some cases, as illustrated recently by the Sixth Circuit's mandamus ruling in the opioids MDL and Judge Furman's certification in the *GM Ignition Switch* litigation (at plaintiffs' request) which was accepted by the Second Circuit. Particularly in light of the low rate of reversal when review is granted, it is difficult to conclude that there is evidence of a serious problem to be solved by expanding interlocutory review.

Against this background, all subcommittee members concluded that proceeding further with this idea was not warranted in light of the many difficulties with doing so (some of which are mentioned below, as they would remain important were the subcommittee to continue down this path). The various reasons articulated by different members of the subcommittee are reflected in the notes of the August 18 call. Some of the reasons mentioned by subcommittee members can be summarized as follows:

Delay: There is clearly a significant issue with delay, and in some circuits it may be more substantial than in others. Though allowing expanded avenues for review need not be linked to a stay of proceedings in the district court, the more that one focuses

review on "cross-cutting" issues, the greater the impulse to pause proceedings until that issue is resolved.

Broad judicial opposition: Though there are some judges who have participated in events attended by members of the subcommittee who expressed willingness to consider expanded interlocutory review, by and large judges were opposed. Court of appeals judges often resisted any idea of "expedited" treatment on appeal of MDL matters (suggested as an antidote to the delay problem), and many regarded existing avenues for interlocutory review as sufficient to deal with real needs for review.

Undercutting the federal court's potential "leadership" role when there is parallel litigation in state courts: When there is federal MDL proceedings, particularly "mass tort" litigation, it often happens that there is also parallel state court litigation, and the federal MDL court can provide something of a "leadership" role and coordinate with the state court judges. But if the progress of the federal MDL were stalled by an interlocutory appeal, at least some of the state courts likely would not be willing to wait for the resolution of a potentially lengthy period of appellate review. Resulting fragmentation of the overall litigation would be undesirable and inconsistent with the overall objective of § 1407, which seeks consistent management and judicial efficiency. That would be an unintended consequence, but still could be serious; indeed, a judge who participated in the June 19 event called it the "Achilles heel of MDL."

Difficulties defining the kinds of MDL proceedings in which the new avenue for appeal would apply: Originally, the proposal for expanding interlocutory review focused on "mass tort" MDLs. That category does seem to include most of the MDLs with very large claimant populations. But it's not clear that it would include all of them. The *VW Diesel* litigation, for example, involved tens of thousands of claimants, but was mainly claiming economic rather than personal injury damages. And data breach MDLs may become more common, raising potentially difficult issues about what is a "personal injury" claim.

An additional difficulty is to determine whether there should be a numerical cutoff to trigger the opportunity for review. Whatever number were chosen to trigger the right to expanded review (e.g., 500 claimants, 1,000 claimants), there could be difficulties determining when that milestone was passed. Some research suggests that some MDL proceedings receive huge numbers of new entrants long after the centralized proceedings were begun. Triggering a new interlocutory review opportunity then would not seem productive. Moreover, there could sometimes be a question about whether one should "count" the unfiled claims on a registry, as in the Zantac litigation.

Finally, if the new appellate route were available in all MDLs (perhaps because no sensible line of demarcation among MDL proceedings could be articulated in a rule), rather than only some

of them, there might be questions about why an MDL centralization order would expand the opportunity for interlocutory review when individual cases, consolidated actions or class actions in a given district might involve many more claimants (perhaps hundreds or thousands) but not be eligible for expanded interlocutory review.

Difficulties defining the kind of rulings that could be reviewed, and burdening the court of appeals: Another narrowing idea that was proposed was to limit the new route to review to rulings on certain legal issues —— e.g., preemption motions or *Daubert* decisions or jurisdictional rulings —— but none of those limitations appeared easy to administer, and these rulings did not seem so distinctive as to support a special route to immediate review.

Another idea was to focus on "cross-cutting" rulings, those that are "central" to a "significant" proportion of the cases pending in the district court. That determination could be particularly challenging for a court of appeals, as it might mean that the appellate court would need to become sufficiently familiar with all the litigation before the district court to determine whether the rule's criteria were satisfied. A Rule 23(f) petition for review, by way of contrast, would not require consideration of such varied issues dependent on the overall and individual characteristics of what is often sprawling litigation.

Undercutting the district court: As noted below, the subcommittee has concluded that if it is to proceed further along this path, it is important to ensure a central role for the district court, if not a "veto" as provided in § 1292(b). Only the district court will be sufficiently familiar with the overall litigation to advise the court of appeals on the role of the ruling under challenge in the overall progress of the litigation. Though one might rewrite § 1292(b) to change the "materially advance the ultimate termination of the litigation" standard in the statute to take account of the limits of § 1407 to "pretrial" proceedings, the existing standard does not seem to have deterred transferee judges from certifying issues for interlocutory review. Any new rule would have to ensure that the district court's perspective was included, not only to assist the court of appeals but also to recognize the need to avoid unnecessary disruption of proceedings in the district court.

In sum, for these reasons and others, the entire subcommittee recommends to the Advisory Committee that further efforts on expanding interlocutory review not be pursued at this time.

Subcommittee Views on Other Issues
that Would Have to be Faced Moving Forward

In case the full Advisory Committee concludes that further efforts are justified regarding interlocutory review, the subcommittee explored the extent to which it has reached consensus on a number of points that would need to be considered going

forward. Here is a summary of those points, provided here for the full Advisory Committee's information:

Appeal as of right: The original proposal was for a right to appeal from any ruling falling within a defined category in any MDL proceedings involving "personal injury" claims. The subcommittee has reached consensus that no rule should command that the court of appeals entertain such an appeal. Any rule would have to provide the court of appeals discretion to decide whether to accept a petition for review.

Expedited treatment of an appeal in the court of appeals: Another suggestion was that a Civil Rule direct that the court of appeals "expedite" the resolution of appeals it has decided to accept under the hypothetical new rule. It is not clear how a Civil Rule could require such action by a court of appeals. Putting that issue aside, the subcommittee has reached consensus that there is no persuasive reason for requiring that the court of appeals alter the sequence of decisionmaking it would otherwise adopt and advance these appeals ahead of other matters, such as criminal cases, broad-based (even national) injunctions regarding governmental activity, cases accepted for review under existing § 1292(b) or Rule 23(f), or ordinary appeals after final judgment.

Ensuring a role for district court: As noted above, the subcommittee is committed to ensuring a role for the district court in advising the court of appeals on whether to grant review. Not only is that advice likely critical to provide the court of appeals with sufficient information to permit it to make a sensible determination whether to grant review, but it is also critical to safeguarding against disrupting the district court's handling of the centralized litigation. The goal of § 1407 transfer is to provide a method for coordinated and disciplined supervision of multiple cases (perhaps inclining state courts to follow federal "leadership" with regard to cases pending in state courts) and, as noted above, the delays that can attend interlocutory review could disrupt that coordinated supervision.

Devising a method for the district court's input to be provided: The best method for providing a district court role likely would present drafting challenges, however. Numerous models already exist, including § 1292(b) (district court certification required); Appellate Rule 21(b)(4) (the court of appeals may invite or order the district judge to address a petition for mandamus); Cal. Code Civ. Pro. §166.1 (permitting any party to request, or the trial court judge to provide without a request, an indication whether the trial court judge believes immediate review would materially advance the conclusion of the litigation). Alternatively, a rule could give the district court a period of time (say 30 days) to express its views on the value of immediate review, perhaps including specifically the question whether immediate review would be useful only if the appeal were resolved within a specified period of time. The subcommittee has not reached consensus on which method would be best to ensure a role for the

district court should this effort continue.

Scope of a rule —— types of MDL cases: As noted above, limiting a rule to "personal injury" MDL proceedings seems unlikely to work. Similarly, the prospect of limiting a rule to a certain kind of ruling (e.g., preemption or a "cross-cutting" issue) seems unpromising. It may be, then, that interlocutory review under the rule would have to be available in all MDL proceedings and as to any type of ruling. But that might prompt a question: Why should there be a special route to review in an MDL proceeding with eight cases, but not in a single-district consolidated proceeding with 800 claimants? Moving toward a rule that applied to all cases (as does the Cal. Code Civ. Pro. § 166.1, mentioned above) could raise questions about whether the rulemaking process really is authorized to relax the statutory criteria in § 1292(b) for all cases. True, § 1292(e) says that rulemaking may provide for interlocutory appeals not otherwise provided under existing sub-sections of the statute, but a rule that in effect could be said to relax one or more requirements of § 1292(b) in all cases might be resisted on the ground it really goes beyond the rulemaking power authorized by § 1292(e).

If further work is done on the interlocutory appeal idea, it may be that additional issues will emerge, but at present at least the issues described above are likely to be raised.

(3) Court Role in Supervision of Leadership Counsel and Reviewing Global Settlements

The third and final issue presently on the subcommittee's agenda is the possibility of developing a rule addressing appointment of leadership counsel, judicial supervision of compensation of leadership counsel, and judicial oversight of "global" settlements sometimes negotiated by leadership counsel. This set of issues appears in important ways to be the most challenging of the questions the subcommittee has confronted.

Owing to the attention focused on the two other issues that the subcommittee has been reviewing, little attention has focused on this topic so far. On September 10, 2020, the subcommittee met by conference call to discuss ways forward on this topic. The consensus view was that the subcommittee needed more information about these issues. Though it has had the benefit of important FJC research on the use of the PFS method to organize MDL mass tort litigation, and of numerous conferences and submissions about the possibility of a rule expanding interlocutory review, it has not received comparable input on this third topic.

The method identified for providing the needed perspective is to convene a conference involving experienced participants who present a variety of perspectives. The objective would be to make certain that there is diversity among the invitees, not only in terms of defense-side and plaintiff-side lawyers, but also emphasizing the need for diversity in race, gender, age, and other

ways. One thing emphasized was involving lawyers who had sought leadership appointment but not been selected. Academic participants should also be included, hopefully representing a range of attitudes on this subject. And of course, it will be critical to involve experienced judges.

The subcommittee invites the full Advisory Committee's help in identifying suitable participants for this planned event. The goal will be to hold the event well in advance of the Advisory Committee's Spring 2021 meeting, and perhaps be able to report then with more definite views on how and whether to proceed along these lines.

Because less work has been done on this subject than others, the following introduction is similar to previous presentations to the Committee on this subject, but it identifies the issues and challenges of this part of the project.

A starting point is to recognize that, fairly often, it seems that the gathering power of MDL proceedings might on occasion bear a significant resemblance to the class action device, perhaps to approach being a de facto class action from the perspective of claimants. But the history of rules for these two semi-parallel devices has differed considerably, particularly regarding supervision of counsel, attorney's fees for leadership counsel, and settlement review.

The class action settlement review procedures were recently revised by amendments that became effective on December 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 if that happens it often does not occur until the end of the MDL proceeding. Meanwhile, 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 proceedings 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 proceedings. 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 (4th)* § 14.215 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 proceedings. 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 through 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.[3]

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

[3] One more recent development deserves mention. On September 11, 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with claims involved in the Opioids MDL. *See In re National Prescription Opiate Litigation*, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019). On November 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*, Sixth Cir. Nos. 19-305 and 19-306.

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 4th* 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(g)(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 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 responsibility) 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.

At present, the basic question is 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, 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 —— there is good reason to make efforts to expand and diversify the ranks of lawyers who take on leadership positions. That is one of the reasons why the subcommittee conference call on September 10 included emphasis on involving younger lawyers and, perhaps particularly, those who had sought but not yet received appointment to a leadership position. 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.

At least the following questions have already emerged:

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 indications that any formal rulemaking would initially be resisted by all sides of the MDL bar and 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 providing 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?

During the Advisory Committee's October 2020 discussion, other issues may come to the fore, and there may be consensus about some of the issues described above. Nonetheless, this outline should provide a starting point for that full Committee discussion. The question going forward is whether this effort holds promise of generating useful results, even if not in a formal rule amendment.

In order to facilitate discussion, not to suggest that the subcommittee has resolved to pursue rulemaking on any of these topics, Appendix A presents an informal sketch of a possible approach to a rule addressing some of these issues, along with notations of questions that would be presented.

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APPENDIX A
Sketch of Possible Rule Approach

The sketch below is offered solely to provide a concrete example of how the topics discussed under (3) above might be addressed in a rule. As emphasized in this agenda memo, the subcommittee has not made any decision about whether to recommend attempting to draft a rule. Indeed, even if some provisions regarding these matters would be useful, it need not follow that they should be embodied in a rule, as opposed to a manual or instructional materials for the Judicial Panel.

Rule 23.3. Multidistrict Litigation Counsel

(a) (1) *Appointing Counsel*. When actions have been transferred for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, the court may appoint [lead][4] counsel to perform designated [acts][responsibilities] on behalf of[5] all counsel who have appeared for similarly aligned parties.[6] In appointing [lead] counsel the court:
(A) must consider:
(i) the work counsel has done in preparing and filing individual actions;
(ii) counsel's experience in handling complex litigation, multidistrict litigation, and the types of claims asserted in the proceedings;
(iii) counsel's knowledge of the applicable law; and
(iv) the resources that counsel will commit to

[4] It may work to leave the many tiers of counsel to the committee note. There may or may not be a single "lead" counsel — it is at least possible to designate an executive committee or some such without identifying a single lead counsel. In addition to lead counsel, there may or may not be a steering or executive committee, subcommittees for discovery or whatever, liaison counsel to work with other counsel in the MDL proceeding, liaison counsel to work with lawyers and actions in state courts, and so on through the needs of a particular MDL. The court may or may not want to be involved in appointing all of these various roles.

[5] I doubt that we want to designate class counsel to represent parties other than their own clients. Probably we cannot say "to represent" other lawyers who represent clients in the MDL proceeding. "Manage" the proceedings might imply too much authority. "Coordinate" addresses the basic purpose. "Coordinate the efforts of all counsel [on a side]" might work, but it may leave the way open to disruption by individual lawyers not appointed to any role.

[6] This is an elastic concept, but perhaps better than "[all] plaintiffs" or "[all] defendants." Large numbers of third-party defendants have not appeared in our discussions, but the more general phrase may be better.

the proceedings;

(B) may consider any other matter pertinent to counsel's ability to perform the designated [acts][responsibilities];

(C) may order potential [lead] counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and taxable costs;

(D) may include in the appointing order provisions about the role of lead counsel and the structure of leadership, the creation and disposition of common benefit funds under Rule 23.3(b), discussion of settlement terms [for parties not represented by lead counsel] under Rule 23.3(c), and matters bearing on attorney's fees and nontaxable costs [for lead counsel and other counsel] under Rule 23.3(d); and

(E) may make further orders in connection with the appointment[, including modification of the terms or termination].

(2) *Standard for Appointing Lead Counsel.* The court must appoint as lead counsel one or more counsel best able to perform the designated responsibilities.

(3) *Interim Lead Counsel.* The court may designate interim lead counsel to report on the ways in which an appointment of lead counsel might advance the purposes of the proceedings.

(4) *Duties of Lead Counsel.* Lead counsel must fairly and adequately discharge the responsibilities designated by the court [without favoring the interests of lead counsel's clients].

(b) COMMON BENEFIT FUND. The court may order establishment of a common benefit fund to compensate lead counsel for discharging the designated responsibilities. The order may be modified at any time, and should [must?]:

(1) set the terms for contributions to the fund [from fees payable for representing individual plaintiffs]; and

(2) provide for distributions to class counsel and other lawyers or refunds of contributions.

(c) SETTLEMENT DISCUSSIONS. If an order under Rule 23.3(a)(1)(D) authorizes lead counsel to discuss settlement terms that [will? may?] be offered to plaintiffs not represented by lead counsel, any terms agreed to by lead counsel:
(1) must be fair, reasonable, and adequate;[7]
(2) must treat all similarly situated plaintiffs equally; and
(3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.

(d) ATTORNEY FEES.
(1) *Common Benefit Fees.* The court may award fees and nontaxable costs to lead counsel and other lawyers from a common benefit fund for services that provide benefits to [plaintiffs? parties?] other than their own clients.[8]
(2) *Individual Contract Fees.* The court may modify the attorney's fee terms in individual representation contracts when the terms would provide unreasonably high fees in relation to the risks assumed, expenses incurred, and work performed under the contract.

[7] This is a particularly difficult proposition. In one way it seems obvious, and almost compelled by the analogy to Rule 23(e). But the justification depends on the proposition that a leadership team may face the same de facto conflicts of interests as class counsel. The incentive to settle on terms that produce substantial fees — both for representing individual plaintiffs and for common-benefit activities — may be real. But the comparison to Rule 23 is complicated by the right of each individual plaintiff to settle, or refuse to settle, on whatever terms that plaintiff finds adequate.

[8] Another tricky question. Lead counsel services often provide benefits both to lead counsel's clients and to other parties, usually —— perhaps always? —— other plaintiffs. But some services may provide benefits only to others' clients. A particular member of the leadership team, for example, may have clients who used only one version of a product that, in different forms, caused distinctive injuries to others, but the work can easily cross those boundaries. And we have occasionally heard hints about leadership counsel who have no clients at all. Is it feasible to write anything about the distinction into rule text? And is there any reason to try: if my hard work would be just as hard if I were representing only my own clients, but it confers great benefit on other lawyers who are spared the need to duplicate the work, why not provide some compensation for the benefit?

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APPENDIX B
Subcommittee Conference Call Notes

MDL Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 10, 2020

On Sept. 10, 2020, the MDL Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Robert Dow (Chair of the subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg, Virginia Seitz, Ariana Tadler, Helen Witt, Joseph Sellers, Rebecca Womeldorf (Chief Counsel, Rules Committee Staff), Julie Wilson (Counsel, Rules Committee Staff), Prof. Edward Cooper (Reporter to the Advisory Committee) and Prof. Richard Marcus (Reporter to the subcommittee), and Emery Lee (FJC).

The focus of this call was the possibility of trying to develop rule provisions that would address the related questions of judicial appointment of leadership counsel in MDL proceedings and the frequent emergence (often as a result of negotiations by leadership counsel) of some sort of "global settlement." In keeping with their supervision of leadership counsel, it may be that transferee judges' oversight of the terms of the settlement could be addressed in a rule.

At a very general level, such an approach might develop for MDL proceedings, or at least some of them, a set of rule provisions somewhat like Rules 23(e), (g), and (h). Those Rule 23 provisions have been very extensively expanded (in the case of 23(e)), and added (in the case of 23(g) and (h)) during the last two decades. No similar modernization has occurred with the MDL statute, § 1407.

Before the conference call, Prof. Marcus circulated a set of introductory materials, largely drawn from the report to the Standing Committee in June 2020, along with an Appendix setting out a possible draft Rule 23.3 sketched by Prof. Cooper at the beginning of the year in an effort to provide some concreteness to the concepts the subcommittee has struggled to define.

The subject was introduced as presenting a "big question" —— whether these possibilities are worth pursuing. If one looks for strong support for doing something along these lines, one initially is more likely to find that in law review articles by law professors than among experienced MDL practitioners or transferee judges.

For some time, it has seemed that the most important need in carefully evaluating these issues is to gather more information about the possible effects of such rulemaking. Until now, the main focus of the subcommittee has been on other matters. It has received abundant input about the question of expanded opportunities for interlocutory review, including at least two

full-day conferences devoted to just that topic. Nothing of that dimension has occurred on this topic.

But there are certainly quite a few challenging questions that proceeding down this path could present, some of which are identified in the materials circulated before the call.

A suggestion was made: Perhaps the subcommittee could prompt the Emory Complex Litigation Center to convene a conference on this topic similar to the one held June 19, 2020, on interlocutory appeals. That event was extremely helpful. The goal would be to ensure that the participants represent diverse viewpoints and perspectives.

A first reaction from a subcommittee member was that holding such a conference seemed an excellent idea. This member had not to date fully focused on these issues, and thought that thorough discussion would benefit from multiple reactions.

Another member agreed that there has been considerable academic interest in these subjects, but noted also that the subcommittee has not yet received a great deal of practitioner input.

A third member agreed that such a conference was worth exploring, but added that it would be important to identify groups or individuals who might be opposed to proceeding along these lines. Academic views are often helpful, but diversity of viewpoint can be even more important.

That drew the response that there probably are academics of a different persuasion; they do not all sing the same tune. And there are judges who seem to have experience in providing early and clear direction and supervision of leadership counsel of the sort we might be exploring for a rule. It would be important to involve them.

At the same time, it should also be kept in mind that any rule would not be designed to restrict the judge's flexibility so much an recognizing the judge's authority and focusing on what appear to be the most important factors when that authority is wielded.

The need for diversity was stressed —— not just plaintiff-side and defense-side representation, though that is certainly critical, but also in terms of gender, race, sexual orientation, and age, perhaps particularly age —— younger lawyers are needed in this sphere, and the subcommittee should hear from them. Indeed, one of the initiatives that might be furthered by this effort would be expansion of the participants beyond "the usual suspects."

A question was raised: Is there a way to locate and have representation for objectors? There are people who often appear as objectors to class action settlements. Is that a source for useful participants in such a conference?

One suggestion was that one could look for what are sometimes called IRPAs —— Individually Represented Plaintiffs' Attorneys. Those people may take umbrage at court orders (a) limiting their ability to litigate their cases, (b) requiring them to pay part of their attorneys' fees into a common benefit fund that would be used to pay leadership counsel, and perhaps (c) facing a judicially-imposed cap on their fees as well.

But IRPAs may not be the right focus, it was noted. The more promising focus would be on people who seek appointment as leadership counsel. Those are the people who are seeking an opportunity to become involved in an important way in major MDL proceedings. If we wish to consider ways to increase diversity in such leadership ranks, it would make most sense to look to those who have attempted to obtain appointment to leadership positions. Those who are disgruntled about the overall functioning of MDL proceedings are probably not as useful a source of participants as those who seek to be involved at the outset.

Another perspective was raised: It will probably be important to involve some current member of the Judicial Panel. Judges Vance and Proctor have been very helpful to the subcommittee, but neither of them is presently on the Panel. In addition, it would be important, if possible, to identify an academic who is not urging the adoption of provisions for MDLs like Rules 23(e), (g), and (h).

All this was summed up as emphasizing both the importance and the challenge of getting viewpoint diversity. This can be the suggestion to the full Committee during the October meeting. The goal should be to have this conference before the spring meeting of the full Committee. It might be possible to set it up for November, but perhaps more realistic to point toward January.

MDL Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
Aug. 18, 2020

On August 18, 2020, the MDL Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Robert Dow (Chair of the subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Joan Ericksen, Judge Robin Rosenberg, Virginia Seitz, Ariana Tadler, Helen Witt, Joseph Sellers, Rebecca Womeldorf (Chief Counsel, Rules Committee Staff), Julie Wilson (Counsel, Rules Committee Staff), Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Reporter to the subcommittee), and Emery Lee (FJC).

Recap of June 19 Miniconference

Judge Dow invited subcommittee members to offer their reactions to the comments during the June 19 miniconference arranged by Emory Law School. The conference drew a remarkable collection of experienced judges and lawyers, and was extremely helpful. He invited comments on what new ideas emerged. [The Appendix to these notes lists the invitees to the June 19 miniconference.]

The first reaction was that Justice Streeter of the California Court of Appeal offered an interesting report on the recent statutory revision for the California state courts, as it seemed to offer useful flexibility. Shortly after the conference, Justice Streeter provided Prof. Marcus with a brief memorandum with background on the California statute. Prof. Marcus would circulate this memorandum to the subcommittee right after the conference call.

For present purposes, the most pertinent observation about the California experience is that, unlike the federal court system, California has a pretty expansive writ of mandate avenue to obtain interlocutory review of trial court orders. But that mechanism has no provision for involving the trial court, even to the point of inviting the trial court to express a view on the utility of interlocutory review.

In 2002, § 166.1 was added to the California Code of Civil Procedure to provide an avenue for interlocutory review in all cases (not just the California analogue to MDL treatment under the federal system) on terms very similar to § 1292(b):

> Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate in any interlocutory order a belief that there is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation. Neither the denial of a request for,

> nor the objection of another party or counsel to, such a commentary in the interlocutory order, may be grounds for a writ or appeal.

As explained, this statute provides the trial court judge with a vehicle to convey a view on the utility of immediate review. Though California has a method for consolidating related cases from around the state (called JCCP), this statute is not limited to such cases. It also is not limited to orders of a certain type.

Another question about California practice came up. Justice Streeter also mentioned that some matters are entitled to expedited review in the California system, in particular rulings on Anti-SLAPP motions and rulings involving juvenile delinquency. Although the exact aspects of that expedited treatment are uncertain, it does seem that at least some of these rulings (e.g., matters involving juveniles in possibly dangerous circumstances) are not frequently before the federal courts.

Under § 166.1, there is no expedited treatment on appeal. Justice Streeter's memo mentions a litigation also mentioned on June 19 by Judge Kuhl, who is a Complex Litigation judge on Los Angeles Superior Court (and a member of the Standing Committee). In one mass toxic exposure litigation in the California state courts, review was had through final ruling by the Supreme Court of California (presumably following an intermediate decision by the Court of Appeal) in a total of two years.

Moving to other topics under discussion on June 19, it was noted that among the many judges present at the miniconference, there seemed to be only one district judge who was really receptive to expanded interlocutory review in MDL proceedings.

But at least one appellate judge raised the possibility that a rule modeled on 28 U.S.C. § 158(d)(2)(A)(iii), which focuses on whether "an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken" should be considered. It may be that this standard is better suited to the MDL situation than the standard in § 1292(b) —— "materially advance the ultimate termination of the litigation." And at least one other district judge who was involved in the June 19 miniconference (and has MDL experience) has since voiced some receptivity to a standard more closely attuned to the MDL situation, in which the transferee court has authority only over "pretrial" matters.

The reference to § 158(d)(2) prompted a question. Has anyone done research to find out how that statute is actually interpreted? Before we give serious consideration to adopting a standard from another statute, it would be important to be familiar with how it has been applied. Those on the call were not certain how that statute has been interpreted.

This comment drew the reaction that a standard might also focus on what the transfer statute itself says. § 1407(a) says that the transfer is for "coordinated or consolidated pretrial proceedings," and that cases should be returned at "the conclusion of such pretrial proceedings." Perhaps, then, a standard could build on that —— "materially advance the completion of the coordinated or consolidated pretrial proceedings." This standard would not be tied so directly to the bankruptcy appeal provision.

Another question arose: Are we talking about all MDL proceedings, or only some of them? That prompted a response that we have found it difficult to identify a dividing line among MDL proceedings that would be promising. One criterion would be the number of cases —— somehow to focus only on a "mega" MDL. But counting cases or claimants seemed somewhat difficult. In addition, it could be that the formal claimant list would be an undercount. In some MDL mass tort proceedings there may be hundreds or even thousands of potential claimants whose cases are "on hold" pending developments in the formal MDL. In addition, as the work of the Supreme Court fellow on when new cases arrive in MDL mass tort proceedings has demonstrated, sometimes the number of cases rises rather gradually; even though the final case count is very large, that may not be apparent for a long time.

A different perspective was offered: "If we don't limit this to the 'mega' MDLs, why should my MDL with eight cases qualify potentially for interlocutory review while a single district consolidation (say in a toxics case) with 1,000 claimants does not?"

This discussion pointed up the importance of focusing on what might be the criteria in a rule if one seemed worth pursuing, but the threshold question is whether the subcommittee has reached a consensus on whether it is presently not promising even to try to draft a rule.

Do Existing Procedures Provide Sufficient Flexibility?

The discussion turned to what might be called the "ultimate question": Based on nearly three years of fairly intense study, has the subcommittee reached consensus on whether there is sufficient promise to justify proceeding with possible drafting of an interlocutory review rule?

There already are some routes for interlocutory review, and some recent experience shows that they can work in MDL proceedings. Judge Furman certified an issue to the Second Circuit in one of his MDLs and that appeal is proceeding. The Sixth Circuit has used mandamus to review at least some rulings in the opioids MDL. So at least sometimes there is an avenue to review.

The first subcommittee member to address this topic reported initially favoring this effort. Over the long and intense period of

exploring these issues, however, this member became convinced that any rulemaking would face major issues that are presently not fixable. For example, the delay problem has been shown to be very serious, and there seems to be no good fix for that. And there are several other similarly intractable problems. § 1292(b) is not a panacea, but any effort to supplement it would be fraught with such difficulties that it is not sensible to proceed. Of great importance is the very broad judicial opposition to expanding the rules. These difficulties "cannot be fixed in a rational rule."

Another subcommittee member reported having undergone a very similar evolution in attitude. There is a real problem with inability to obtain timely review in some MDL cases, but we have not heard of any realistic solution. With virtually all the judges opposed, there would be almost no hope of success. Among attorneys, there is also much dissent. This project is "not doable."

Another subcommittee member expressed agreement. The idea of using the standard in § 158(d) regarding bankruptcy appeals was intriguing in some ways. But as one of the judges who participated in the June 19 conference stressed, there could be very serious unintended consequences to broadening the route to interlocutory appeal. One particular example was labeled the "Achilles heel of MDL" of any such effort —— the effect on the federal court's ability to provide leadership for state courts entertaining related cases. Right now, it may often happen that the MDL transferee judge's collaboration with state court judges and the resulting federal judicial leadership are critical to the orderly handling of parallel litigation. Often the state courts will "wait" for the federal cases to proceed first. But if the federal proceedings were slowed by an interlocutory appeal, there would be a significant likelihood that state courts would be unwilling to wait. There would likely be no obvious leader in those circumstances, so one could find that state court litigation would proceed in numerous states. That is contrary to the basic goal of MDL to achieve coordinated pretrial development of these cases.

Another subcommittee member agreed with the ones who had already spoke —— "We should leave this as it is."

A judge member observed that "the evidence is simply not there to support a change." The statistics provided in submissions from the plaintiff side show an affirmance rate that resembles the rate in other civil litigation and belies a need to facilitate interlocutory review. Though some defense counsel say they are unwilling to seek review under § 1292(b), there is no persuasive evidence of backlash by transferee judges when defendants do seek review under the existing statute.

Another judicial member agreed: "The existing rules are good enough." Our focus should be elsewhere, and we should steer away from this possibility.

A third judicial member reported going "back and forth" on this question for a long time. There is a valid concern with whether some transferee judges appreciate that § 1292(b) offers sufficient flexibility to accommodate needed review. Judge Furman's GM order was a *tour de force*, and it is now in the official reports. But it may be that some judges would not be comfortable doing what he did. As the June 19 conference confirmed, however, and we had seen even before that, the great majority of experienced judges were not receptive to broadening interlocutory review.

CONSENSUS: The consensus was that the subcommittee should report to the full Committee that it does not favor proceeding further with efforts to expand interlocutory review.

It was observed that the ultimate decision whether to proceed is up to the full Committee, not the subcommittee, so the suggestion was that further discussion address whether, should the full Committee direct the subcommittee to proceed with the interlocutory appeal issue, it could also advise on what seemed to be its inclinations on the additional points that have been under discussion. Surely some will not produce consensus, but others may and that may be a useful thing to report during the fall meeting. In a sense, this portion of the report would identify the difficult issues that would lie in the future if the subcommittee is directed to proceed, as well as permitting Advisory Committee members to express reservations, if any, with the consensus the subcommittee has reached on some questions.

The discussion continued for this hypothetical purpose.

Appeal as of Right or Discretionary

CONSENSUS: The subcommittee reached consensus that an appeal of right should not be provided; any rule should make appeal discretionary with the court of appeals.

Expedited Treatment in Court of Appeals

CONSENSUS: The subcommittee consensus was that a rule (particularly a Civil Rule) should not attempt to command a court of appeals to grant priority to such an appeal. Whether a rule should, if adopted, invite the district court to comment on whether interlocutory review would be helpful in light of the likely duration of an appeal appears to deserve further study.

Stay of Proceedings

CONSENSUS: The subcommittee consensus was that there should not be an automatic stay provision should discretionary review be granted. If the Subcommittee is to proceed further on the interlocutory review question, it might look to Rule 23(f): "An appeal does not say proceedings in the district court unless the district judge or the court of appeals so orders."

Role of the District Court

The subcommittee has been convinced that the Rule 23(f) model should not be used on this issue; the district court should not be excluded from being heard on whether an immediate appeal should be allowed.

The subcommittee did not reach full consensus on other issues related to the role of the district court, however. The current discussion suggests that the goal should be to provide the district court with a timely and meaningful opportunity to express a view, and provide the court of appeal with needed insight on whether granting review would really advance the MDL process. If the subcommittee proceeds with this topic, it will need to give further attention to these matters. Various models exist:

> Appellate Rule 21(b)(4), dealing with a petition for a writ of mandamus, says: "The court of appeals may invite or order the trial-court judge to address the petition or may invite an amicus curiae to do so. The trial-court judge may request permission to address the petition but may not do so unless invited or ordered to do so by the court of appeals."
>
> California Code of Civil Procedure § 166.1 says: "Upon the written request of any party or his or her counsel, or at the judge's discretion, a judge may indicate [whether immediate review] will materially advance the conclusion of the litigation."
>
> Section 1292(b) says that the court of appeals has discretion to grant review only if the district certifies an order for immediate review. This is the "district court veto."
>
> A rule might provide the district court with a period of time, say 30 days, to express views on the value of immediate review, with the expectation that the court of appeals would not act on the proposed appeal until that time had expired.
>
> A rule might invite or direct the district court to express a view on the utility of immediate review, perhaps including attention to whether the likely time needed for an appellate decision would frustrate the purposes for enabling interlocutory review.

The subcommittee has not reached consensus on which of these approaches, or which alternative approach, might be suitable. It was noted that it is highly unlikely that a court of appeals would grant review if the transferee judge offered reasons why it would not be helpful and might be harmful. Given that, it might be that something like the "district court veto" would make sense. For some subcommittee members, a veto power would give the district judge undue power.

An example was offered, based in part on the June 19 discussion — a *Daubert* ruling. As one of the judges pointed out, that is a heavily fact-bound decision. Reviewing based on a full trial record may be much better than relying on a pretrial ruling, particularly when (as seems likely) the pretrial ruling is not to exclude the opinion evidence. (If the ruling were to exclude, at least in the cases the subcommittee has heard about, that would often lead to entry of summary judgment for defendants, an appealable order.)

This discussion prompted a caution. "If the subcommittee might recommend a rule without a district court veto power, it would need to explain why it has changed § 1292(b) that way but only for certain cases." In a way, that looks to the next topic — scope of the possible new rule. Nonetheless, it is important to keep in mind at this juncture also.

As has already been discussed, line drawing may look peculiar if the new rule can be used in all MDLs — including one with only eight cases — but not in any other cases, even if they are consolidations of hundreds or thousands of cases or claims from within a given district. Why do disappointed parties in MDL cases get a chance to persuade the court of appeals to grant review without first obtaining the support of the district judge, while the lawyers in the 1,000 plaintiffs case do not (unless one considers the extraordinary and rarely available writ of mandamus)?

Section 1292(e) would have to be the authority for such a rule. It says:

> The Supreme Court may prescribe rules, in accordance with section 2072 of this title [the Rules Enabling Act], to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under section (a), (b), (c), or (d).

At some point there might be questions raised about whether changing § 1292(b) only slightly — to remove the district court veto, for example — is really within the grant of rulemaking authority. It might be said that the rulemaking authority was not added to permit the rulemakers to authorize appeals in "near miss" cases that can't satisfy all of the requirements for certification under subsections (a), (b), (c), or (d).

That ties in with the question whether any rule change would apply only to MDL cases. Unless there is something pertinent and unique about them, it may be hard to justify what could be said to bypass § 1292(b) for only those cases. But if it is not limited to MDL cases, it really sounds like rewriting what Congress enacted.

For the present, the important thing is to alert the full Committee that this may be a challenging question if the subcommittee is to continue pursuing this question.

CONSENSUS: There is a consensus that the district judge should not be cut out of the decision whether to grant review. The question how best to provide that input remains unanswered.

Scope of Rule

The discussion concerning the authority provided under § 1292(e) above relates to this issue as well. The original rule-amendment proposal attempted to limit the right to immediate review to personal injury MDLs. It seems a continuing reality that the great bulk of individual cases are housed in a small number of MDL proceedings often referred to as "mass tort" cases.

Various methods of distinguishing among MDLs have been discussed. Initially, the subcommittee mainly heard from lawyers and judges most experienced with mass tort MDLs. But as discussion advanced, it became apparent that deciding which MDLs were for "personal injury" or were "mass tort" MDLs could be a challenge in a rule. How, for example, should a data breach MDL be treated, particularly if there were some claims for emotional distress?

Counting claimants also presents challenges. As noted above, there may be a cascade of new cases long after the MDL began. But it was emphasized that limiting attention to the claims or cases on file in court may overlook a lot of potential cases and fail to appreciate the true importance of rulings. In the Zantac MDL, for example, there is a "registry" for potential claims that may have tens of thousands of claims. Surely one should consider that.

A related point came up. As noted earlier, allowing expanded interlocutory review in federal MDLs might undercut the leadership role of the MDL transferee judge when there are numerous parallel state-court actions. Shouldn't there be some way to include those state court cases in the count if there is to be a count?

These difficulties could be solved, in a sense, by having a rule apply to all MDLs. But that brings forward a different question already discussed —— why are all MDLs treated differently from huge case consolidations that were not confected by the Judicial Panel? Why shouldn't those get an equal opportunity for interlocutory review of what may be critical cross-cutting rulings?

One answer for present purposes is that the subcommittee has not looked seriously at the possibility of expanding any rule beyond MDLs. It sought the June 19 mini conference as a way to broaden its focus from "mass tort" MDLs, which had been the original focus. But it has not moved beyond that. Were it to do so, it would need to engage in very substantial additional fact-gathering.

In addition, moving in that direction might take the subcommittee toward or possibly beyond the limits of § 1292(e), if in effect it sought to relax the existing criteria in § 1292(b) for all cases, not just MDLs.

CONSENSUS: There was no consensus within the subcommittee on how to handle these problems; instead, the consensus is that there would be considerable challenges resolving them.

Types of Rulings Subject to Review

For a time, some proponents of review urged that categories of rulings might be included in a rule that would limit it to appeals of those sorts of rulings. Candidates advanced had included preemption rulings, Daubert rulings, and jurisdiction rulings. But the research done so far on actual appeals in MDL proceedings does not show that these sorts of rulings are often the subject of an appeal, and does show that a great variety of other rulings are often the subject of appeals. So it is not apparent that these sorts of rulings should be singled out.

Perhaps the most persuasive approach to this question was to emphasize that "cross-cutting" rulings should be the focus. But that really is just another way of saying that appeals should be allowed only when their resolution will significantly advance the overall resolution of either the MDL as a whole, or at least the pretrial proceedings transferred to the MDL transferee judge.

CONSENSUS: There appears to be no value to trying to define in a rule categories of orders that are the only ones eligible for interlocutory review under the rule.

Standard for Granting Review

This topic was touched on several times during the call. The existing standard in § 1292(b) — "an immediate appeal from the order may materially advance the ultimate termination of the litigation" — may not quite fit because the transferee judge is not authorized to hold a trial, but only to complete pretrial activities.

The standard in § 158(d) — "materially advance the progress of the case or proceeding" — might be closer to the mark.

A standard tied to § 1407(a) — "materially advance the conclusion of the coordinated or consolidated pretrial proceedings" — might better explain treating MDLs differently from other cases.

CONSENSUS: The subcommittee does not have a consensus view on what the standard should be; these issues would have to be pursued further if it is to continue considering a rule on interlocutory appellate review.

APPENDIX

Participants Invited to the June 19 Miniconference

Plaintiffs' Counsel:
Lauren Barnes, Hagens Berman
Virginia Buchanan, Levin Papantonio
Elizabeth Cabraser, Lieff Cabraser
Brian Devine, Seeger Salvas
Gretchen Freeman Cappio, Keller Rohrback
Jenn Joost, Kessler Topaz
Dena Sharp, Girard Sharp
Adam Slater, Mazie Slater

Defense Counsel:
John Beisner, Skadden
Kim Branscome, Dechert
Chris Chorba, Gibson Dunn
Cari Dawson, Alston
Joe Petrosinelli, Williams & Connolly
Will Barnette, Home Depot
Becky Francis, Microsoft

District Judges:
Judge Charles Breyer (CA)
Judge Karen Caldwell (KY)
Judge Gary Feinerman (IL)
Judge Jesse Furman (NY)
Judge Paul Grimm (MD)
Judge Matthew Kennelly (IL)
Judge David Proctor (AL)
Judge Lee Rosenthal (TX)
Judge Leonard Stark (DE)
Judge Jon Tigar (CA)

Court of Appeals Judges:
Judge Michael Chagares (3d Cir.)
Judge William Fletcher (9th Cir.)
Judge Anthony Scirica (3d Cir.)
Judge Diane Wood (7th Cir.)

State Court Judges:
Judge Carolyn Kuhl (Los Angeles)
Justice Jon Streeter (California Court of Appeal)

Law Professors:
Professor Andrew Bradt
Professor Robert Klonoff

Government/Court Personnel:
Tommie Duncan (JPML)
Jerry Kalina (JPML)

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APPEAL FINALITY AFTER CONSOLIDATION
JOINT CIVIL-APPELLATE SUBCOMMITTEE

The Civil and Appellate Rules Committees have established a joint subcommittee, chaired by Judge Rosenberg, to consider the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (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 practical problems.

The subcommittee concluded that one source of practical problems would be forfeiture of appeal opportunities resulting from unfamiliarity with what was a new rule for most circuits, or from failure to realize that a series of orders had resolved all claims among all parties in what began as a separate action. The Federal Judicial Center agreed to undertake a study to determine whether such problems could be identified.

Dr. Emery Lee began the FJC study by a docket search of all federal civil actions filed in 2015, 2016, and 2017. Given the time required to move from filing to consolidation and then to final disposition of all parts of an originally separate action, this period included approximately equal numbers of cases terminating before and terminating after *Hall v. Hall* was decided. Cases in MDL proceedings were excluded from the data base both because they are difficult to track after consolidation, and because few are remanded by the MDL court. The remaining cases yielded 5,953 consolidations that included a total of 20,730 originally independent actions. Together, they were 2.5% of all federal civil filings. A random sample of 400 of these cases was selected from a cohort of "lead" consolidated cases, yielding 385 that were suitable for study. In this sample, 28% of the consolidations were for all purposes, and the nature of the consolidation was not indicated for 48%. It seems likely that most of these were for all purposes. If so, three out of four consolidations effectively become a single action.

This sample yielded nine consolidations that resulted in a judgment terminating all parts of an originally separate action without disposing of the entire consolidated proceeding. Some perspective on this number may be gained by reflecting that 48% of the consolidate proceedings were resolved by settlement, and another 19% by voluntary dismissal. Examination of those nine "*Hall v. Hall* moments" showed that no appeal was taken in three, and that no apparent problems arose from the *Hall v. Hall* rule in the remaining six.

The subcommittee explored the FJC results in a conference call. Notes on the call are appended below. The subcommittee decided that the apparent lack of any practical problems in a

sample of 385 consolidations suggests that there is little reason to expand the sample extracted from the 2015-17 data base. Nor does it seem useful to immediately launch a study of two more years, 2018 and 2019, in part because time will be required for cases filed in those years to progress to the kinds of dispositions that might yield further useful information. This kind of empirical work consumes substantial resources. Further study by other means may show good reason for an expanded docket search, but not for now.

The subcommittee explored other possible ways to gather additional information. It chose to begin an informal survey of a few courts of appeals. Several means may be found to identify and resolve *Hall v. Hall* questions in a court of appeals. Staff attorneys may spot questions of jurisdiction or timeliness. Motions panels may encounter them. Merits panels may reach them and decide, perhaps with an opinion not for publication or with a precedential opinion. These inquiries should be relatively easy to pursue.

It also may prove useful to reach out to the bar groups that frequently provide help to the rules committees. That question will be considered further.

The subcommittee also will continue to evaluate the arguments that new rules should be proposed even if empirical study fails to show practical problems. It seems likely that the 48% of consolidation orders that do not designate the purpose of consolidation generally intend consolidation for all purposes. There is no indication that this practice causes problems. Amending Rule 42(a) to encourage or require a more explicit statement of the purposes of "consolidation" does not seem an urgent matter.

The values that inhere in Rule 54(b), on the other hand, may warrant further thought. If indeed most consolidations are ordered for "all purposes," with an intent to conduct all further proceedings as if the originally independent actions had been filed as one, the calculus of finality from that point on seems the same as if they had been filed as one. If it all begins as a single action, Rule 54(b) relies on the district judge as the "dispatcher," charged with evaluating the possible gains and losses of an immediate appeal. An immediate appeal may be useful, even important, for the parties caught up in the orders that can be made final judgments. It can be important as well for other parties. The trial court can benefit from appellate resolution of questions that affect the matters that remain pending before it, even when it seems prudent to stay further proceedings pending appeal. Or it may find that it can carry on with further proceedings without fear that the effort will be laid waste by the decision on appeal. The court of appeals may benefit from the opportunity to decide a common controlling question early, or may instead be burdened by the prospect of separate appeals that present closely related issues on an essentially common record.

The subcommittee will continue its work, recognizing that valuable information and insights may be gained, but also believing that there is no pressing need for prompt decisions. The subject is worthy, but not urgent.

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CARES ACT SUBCOMMITTEE

The CARES Act

Section 15002 of the CARES Act included specific provisions for the use of video and telephone conferences in criminal cases during the period of the national emergency relating to the COVID-19 pandemic. It also included § 15002(b)(6):

> (6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of the United States and the Supreme Court 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 Evidence Rules Committee is moving toward the conclusion that the Evidence Rules can adapt to any foreseeable emergency circumstances. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees have all created subcommittees to study the ways in which their rules might be amended in response to this invitation.

Reports and recommendations by the subcommittees will be considered at the fall meetings of their respective advisory committees. Professor Daniel Capra, Reporter for the Evidence Rules Committee, has undertaken the role of ambassador plenipotentiary, observing subcommittee meetings, reporting progress of each to the others, and promoting uniformity as they work toward their recommendations. His work as a neutral without a subcommittee to respond to has proved invaluable.

The task for this Committee is to review the assessment and recommendations of the CARES Act Subcommittee chaired by Judge Kent Jordan. The goal is to prepare recommendations that reflect the Advisory Committee's best judgment of what makes sense for the Civil Rules, given their inherent character and what we know about the adjustments that parties and courts have made to meet the needs of litigation during a nation (indeed world)-wide pandemic. The Standing Committee will consider the recommendations of the several advisory committees at their January 2021 meeting. The Standing Committee, however, does not expect to act at that meeting to approve proposals for public comment. The goal, instead, is to learn as much as can be from recommendations that may diverge in various respects. It is possible, and perhaps probable, that different approaches are appropriate for each set of rules. The prospect that there may be no recommendation for emergency provisions in the Evidence Rules is a good illustration. At the same time, there are good reasons to work for uniformity in some common provisions. The definition of what constitutes an "emergency" is a leading example that continues to confront different views in different subcommittees. It will be important for each advisory committee to consider what it knows of the

progress in other advisory committees or subcommittees at the time it meets. Differing views can be further discussed among the subcommittees as each committee prepares its report to the Standing Committee. But it is proper to adhere to each advisory committee's best judgment, providing different perspectives for consideration by the Standing Committee.

Recommendations

Introduction. The process of generating these recommendations has involved several subcommittee conference calls and exchanges in between the calls. Successive rules sketches and then drafts have evolved through a process so transformative that there is little point in setting them out in detail. The evolution is summarized in the discussion of the central points that follows these recommendations, and detailed in the notes of the conference calls appended to this report.

A separate task awaits. Many close observers of adaptations made in response to the current pandemic have suggested that this experience has demonstrated the advantages of remote procedures, particularly in discovery but perhaps at trial as well. The subcommittee has begun to shape a list of rules that might be considered for amendments that apply generally, without any thought of a rules emergency. The list will be shortened if the Advisory Committee adopts the alternative recommendation to forgo any general emergency rule in favor of proposing adoption of a few general rules amendments on the time track that would have been used to propose a general emergency rule. A separate list of rules that might be considered for general amendments prepared by member Joseph Sellers is appended below.

Emergency Rule or No Emergency Rule? The subcommittee has reached a point of equipoise on the question whether any general emergency rule, here illustrated by a draft Rule 87, should be recommended for publication and adoption. The alternative would be to follow the same timetable to publish and adopt as part of the regular rules all or some of the Emergency Rules authorized by draft Rule 87(c).

Several advantages may be gained by proceeding toward a general emergency rule. Although none of the different advisory committee subcommittees are considering proposals that fit the narrow focus of the CARES Act invitation, taking up the invitation responds to the concerns that moved Congress to extend the invitation. And on the likely assumption that general emergency rules will be proposed for at least the Bankruptcy and Criminal Rules, the absence of any similar Civil Rule would inevitably prompt speculation and perhaps arguments about negative implications. The distinctive environments in which the different sets of rules operate, and the roles of the corresponding advisory committees, should not support "expressio unius" comparisons across different sets of rules. But the temptation might prove irresistible, even if alleviated to some extent by the absence of

any emergency provision in the Evidence Rules. The wise and effective application that has characterized the Civil Rules during the COVID-19 pandemic might be stunted as a result.

The implications that might be drawn from the absence of a general Civil Emergency Rule could be addressed directly by some means. All of the reasons for concluding that no general rule is needed could be reported to the Standing Committee. It does not seem likely, however, that many litigants or courts routinely look to that source for guidance. A more ambitious approach would be to publish a Rule 87 proposal for comment, asking for comment on the proposition that the rules are better left as they are, apart from specific amendments. That would generate a more visible record, and could provide useful information that prompts actual adoption of a rule, with modifications to reflect the new information. That may in the end prove the most useful approach.

A more functional reason can be found for adopting a general emergency rule. Although the Civil Rules have borne up remarkably well during the COVID-19 pandemic, some rules texts may impose impenetrable barriers, allowing no discretion or interpretation to meet emergency circumstances. The specific Emergency Rules set out in draft Rule 87(c) seem to raise such barriers. But if there are as few of these rules as seem to be, this need can be met by amending those rules directly.

The argument for eschewing a general emergency rule is based primarily on the belief that the Civil Rules have, with very limited exceptions, proved sufficiently flexible to serve the needs of litigants and the courts, despite the extraordinary pressures generated by the COVID-19 pandemic. When a rule set serves its purpose, as ours has, the case can be made that doing nothing (except perhaps for making the few changes noted in draft Rule 87(c)) is preferable to announcing a new rule and then facing the law of unintended consequences, as creative lawyers and tenacious litigants seek out handholds for new arguments in the cracks and seams that even the most carefully drafted language will present. Better to leave well enough alone, the reasoning runs, than to create a new ground for battle. In addition, permanent revisions to the few rules identified in draft Rule 87(c) may prove more generally effective because they will be referred to with greater frequency than will a general emergency rule, and they may prove useful in circumstances that do not rise to the level of a rules emergency.

General Emergency Rule. The value of recommending a general emergency rule depends in large part on the quality of the rule. This draft Rule 87 has been developed by a process that continually narrowed all provisions, beginning with the definition of an emergency, identifying the judicial actors that may declare an emergency, and restricting the number of rules that might be subjected to departures in an emergency.

The draft Rule 87 text and committee note are set out here without elaborate footnotes or commentary on many of the issues that require careful thought, particularly those that arise from differences in the approaches developed by the subcommittees for different advisory committees. Paragraphs 87(c)(5) and (6) are shown with overstriking that reflects the subcommittee's conclusions that they should not be advanced for further work, but deserve review to confirm or change that conclusion. All proposals remain in progress. The targets for comparison will shift. But a few notes on the specific Emergency Rules identified in Rule 87(c) are included after the committee note.

Rule 87. Procedure in Emergency

(a) RULES EMERGENCY. The Judicial Conference of the United States may declare a rules emergency when extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARATION OF RULES EMERGENCY. A declaration of a rules emergency:

(1) must designate the court or courts affected by the emergency;

(2) may authorize only one or more of the Emergency Rules provided by Rule 87(c) to take the place of the same rule [for the period set by Rule 87(b)(3), (4), and (5)];

(3) must be limited to a stated period of no more than 90 days;

(4) may be renewed through additional declarations of the Judicial Conference for successive periods of no more than 90 days [each]; and

(5) may be modified or terminated before the end of the stated period.

(c) EMERGENCY RULES.

(1) Emergency Rule 4(e)(2)(B): leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there, or, if ordered by the court, sending a copy of each to [that place] [the individual's dwelling or usual place of abode] by registered or certified mail or other reliable means that require a signed receipt.

(2) Emergency Rule 4(h)(1)(B): by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process or, if ordered by the court, by mailing them by registered or certified mail or other reliable means that require a signed receipt, and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant;

(3) Emergency Rule 4(j)(2)(a): delivering a copy of the summons and of the complaint to its chief executive officer or, if ordered by the court, sending them to the chief executive officer by registered or certified mail or other reliable means that require a signed receipt;

(4) Emergency Rule 6(b)(2): A court may apply Rule 6(b)(1) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The order extending time has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under those rules.

~~(5) Emergency Rule 43(a): At trial, the witnesses' testimony must be taken in open court or, with appropriate safeguards, by remote means that permit reasonable public access unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise.~~

~~(6) Emergency Rule 77(b): Every trial on the merits must be conducted in open court in person or by remote means that permit reasonable public access and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge in chambers, without the attendance of the clerk or other court official, and anywhere inside or outside the district. But no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent.~~

(d) EFFECT OF TERMINATION. A proceeding not authorized by a rule but authorized and commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice.[9]

Committee Note

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for considering a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions.

[9] This provision seems unnecessary if only Emergency Rules 4, and even 6, are authorized. If we venture into "open court" territory, it may be useful to ensure that it is proper to carry on with a remote trial after it has begun. But this is an added argument for avoiding all of the "open court" issues.

At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unsurpassable obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local — familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility that is embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the extensive flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should exhaust the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this Rule 87, or a declaration of a rules emergency, do not imply any limitation of the courts' ability to respond to emergency circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration can extend to one or more of the emergency rules listed in subdivision(c) and must designate the emergency rule or rules included in the declaration. An emergency rule takes the place of the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, and may be renewed through additional declarations of the Judicial Conference for successive stated periods of no more than 90 days each, but the Judicial Conference may terminate or modify a declaration before the end of the stated period.

Subdivision (c). Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rules 4(e)(2)(B), 4(h)(1)(B), and 4(j)(2)(a) begin with the text of the present rule and authorize additional means of service "if ordered by the court." The nature of some emergencies may make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties, taking account of the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice for the district by entering a standing order, or even by local rule if it is practicable to adopt a local rule within the expected duration of the emergency and the prospect that the declaration of emergency may be renewed.

[Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those times under Rule 6(b)(1). Rule 6(b)(1) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension will ordinarily depend on case-specific factors as well. Special care must be taken to ensure that the parties understand the effect of an extension on the time for filing a notice of appeal. The interface with Appellate Rule 4(a)(4) is complicated by the provision in Emergency Rule 6(b)(2) that an order extending time has the same effect as a timely motion under the enumerated rules. If the order extending time is not followed by an actual motion within the extended time, the time to file a notice of appeal begins when the extended time period ends.]

~~The emergency provisions for Rules 43 and 77 must not be taken to imply that remote proceedings do not satisfy an "open court" requirement without authorization of an emergency rule.~~

Subdivision (d). Proceedings may be commenced under an emergency rule but not be completed before the declaration of a judicial emergency terminates. Completing a particular proceeding by reverting to the general provisions of the applicable rule may be possible without any real difficulty or may generate unnecessary waste. A proceeding may be completed as if the declaration had not terminated when compliance with the applicable rule would be infeasible or work an injustice.

~~[Dissipation of the circumstances that supported the declaration of a rules emergency does not always mean that the effects of the emergency have dissipated as well. Delays in all~~

~~proceedings in the district courts, civil, criminal, and bankruptcy, may produce backlogs that can be reduced only over relatively protracted periods. Perhaps all of the needed adjustments can be addressed under the general provisions of the rules, but it remains possible to declare a rules emergency to address the after-effects of the original emergency.]~~[10]

Comments on Specific Emergency Rules

Emergency Rules 4(e)(2)(B), 4(h)(1)(B), and 4(j)(2)(a): These emergency rules are drafted in the same way. Each begins with the full text of the present rule. Each adds the same provision for making service of the summons and complaint by alternative means: "registered or certified mail or other reliable means that require a signed receipt." Each depends on a court order to authorize resort to the alternative means. As explored in the committee note, the court may act by order in a particular case or may adopt a standing order, or perhaps a local rule, establishing more general standards for relying on the alternative means. The description of the alternative means is deliberately open-ended. United States Mail is a familiar mode of service, available now in many federal courts by adopting state practice. But, particularly in emergency circumstances, it may be that familiar commercial carriers are more reliable. It is too early to speculate whether electronic means of communication will, at the time of some future emergency, prove an attractive alternative for at least some parties, and provide a reliable electronic equivalent of a signed receipt.

If these are the only emergency rules that come to remain in Rule 87(c), however, the arguments for abandoning Rule 87 become more powerful. Direct amendments of Rule 4 could become more attractive.

Emergency Rule 6(b)(2): Rule 6(b)(2) presents an impenetrable barrier: "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." These post-judgment motions require prompt action, both to enable the court to act while the action remains fresh in mind and to avoid unacceptable delay in moving toward appeal finality. There is little reason to reexamine the present rule in its own terms.

It is not difficult, however, to imagine emergency circumstances that make it difficult or impossible to comply with the 28-day time period set for these motions apart from Rule 60(b). The time runs from entry of judgment. Notice of the judgment may not arrive immediately if a party is not in the CM/ECF system. Some time may be required to decide whether to make a motion, and then to prepare it. Emergency circumstances might shut down all means of

[10] This paragraph was suggested during the July 30 subcommittee meeting. It had some relevance to a rule that permitted open-ended emergency responses, but is difficult to maintain with the current approach.

filing before the 28th day; even if the court is inaccessible within the meaning of Rule 6(a)(3), extending the time to the first accessible day is not much relief. Allowing a more effective opportunity is attractive.

Rule 60(b) motions stand somewhat different. Rule 60(c) sets the time as "a reasonable time——and for reasons (1), (2), and (3) no more than a year after the entry of the judgment * * *." A "reasonable time" can readily accommodate emergency circumstances. The flat one-year barrier seems more absolute, and the prospect of reinstating the reasonable time limit by working through the catch-all provision of Rule 60(b)(6) seems remote. The Rule 6(b)(2) provision for Rule 60(b) is further complicated by its role with respect to appeal time. Appellate Rule 4(a)(4) treats a Rule 60(b) motion in the same way as timely motions under the other rules listed in Rule 60(b)(2) if the Rule 60(b) motion is filed no later than 28 days after judgment is entered.

The central difficulty with Emergency Rule 6(b)(2) arises from the nexus to Appellate Rule 4 just noted. Extending the time to make any of these motions would be useful for a party who intends to stand or fall on the motion, without appealing no matter how the motion is resolved. But for a party that wishes to appeal, extending the time to make the motion is not much help unless the appeal time is also extended. That is why Emergency Rule 6(b)(2) provides that an order extending the time to act "has the same effect under Appellate Rule 4(a)(4) as a timely motion under those rules." And that is why a 30-day limit is imposed on the extension, even recognizing that might not provide real relief in a severe emergency. An open-ended license to defer entry of a judgment that triggers appeal time would be questionable.

At the least, the relationship to appeal time means that a proposal to move forward with Emergency Rule 6(b)(2) will have to be coordinated with the Appellate Rules Committee. It is not unlikely that consideration must be given to once again amending Appellate Rule 4(a)(4), given the mandatory and jurisdictional character of appeal time. Draft Emergency Rule 6(b)(2), moreover, attempts to skirt the tie to Rule 4(a)(4) by providing that an extension has the same effect as a timely motion. That is intended to mean that if an extension is granted but no motion is made within the allotted time, appeal time starts to run on expiration of the allotted time. This indirect operation on the Appellate Rules raises serious challenges. There are traps enough in Appellate Rule 4 for all but the most experienced appellate lawyers. Adding yet another is not attractive, even recognizing that some measure of protection is available under Appellate Rule 4(a)(6).

If an Emergency Rule 6(b)(2) is pursued further, it will be necessary to examine further the way in which the present draft incorporates Rule 6(b)(1). Rule 6(b)(1)(A) governs extensions granted "before the original time or its extension expires." That is compatible with multiple extensions for the "no more than 30

days" allowed by Emergency Rule 6(b)(2). Rule 6(a)(1)(B) allows an extension on a motion after the original time has expired on a showing of excusable neglect. It may be that the emergency rule should be drafted in more complex terms.

These competing concerns left the subcommittee uncertain whether it would be better to omit Emergency Rule 6(b)(2). Crafting a satisfactory emergency rule will be difficult. But foreclosing any direct opportunity for emergency relief is truly unattractive.

This question deserves careful discussion.

Emergency Rules 43(a) and 77(b): These two rules are presented with overstriking because the subcommittee recommends that they be considered but then rejected.

Both proposals respond to "open court" rules that might be read too narrowly to permit adequate responses to some emergency conditions. One reason to abandon them is the belief that the corresponding rules should be interpreted and applied to achieve the same results as the emergency rules drafts. The risk of adopting them is that the contrast between the emergency rule text and the general rules will discourage flexible application of the general rules. The subcommittee believes that the prospect of unduly narrow application of the general rules is outweighed by the hope for appropriately broad application and the risk of unintended negative inferences following adoption of the emergency rules. There is every hope that rules emergencies will be rare, and often limited in time and space. Maintaining the elastic potential of the general rules is more important.

Rule 43(a) directs that the witnesses' testimony be taken in open court, but adds this: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Conditions that warrant declaration of a rules emergency are almost certain to establish good cause and compelling circumstances. Appropriate safeguards can be ordered for each witness, no matter whether most or all witnesses testify by contemporaneous transmission. Emergency Rule 43(a) adds an express direction that the means of transmission permit reasonable public access, but that too can be provided as something that inheres in "open court." The only apparent concern is that some courts may fear that the general provisions of Rule 43(a) may be read to focus on a single witness, or no more than a few. The rule text, however, begins with "witnesses' testimony," and the contemporaneous transmission sentence follows up by referring to "testimony" in general terms. The prospect that Rule 43(a) will be applied as appropriate to meet emergency circumstances is strong enough to discard draft Rule 87(c)(5).

Rule 77(b) directs that "every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." This provision has not prevented courts from responding

to the COVID-19 pandemic by planning for, and even starting to hold, trials on remote communication platforms. The challenges of such proceedings are recognized, with special emphasis on the difficulties that inhere in jury trials. Draft Emergency Rule 77(b) does nothing to address these challenges, nor could it. Much more experience is needed to support extensive and as yet uncertain provisions for jury trials, beginning with attempts to ensure a fairly representative selection of potential jurors and proceeding on through voir dire, trial itself, and jury deliberations. Opportunities abound for innocent or even willful jury behavior while participating by remote means. At most, an emergency rule can provide reassurance that remote means that provide reasonable public access satisfy the "open court" direction. And that reassurance would be bought at the price of stimulating arguments by negative inference to stifle effective implementation of Rule 77(b) as it is. Here too, the prospect that Rule 77(b) is being applied to meet the needs of emergency circumstances, and will be applied with growing assurance as experience develops, is strong enough to discard draft Rule 87(c)(6).

General Concerns and the Paths of Development

The discussion that follows describes in summary fashion the paths followed by the subcommittee, as guided by the work of the other subcommittees, in developing the proposals described above. Understanding this history will help in evaluating the proposals.

Uniformity

The value of uniformity is noted in the CARES Act introduction. Different substantive approaches to common or related issues are discussed in the sections that follow. Differences in what seem to be issues of style, however, are deferred for resolution in joint work among the advisory committees and the Style Consultants. The committees should consider issues only at the uncertain line where an issue that seems a matter of style to some may seem a matter of substance to others.

What Constitutes an Emergency?: Rule 87(a)

The very first efforts to define the scope of emergency rules took a cue from § 15002(b)(6) of the CARES Act. They looked for an emergency declared by the President under the National Emergencies Act.

This approach foundered on two basic concerns. The first was the discovery that Presidents have declared several national emergencies. Some of them have remained in force for many years, and remain in force now. Few of them have any relation to circumstances that affect court operations and procedures for any substantial period of time. There would be no effective limit on whatever emergency rules might be established if all that were required is an extant declaration of emergency.

The second concern was that many emergencies that intensely affect court operations may be local or regional, not national in scope. Familiar examples include a courthouse bombing; a hurricane, tidal surge, or flood; widespread fires; civil unrest; or a local and sustained disruption of travel or electronic communication.

The prospect of local emergencies initially led to emergencies declared by local authorities, such as a governor, mayor, or other official.

The prospect that emergencies declared by local authorities should be considered led to a still deeper concern. Why should the courts depend on executive or legislative officials, state or national, to enable judicial responses to emergency circumstances that impede effective judicial functions?

These concerns led to adoption of a functional definition of an emergency that does not depend on external definitions. What counts is impact on court functions. An early suggestion in this direction was provided by Judge Lewis A. Kaplan, as reported by the draft Minutes for the May 5, 2020 Criminal Rules Committee meeting: "Emergency ought to be defined in relation to the impairment of the ability of the courts to perform their constitutional functions. Nothing else."

The functional approach developed over time. Initial drafts of Civil Rule 87 looked only to extraordinary circumstances creating a "judicial emergency" by impeding a court's ability to perform its functions. Exchanges among the subcommittees concluded that it is better, and more functional, to refer to a "rules emergency." And a more detailed criterion was added to Civil Rule 87 by acceding to draft Criminal Rule 62(a), as reflected above:

> extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

Draft Criminal Rule 62(a) adds an additional element:

> no viable [feasible? practical? workable?] alternative measures would eliminate the impairment within a reasonable time.

It seems possible, perhaps probable, that the differences between the Civil Rules and Criminal Rules contexts justify different definitions. For many years, the Civil Rules have been drafted with a deliberate choice to confer very broad discretion to shape the general provisions to the needs of each specific action. Reports on the adaptations made by litigants and the courts in response to the current pandemic suggest that this flexibility has proved adequate to meet nearly all emergency problems. The Criminal Rules, on the other hand, include several less flexible provisions. The need for proceedings in the presence of the court reappears

regularly. The specific Criminal Rules identified in the CARES Act are of this sort. The Criminal Rules subcommittee continues to work to identify other Criminal Rules that might be included in an emergency rule that enumerates those rules —— and only those rules —— that might be subject to departure when a rules emergency is declared. Comparisons may prove more illuminating when the list is developed further.

For the Civil Rules, the "no viable alternative" provision seems an unnecessary complication. It seems intended, by its very nature as an added criterion, to stiffen the initial reference to circumstances that "substantially impair" the ability to function in compliance with the rules. For the Civil Rules, "substantially impair," coupled with the sound judgment of the Judicial Conference, seems protection enough. A transient impairment, or one that can be addressed under the rules, is not substantial. Beyond that, it seems likely that "alternative measures" are intended to contemplate measures that, after all, are available within the general rules as they stand. If so, this is another but ambiguous attempt to ensure care in making the determination whether the court can perform its functions in compliance with these rules. A different possible interpretation would be that alternatives not within these rules must be studied, perhaps in a search for means that are both necessary and narrowly tailored to meet the necessity. An illustration may be provided by 28 U.S.C. § 141, which authorize "special sessions" of a district court at places outside the district on a finding of emergency conditions that prevent holding the session at a reasonably available location within the district. That specific illustration, however, seems better understood as an example of an alternative available "in compliance with these rules." A broader interpretation seems inconsistent with the structure of Civil Rule 87, which permits only a specific set of emergency rules. Rejecting that interpretation, however, simply underscores the role of the "no viable alternative" provision as an apparently redundant emphasis on the central requirement that the court not be able to perform its functions in compliance with these rules.

Omitting this added criterion also avoids the question raised by the Criminal Rule 62(b)(1) provision that the Judicial Conference may declare a rules emergency "upon finding that the conditions" for a rules emergency are met. It is not clear whether it suffices simply to declare that an emergency exists, or whether more specific factors must be found and articulated. Requiring the Judicial Conference to identify and evaluate possible alternative measures and their inadequacies would be an onerous task.

The subcommittee has resisted adding this element to Rule 87(a) for these reasons. It may not be useful to attempt to reconcile the Civil and Criminal Rules drafts. The subcommittee has frequently considered, and found persuasive, the proposition that the structure, traditions, and sources of the Criminal Rules are markedly different from the structure, traditions, and sources of the Civil Rules. To be sure, different directions to the Judicial

Conference may seem disconcerting if Civil Rule 87 is proposed for adoption. That question remains for further deliberation.

Who Declares an Emergency?: Rule 87(a)

Several alternatives were explored before reaching the proposal that a rules emergency can be declared only by the Judicial Conference. The list included circuit judicial councils, chief circuit judges, chief district judges, or the full bench of circuit or district courts. The Supreme Court was mentioned once by one subcommittee, but was promptly discarded for fear of adding yet another responsibility to its already heavy burdens.

The more localized authorities seemed attractive because they know local circumstances better than more remote bodies. They also know their own capacities better, and can tailor emergency responses that better fit their operations.

The subcommittee narrowed the list rather early to include only circuit judicial councils. The balance of circuit and district judges would provide good access to local information, and at the same time promote uniformity in responding to local, regional, or circuit-wide emergencies. Individual districts could readily ask the circuit council to act, and it was expected that the council could act quickly.

The recommendation to rely on the Judicial Conference alone was based in part on the preference of the Criminal Rules subcommittee. Circuit councils might well adopt disparate responses to national emergencies or regional emergencies that cross circuit lines. One council or another might not be as reluctant as the Judicial Conference to declare a rules emergency, and might be willing to depart from more rules provisions. The Judicial Conference, composed of the chief judge of each circuit and a district judge from each circuit, is able to respond quickly in an emergency. Its members provide an immediate source of local information, and can quickly gather more. The Judicial Conference also plays a pivotal role in the Rules Enabling Act process. In all, it seemed best to rely on the Judicial Conference alone. If it declares a national rules emergency, it can provide for nationally uniform responses when appropriate. At the same time, it can declare a rules emergency for a single district or, at least in theory, part of a district.

The Judicial Conference need not rely on its own resources to know when it should consider declaring a rules emergency. Suggestions that it act can come not only from its own members but from other judges, often by informal means, particularly when the scope of a potential emergency is local or regional.

Relying only on the Judicial Conference may have some impact on the understanding of the appropriate scope of a rules emergency declaration. Although it is well structured to respond quickly in determining whether to declare an emergency, it may not be well

structured to define the precise scope of the rules-departing procedures best suited for immediate adoption, and perhaps ongoing adaptation. That range of concerns is addressed in the draft provisions of Rule 87(b) and (c) that prescribe the contents of a declaration of emergency and the rules that can be adopted under a declaration.

The Declaration: Rule 87(b)

Draft Rule 87(b) prescribes in narrow ways the authority established by declaring a rules emergency. Some of the limits are formal: The declaration must designate the court or courts affected by the emergency; must be limited to a stated period of no more than 90 days; and may be modified or terminated before the end of the stated period.

The remaining limit on the authority to declare a rules emergency is found in Rule 87(b)(2). This draft is quite narrow, authorizing only a few specific revisions of a few identified rules. The subcommittee came to this recommendation by a process that continually narrowed the scope of this authority. The process is described with draft Rule 87(c).

Extending a Declaration

Draft Rules 87(b)(4) and (5) address the questions created by the variable and often uncertain duration of rules emergencies. Paragraph (4) allows renewal by additional declarations of the Judicial Conference for periods of no more than 90 days each, ensuring continued attention to the need for emergency measures. Paragraph (5) allows a declaration to be modified or terminated before the end of the initial stated period.

Draft Criminal Rule 62(b)(3) takes a more formal approach, providing for "additional declarations if emergency conditions change or persist." This is a real difference, but this is a point on which Civil Rule 87, if it is pursued further, and Criminal Rule 62, should be made uniform.

Emergency Rules: Rule 87(c)

Rule 87(c) authorizes only a small number of departures from the Civil Rules in response to a declaration of a rules emergency. This recommendation rests on the belief that ongoing responses to the procedural challenges arising from the COVID-19 pandemic have demonstrated the capacity of courts and litigants to seize the opportunities created by the wide measures of discretion and flexibility deliberately built into the rules. It will be important to continually monitor potential roadblocks to ensure that this belief continues to be justified. The process that led to the present recommendation is instructive.

Early drafts authorized essentially wide-open responses once an emergency is declared. The most enthusiastic draft offered

alternative versions. One, somewhat narrower, authorized a district court to authorize departure from a rule identified by a declaration of emergency "when (1) necessary to perform the court's functions [in a particular case] and (2) consistent with all obligations [imposed by][under] the Constitution of the United States and applicable statutes." The broader version provided that "the parties should [agree on]{propose to the court} modified procedures that depart from the rule to the extent necessary to respond to the emergency. If the parties cannot agree the court may act under Rule 16 to specify the procedure to be followed."

More restrained versions soon followed. Two basic forms were considered. One would allow the Judicial Conference to declare an emergency with respect to any rule or rules except for those identified in a list of untouchable rules. The illustrative list of excluded rules never came on for extended discussion. Sufficient illustration is provided by rules affecting the right to jury trial — an emergency could not justify relaxing the standard for judgment as a matter of law or for summary judgment, seating a jury of fewer than 6 members, dispensing with jury instructions, or like measures. The other basic form was the obvious counter: it would list the only rules that could be affected by a declaration of emergency.

The difficulty of the task quickly emerged from attempts to develop suitable lists of rules to be excluded from, or included in, a declaration of emergency. Rule 4 provides an example that is duplicated by many other rules. Parts of Rule 4 may well deserve modification to meet emergency circumstances if they are not modified for all purposes. Other parts, including the basic requirement that summons and complaint be served, should not be modified. Any list of exclusions or inclusions would be quite long, and fraught with the prospect of error.

Regular Rules Amendments Alternative

The alternative to recommending a narrow set of emergency rules to be available through a Judicial Conference declaration of a rules emergency is to proceed directly, on the same time table, to propose amendments of the same rules that do not depend on a determination of an emergency by the Judicial Conference or any court. The amendments might simply adopt the proposed emergency rule text for all circumstances. Or somewhat different provisions might be proposed, seeking terms flexible enough to accommodate an emergency without relaxing important safeguards.

The subcommittee has not extensively studied the differences that might be made in proposing to amend the regular rules in ways that parallel the draft emergency rules. There should be time enough, however, to study the possible differences and advance proposals for publication at the same time that a potential general emergency rule might be —— or is —— proposed for publication.

Emergency Rules 4: The three Emergency Rules 4 proposed in draft Rule 87(c)(1), (2), and (3) all begin with present rule text. Each authorizes service by additional means if ordered by the court. The additional means, "registered or certified mail or other reliable means that require a signed receipt," are modest, and familiar in present practice when authorized by state law. Adding these provisions to the regular rules is likely to prove desirable for nonemergency circumstances as well as for emergencies.

It would be possible to propose still more detailed provisions. One illustration overlaps problems that exist now, but may be multiplied by an emergency. A calamitous fire, flood, earthquake, or hurricane may render large numbers of people homeless. How should service be made on an individual who has no "dwelling or usual place of abode"? Or what of intended defendants who deliberately disappear to evade service, perhaps with added cover generated by an emergency?

These and like questions occur regularly. They have not generated calls for rules amendments. It seems better to defer them rather than attempt to find answers in the time frame for publishing emergency rule proposals.

Emergency Rule 6(b)(2): The discussion of Emergency Rule 6(b)(2) shows the difficulties that will be encountered in attempting a general revision to permit extensions of the times for the enumerated post-judgment motions. The same difficulties face any attempt at a general rule revision, without the comfort of relying on a Judicial Conference declaration that adopts the emergency rule for a stated and limited period.

If a proposal is to be made to amend Rule 6(b)(2) itself, it likely should borrow from the standard set by draft Rule 87(a) for declaring a rules emergency. The authority to extend the time for a post-judgment rule would require "extraordinary circumstances" that make it impossible (or nearly impossible?) to move within the "original time." The same standard should be set for even making a motion to extend after expiration of the original time, if such motions are to be recognized at all.

One possibility would be to work on a general amendment of Rule 6(b)(2), recognizing that it may not be feasible to draft a suitable proposal on the same time track as the emergency rules.

Emergency Rules 43(a), 77(b): In one way, general rules amendments may reduce the reservations about proposing these emergency rules to ensure that "open court" proceedings can include remote testimony, argument, and deliberation. The concern has been that adopting these provisions only for emergencies could all too easily stifle desirable evolution of nonemergency practice. General rules amendments on the same terms vanquish that concern, and may have the added benefit of encouraging remote proceedings more generally.

Still, pursuing these issues for general rules amendments would require further thought. Experience with remote trials is only beginning to develop, and cogent concerns remain even for emergency circumstances. Additional safeguards might well be wise for any general rules amendments.

APPENDIX
Subcommittee Conference Call Notes

CARES Act Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
September 11, 2020

On September 11, 2020, the CARES Act Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Kent Jordan (Chair of the subcommittee); Judge John Bates (Chair of the Advisory Committee); Judge Robert Dow; Judge Sara Lioi, Judge Jennifer Boal, Joseph Sellers, Susan Soong, Prof. Edward Cooper (Reporter to the Civil Rules Committee); Prof. Daniel Capra (Reporter to the Evidence Rules Committee); Prof. Richard Marcus (Associate Reporter to the Civil Rules Committee); and Rebecca Womeldorf representing the Rules Committee Staff.

The call began with a recap: Since the August 20 conference call, the Rule 87 draft has been revised and circulated. It will be the main focus of discussion during this call. In addition, the Advisory Committee's Reporters have conferred with the Reporters of the other advisory committees under the guidance of Prof. Capra. The goal is to determine what should be put before the full Advisory Committee at its October meeting.

One starting point is that the other advisory committees (except Evidence) have also been working on drafts of possible emergency rules. The various drafts vary on certain things. All (save Appellate) are describing the trigger event as a "rules emergency." The general criterion of what constitutes a rules emergency is as follows: "extraordinary circumstances relating to public health or safety or affecting physical or electronic access to a court [that] substantially impair the ability of a court to perform its functions in compliance with these rules."

Criminal and Civil both say authority for declaring a judicial emergency rests with the Judicial Conference, and specify that such a declaration must not last longer than 90 days (subject to renewal or a new declaration). Criminal adds an additional criterion —— that no "viable alternative measures would eliminate the impairment within a reasonable time." The Civil draft does not include that "viable alternatives" limitation. The Criminal draft also calls for the Judicial Conference to make "findings." The Civil draft calls only for a "declaration" by the Conference.

An initial note of caution was expressed about both the "viable alternatives" and "findings" aspects of the Criminal draft rule. Those provisions would seem to constrain the Judicial Conference too much by requiring that it imagine and account for all possible alternatives. It might even be that there could be disagreements about which alternatives are "viable." And the findings requirement seems an unnecessary formality.

Another difference is that the Criminal draft separates the definition of a rules emergency in its section (a) from its section (b), which recognizes the Judicial Conference as having authority to declare such an emergency. That might arguably suggest that courts might regard themselves as authorized to declare a rules emergency without prior Judicial Conference action. There may be some other divergences, but those appear the major differences.

The question whether the various sets of rules must be the same remains somewhat open. Consistency seems inherently desirable, but the various rules need not move in lock step. The overall standard, after all, is that a rules emergency exists when the described events prevent the court from performing its functions "in compliance with *these* rules." That might be different for different sets of rules, which call for different measures of compliance.

A subcommittee member expressed worries about the "viable alternatives" idea. That seems to limit the flexibility of courts to respond to emergency conditions and also may invite disputes about what are "alternatives" and whether they are "viable." The Criminal draft also says that inquiry must address whether the alternatives could be employed "within a reasonable time." That could add to the uncertainty and constrain needed flexibility. How soon is soon enough?

Another subcommittee member agreed. The "viable alternatives" provision is a real difference. Perhaps the Standing Committee will have to decide whether it is useful, if the two sets of rules can't diverge on that point. But perhaps it will be satisfactory for the Criminal Rules to include the "viable alternatives" proviso while the Civil Rules do not.

One reason for the "viable alternatives" language was noted —— it may be that the Criminal Rules drafters regard it as important to consider the alternative offered by 28 U.S.C. § 141 —— holding proceedings outside the district —— rather than other alternatives.

Another subcommittee member expressed a preference for the overall arrangement in Rule 87 (compared to the Criminal Rules draft), and did not favor adding the "viable alternatives" proviso.

The emerging consensus of the subcommittee was not to include the "viable alternatives" language. It was emphasized, however, that the agenda report should make the full Advisory Committee aware of this choice so that it could decide whether to alter or endorse it. It is likely that the Criminal Rules Committee (at least going by current discussions) will advocate including that provision in its rule.

Another introductory matter was the basic question whether any rule would be needed at all. The Criminal Rules achieved needed flexibility for the COVID-19 pandemic only with action by Congress. Without that congressional action there might have been

considerable difficulties in criminal cases. The Civil Rules, on the other hand, afforded great flexibility during the pandemic lockdowns.

The Rule 87 draft was introduced in broad strokes. Subsection (a) says that the Judicial Conference may declare a rules emergency when the specified conditions exist. Those have already been discussed. Subsection (b) specifies the contents and limits of such a Judicial Conference declaration. The declaration may focus on only one or a few courts. It may implement fewer than all the Emergency Rules in subsection (c). It may not remain in effect for more than 90 days. It could be "modified" or "renewed" for further periods of no more than 90 days. It could also be modified or terminated early. The question whether, when emergency conditions persist after 90 days, there must be an entirely new declaration appears to be another difference between the Rule 87 draft and the Criminal Rules draft, which seems to require a new declaration rather than only a "renewal."

The "extension" v. "new declaration" issue was discussed. One example is the current pandemic. When this began six months ago, few of us expected things would still be as bad as they are now, six months later. "It's still happening." Does it make sense to say that the Judicial Conference must make a complete new declaration through a formal process? Why shouldn't we trust the Conference on this one. But one reaction was that this divergence between the Civil and Criminal drafts does not seem really to be very significant. Maybe this is not worth debating.

This drew the comment that the definition is different ("viable alternatives"), and our draft does not say the Judicial Conference must make "findings," either on an initial declaration or on a renewal. Perhaps these details will not actually matter too much. "The Judicial Conference won't see its task as differentiating between rules statements of standards." But that point could equally bear on the Criminal rules draft.

On the other hand, it was suggested, the draft Criminal Rule may actually be more flexible. So the choice is not so stark. And a question was asked: If the Conference may "modify" an initial declaration, would that include "modifying" a declaration that found California to be in emergency conditions to add Nevada?

Discussion turned to subsection (c) of the Rule 87 draft, which enumerates the specific rule changes that can be made. There are not many, but they come into play only "if ordered by the court." Should that court order be retained even though none of this can happen without Judicial Conference action?

An issue that emerged was that this phrase ("if ordered by the court") is often used in the rules, and always or almost always means an order in the individual action. Is that what this is getting at? Perhaps a different phrase would be a better choice.

One reaction, particularly with regard to the service methods permitted under Rule 4, is that individual judge orders should not suffice. The rule should say that only a General Order or other district-wide provision would suffice.

A response was that if we can trust the Judicial Conference not to declare a rules emergency inappropriately, we can also trust the district courts not to suspend service requirements inappropriately. Moreover, given districts may have very different circumstances. The number of judges varies quite a lot. Some districts include multiple courthouses; access may be impaired in some but not others. In fact, in several district courts, there has been a collaborative attitude toward methods of coping with the current pandemic.

A different perspective was that the Civil, Criminal, and Bankruptcy Rules Committees have developed basically the same structure. In each, subsection (c) provides specifics on what variations are permitted under that set of rules. There are differences in details, but overall there is notable consistency. On this subject, the contrast with the draft under study by the Appellate Rules is striking. It may say that a circuit Chief Judge may declare any rule inapplicable due to an emergency. This authority seems extremely broad.

A suggestion emerged: Maybe the way to handle this question is for the committee note to say that the rule is not intended to promote individual variations within a district, and express the expectation that ordinarily a district-wide solution would be expected. Another suggestion was that the committee note could say the usually a General Order for the entire district would be expected.

Another idea is a an "emergency local rule." 28 U.S.C. § 2071(e) permits districts to adopt local rules without the customary public notice and opportunity for comment on determining that "there is an immediate need for a rule." Perhaps the best solution for the Civil Rules would be for the committee note to say that such measures "often" would be taken district-wide rather than on a judge-by-judge basis. Probably what will happen if an emergency rule is added to the national rules is that there will also be emergency provisions added to local rules to permit adoption of local measures without the formalities that attend adoption of a local rule for non-emergency use.

Discussion turned to draft Rule 87(c)(4), which addresses the current rule that forbids extending the time with regard to certain motions, an authority that dovetails with limitations in Appellate Rule 4 on appeals. The big problem is that this affects the time limit for appeal, and that is not something principally governed by the civil rules. For Civil to act without a parallel measure from Appellate would not be sensible. And beyond that there is the mandatory and jurisdictional aspect of time to appeal. Can this be done? Should it even be attempted?

A first reaction was that one of the most frustrating problems confronted by appellate courts is anything that might be a trap for the unwary on time to appeal. But that is not a problem this subcommittee, or this Advisory Committee, can solve. Adding something that suggests the problem has been solved might create new problems without solving others. Consider somebody who relied on this new rule provision but could have complied with the usual one had the emergency rule not offered respite. That could be a trap.

On the other hand, it was urged, consider the people who cannot use ECF and have to depend on the U.S. mail or going to the courthouse. What are those people to do?

After further discussion about the impossibility of solving such problems in the Civil Rules, the conclusion was to leave the idea in the materials for the discussion of the concept with the full Advisory Committee.

Discussion shifted to the "bottom line" question: Should there be an emergency rule at all? Experience this year has shown that the civil rules are very flexible. Maybe there is no need for a Rule 87.

One reaction was that there is a value to focus attention in this way on the very few places where there still appear to be pressure points despite the overall flexibility of the civil rules. That's what draft Rule 87(c) does —— focusing on service, allowing the court to extend time for motions under Rules 50(b) and (d), Rule 52(b), Rule 59(b), (d), and (e), and 60(b) (though that might raise difficult issues of appellate jurisdiction), and addressing "open court" provisions.

Another point was raised: If the Criminal, Bankruptcy, and Appellate Rules all have emergency provisions, perhaps that will be taken to mean that emergency measures are not allowed under the Civil Rules because they do not have a parallel provision. Moreover, having a very limited Rule 87 would nevertheless support a committee note that could affirm that experience this year has shown that most of the civil rules have sufficient flexibility built in. This rule, then, would be designed to address the few that do not, and at the same time the note could emphasize that it does not narrow the latitude the other rules have afforded the courts to respond to the pandemic emergency.

A subcommittee member noted that it is important to highlight that flexibility. Otherwise there may be a risk people will say that we can't change anything from the way it is done in normal times under the civil rules except with regard to the specific things mentioned in the emergency rule.

Perhaps, it was suggested, there might be a way to say that we considered a general emergency rule and determined it would not be needed. But unless there is <u>some</u> rule change, that cannot be done

because one cannot issue a committee note without a rule amendment.

A possible downside to adopting a narrow rule was reiterated: It might suggest that nothing else can be done differently in emergency conditions. Having a rule seems to imply that only the changes authorized in the rule may be made.

A subcommittee member observed "I have vacillated on this." The draft committee note says the rules are already flexible. The risk is that a narrow rule might tempt some to argue that the new emergency rule actually constricts the needed flexibility we have now. "We did o.k. this time, but limiting our flexibility to respond to unforeseen circumstances would be dangerous."

One reaction was that maybe for the present we can "punt" on this question. It's not clear that we need an emergency rule. Certainly we do not want one that limits existing flexibility in the rules system. It may be that a committee note that affirms the existing flexibility would be a good antidote, but that could be risky as well.

Another reaction was that, if the only things subject to change are in Rule 4 on service, it would also be clear that the rule is so limited because of that overall flexibility.

A further reaction was that the proposals dealing with the "open court" provisions now in the rules (e.g., 43(a) and 77(b)) seem more likely to cause problems than to solve problems. A consensus emerged that these provisions could be dropped from the proposal to the full Advisory Committee.

A different reaction was that there might be a vice in having a narrow emergency rule if it impeded needed flexibility in regard to rules not mentioned.

A suggestion was made —— perhaps a rule that only dealt with Rule 4 service issues in emergency conditions could suffice for rule-adjustment purposes. And that might come with a committee note affirming the general flexibility of the rules, as evidenced by the pandemic experience. But that drew the response that unless there is a general emergency rule it is unlikely that people seeking to affirm the overall flexibility will look for affirmation in a note to Rule 4.

Another reaction was that service via email may become a generally acceptable method, but that's for the future. We need not raise that with the full Advisory Committee at this time.

The conference call concluded with the need to have agenda materials ready for the Advisory Committee's October meeting.

CARES Act Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
August 20, 2020

On August 20, 2020, the CARES Act Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Kent Jordan (Chair of the subcommittee); Judge John Bates (Chair of the Advisory Committee); Judge Robert Dow; Judge Sara Lioi, Judge Jennifer Boal, Joseph Sellers, Susan Soong, Prof. Edward Cooper (Reporter to the Civil Rules Committee); Prof. Daniel Capra (Reporter to the Evidence Rules Committee); Prof. Richard Marcus (Associate Reporter to the Civil Rules Committee); and Rebecca Womeldorf and Julie Wilson representing the Rules Committee Staff.

Before the conference call, subcommittee member Joe Sellers circulated a list of possible rules for inclusion in a "positive" list in an emergency rule. That listing is included as an Appendix to these notes.

This call began with the recognition that the previous call had left off comparing a "negative" with a "positive" list of rules. One way of looking at that question, with the Sellers list in mind, would be to consider how many rules really would need to be included on such a list. Approaching the same question from the "other end," one might instead ask how many rules should be insulated against relaxation, with an emergency rule that only limited relaxation of those rules. The very comprehensive list compiled by Mr. Sellers suggested that a positive list might be very long.

As a starting point, however, a question arose about how the other advisory committees were approaching their tasks. Prof. Capra, who has participated in the online meetings and conference calls of all the participating advisory committees (criminal, bankruptcy, and appellate in addition to civil) provided a report. The Criminal and Bankruptcy Rules Advisory Committees were gravitating toward a relatively aligned set of rule provisions. One divergence was about who should have authority to declare a rules emergency. None favored making that depend on a declaration by the President or some other entity outside the Judiciary. But there were divergences about where within the Judiciary this authority should lie. The Criminal Rules group favored having the Judicial Conference be the sole authority. The Bankruptcy Rules group was receptive to multiple sources for declaring the rules emergency —— the Judicial Conference, the Circuit Council or Circuit Chief Judge, or the Chief Bankruptcy Judge. In addition, the drafts are also focusing on what one might call a "soft landing" —— to address measures taken under an emergency rule provision when it was in effect, but not completed until after the emergency period ended.

This introduction led to a question: If an emergency is declared, who decides what rules may be modified, and in what way?

An initial response was that the answer to that question remains unclear. The Criminal Rules draft includes a section (c) to identify rules that could be relaxed, but that provision has not been drafted yet. It may be that the thinking is that the Judicial Conference is to make that choice, perhaps at the same time it declares a rules emergency. It is not absolutely clear whether this decision might be made court by court.

For the present, the parallelism among various rule drafts has been at the forefront of discussion. Almost by definition, what specific rules can be relaxed, and in what way, is not a comparably common issue. The question whether there is a rule emergency, and the decision who can so declare, seem to be things on which there should be parallelism. The Reporters are soon to confer among each other to compare notes on parallelism and divergence.

This discussion led to a further question: How can the Judicial Conference really be asked to specify the rules, or portions of rules, that might be relaxed? Consider, for example, Rule 4 of the Civil Rules regarding service. It is quite long and intricate. It is one thing to say that service by mail might be authorized during an emergency like this one even if not so authorized in the courts of the state in which the federal court sits. (In California, for example, service by mail is authorized, so under Rule 4(e)(1) it is similarly available for cases in federal court in California.) But surely nobody is suggesting that service of process can be entirely suspended. So a considerable amount of precision is required, and the selection of rules to relax really depends on details it seems too much to ask that the Judicial Conference master, particularly during a time of emergency.

On the other hand, leaving the question entirely uncertain is very likely to provoke resistance to an emergency rule. So there is a gulf between complete discretion for somebody to decide what is subject to relaxation and saying that the Judicial Conference must answer that question in great detail.

It was noted that the Judicial Conference has 26 committees, and the Standing Committee is just one of them. That underscores how difficult it would be for the Conference itself to do this detail work. But the Standing Committee is not set up to provide that sort of guidance either. The Standing Committee meets twice a year, and the advisory committees also meet twice a year. The Conference has an Executive Committee to take actions when urgently needed, but asking that committee to take this responsibility for the detail of emergency measures seems unwarranted.

This discussion prompted a reaction from judicial members of the subcommittee: The Civil Rules have much more flexibility than the Criminal Rules. There is a reason for that; the Criminal Rules are intended to be more precise and constraining due to the characteristics of criminal cases, including constitutional rights and statutory provisions that come into play there. Remember that

the CARES Act explicitly authorized modification of practice during the pandemic under quite a few criminal rules, and spelled out the findings required and the substitute procedures permitted.

The Civil Rules, by way of contrast, have flexibility built into them. For example, the references to things that must be done "in open court" might be raised as obstacles to some current practices but, without any change in the national rules, courts have effectively conducted business via online methods. Similarly, the need for a court order to go forward (absent stipulation) with a remote deposition might give way. The pandemic experience has shown that, without change, the Civil Rules are flexible enough to accommodate a lot of accommodation measures.

Nevertheless, if there is to be an emergency provision in the Civil Rules, it might be a great deal easier to justify if it were not an omnibus authorization to deviate from any or all the rules in the rule book. Instead, it might say "these three rules" may be modified, and perhaps prescribe exactly how they could be modified. That drew the comment that "we are still going toward a positive approach —— listing which rules can be changed rather than saying all can be changed unless on the 'do not touch' list."

It was agreed that some rules are "sacrosanct." Service is fundamental to due process, though there are many different ways to deliver service. The summary judgment standard is similarly not subject to relaxation during an emergency; the Seventh Amendment makes that clear. Perhaps an emergency rule could identify the rules subject to relaxation without specifying the exact modification that could be made to respond to an emergency.

Summing up, it was suggested that the discussion was tending toward two questions: (1) What modifications or allowed, or what rules may be modified? and (2) Who makes the decision on which rules are to be modified, and in what way? On the second question, several alternatives seem to be in play. One is the Judicial Conference. Another is the Circuit Chief Judge or Circuit Council, and a third is the district chief judge. The Appellate Rules approach, for example, looks to the circuit chief judge. The CARES Act, on the other hand (with the imprimatur of Congress on which criminal rules may be relaxed, and in what way) looks to district chief judge.

That prompted the question "Do we have to emulate the CARES Act?" The CARES Act requires findings from the district chief judges and/or individual district judges. If one looks to the chief judges of the various circuits, one problem could be that in a national emergency there could be considerable differences in district courts in adjacent states. If one looks to district chief judges or individual district judges, there might be concern that judges would indulge their attitudes toward various Civil Rules, and that some judges may be impatient with some rules. To all of this, one response was: "That takes us back to the Judicial Conference."

Summing up, one reaction was that maybe we should try to find the "least bad answer." That may well be relying on the Judicial Conference. But for specifics, it seems unwise to expect the Conference to be conversant with four sets of rules and aware of where the "pressure points" are in each of them. So maybe the responsibility to provide specifics should fall on the respective advisory committees. But having an advisory committee assemble, even online, sounds very difficult to arrange, particularly in an emergency. They just are not set up to do that job.

There was discussion of alternatives to the Judicial Conference. Regarding the Appellate Rules, it would surely not be district court judges, much less bankruptcy chief judges. For the Bankruptcy Rules, it seems odd that the chief bankruptcy judge might wield such authority rather than the chief district judge, since the bankruptcy court is really a part of the district court.

This discussion drew the reaction "I'm comfortable with the Judicial Conference having the sole authority to declare a rules emergency." What about a really local emergency, it was asked. The response was that the Judicial Conference should then be nimble enough to respond, and should be trusted to obtain reliable information from the affected locale.

A different question emerged: One feature of a declaration of an emergency under the draft was that it must specify the duration of the emergency, or at least the duration of the emergency authority to deviate from the ordinary rules. The draft recognizes that a declaration may be "renewed" for successive stated periods of no more than 90 days. The experience since March shows that a forecast about the duration of an emergency may under estimate. Some method of responding to that reality is important.

That prompted the question whether "renewal" should require just as much formality as the initial declaration of a rules emergency. Put differently, it was noted that the Criminal Rules draft calls for "findings" to declare an emergency and also to extend permission to relax the rules for additional time beyond 90 days. Should the limits on an extension be stricter? Does this possibility of "unending" renewals reinforce the wisdom of having only the Judicial Conference authorized to declare a rules emergency, rather than having that authority at the district court level?

The reaction was that these issues warranted another look at the draft.

The discussion turned to what should be listed on a "positive" list of rules, and perhaps what specific alternative or additional provisions could be implemented regarding those rules.

A first reaction was that the Sellers list (*see* Appendix) and a review of modifications adopted in many districts in this pandemic under the current rules suggest that there are really few

rules that present major obstacles to flexibility needed in an emergency. For example, one might point to Rule 43(a) on remote testimony, Rule 30(b)(4) on remote depositions, and Rule 77(b) on holding trial in "open court." If one wanted to prepare a "negative" list of "do not touch" rules, it might include Rule 56, Rule 23, Rule 38, and important parts of Rule 4.

A reaction to these points was that perhaps there might be a hybrid approach —— authorize the Judicial Conference to declare a rules emergency, but also specify which rules might be relaxed, and perhaps in what ways, thereby providing the Conference with what might be called a checklist, and a substitute or additional rule that might be implemented during the emergency.

That suggestion raised a question: Should there be a catch-all further authority for other rules not listed? A reaction to that idea was "How does the Judicial Conference know what additional rules to include?" That could return us to the starting problem of how the Conference could pick and choose.

A response was that if you look at the 90-plus numbered rules in our rule book there would probably be uniform agreement that 60 to 70 need not be changed, either because the emergency had no significant impact on them, or because they already have built-in flexibility that can accommodate needed emergency adaptations. So maybe one could have a rule that includes three features: (1) specific rules that could be modified in specified ways; (2) a list of rules that can't be touched; and (3) a flexible "catch-all" provision that permits modification of other rules. Indeed, maybe there is no reason to try to identify the rules that are sacrosanct. Maybe all that is needed is a list of five or six that can be modified (perhaps in specified ways) and provide the Judicial Conference with authority to modify others if essential to dealing with a rules emergency.

The question whether to try to provide an "off limits" list was discussed. This could be tough to devise. But failure to do so could invite blow back about the latitude conferred to disregard what's in the rules. The Rules Enabling Act requires that rule changes be subject to public comment and put before Congress before they go into effect. The emergency rule might be characterized as an "escape hatch" from those statutory constraints. Another reaction was that most rules don't substantially impair the courts' ability to perform their functions.

The evolving discussion was summed up: "Maybe we can leave off a safety valve, and also the idea of a negative list of rules that can't be touched." Instead, the question is what we really need to put on our positive list.

Further discussion suggested that actually (particularly in light of experience during the pandemic) very few rules need be on our list. One example might be the "open court" provisions that appear in some rules. But actual experience with proceedings via

Zoom or other methods shows that the "open court" provisions have not prevented needed accommodations in current circumstances. So one view could be "it's working now, and we don't need to add emergency authority."

Another point was that some rules have been identified as possibly deserving consideration for long-term amendment after the pandemic eases, if there is a "new normal." Would there be an inconsistency in saying that these rules might be amended for non-emergency times, but need not be relaxed during emergencies? Examples of this sort include Rule 30(b)(4) on remote depositions, Rule 43(a) on remote testimony in "open court," Rule 32(a)(4) on use of deposition testimony of "unavailable" witnesses, and Rule 77(b) on place of trial.

Another rule that might need relaxation was suggested: Rule 6(b)(2), which forbids a court to extend the time for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). Because time limits can cause serious problems in situations like the one in which we presently find ourselves, it is probably important to permit judges to extend time pursuant to Rule 6(b)(1) even with regard to those motions in emergency conditions. But it would be important to integrate any change here with the Appellate Rules.

On the other hand, other rules that have sometimes been identified as warranting greater flexibility may not. For example, Rule 77(c)(1) on the hours of the clerk's office seems to afford enough flexibility. It was noted that the C.D. Cal. has a deputy clerk "virtually on duty" even though physical access to the clerk's office is not provided.

Another rule that has been mentioned is Rule 77(a), which says when court is "open." But it says court is "considered always open." The word "considered" is important in that rule. That surely does not mean that the public can go inside 24/7; and electronic filing goes a long time toward actually making the court "open" even when nobody is there.

A related question that has been raised by several recent rule change submissions is whether the rule on pro se electronic filings should be changed, or at least subject to relaxation during emergency conditions. It may be that actual experience has proven flexible enough.

The call ended with the expectation that the subcommittee should re-convene by conference call or Zoom before agenda materials are due for the Advisory Committee's October meeting. In the interim, the Reporters will try to identify a list of rules that should be subject to suspension or relaxation by the Judicial Conference when it declares an emergency, and consider whether draft Rule 87(c) could not only list those rules but also specify what rules would be applied during the emergency period. That would relieve the Judicial Conference of any need to provide such specifics in the event of a rules emergency.

APPENDIX

List of Rules Compiled by Joe Sellers and Circulated Before August 20 Conference Call

Rule 4(d)(1)(G): This rule provides that notice of commencement of suit and the waiver of service option may be sent by 1st class mail "or other reliable means." While the rule language should be sufficient to allow for modifications to accommodate obstacles created by a rules emergency, it may be wise to include the rule among those implicated by a rules emergency to ensure what qualifies as "other reliable means" is applied in a consistent manner.

Rule 4(d)(1)(F): Rule provides for time to return a request to waive service. As Rule 6(b) permits courts to extend time before the original time expires or for good cause after the time expired, the rule already empowers the court to extend the time. Query whether to include the rule among those implicated by a rules emergency to ensure a consistent approach to the provision of extra time.

Rule 4(e)(2): Rule provides that service of individual w/in a judicial district may be achieved by delivering a copy to the individual personally, leaving a copy at their usual abode or delivering a copy to an authorized agent. Do we need to include among rules implicated by a rules emergency to provide for delivery by electronic or "other reliable means."

Rule 4(f)(2)(c)(I): Rule provides for service of individual in a foreign country, which may be achieved where no international agreement exists by (I) delivering a copy of the summons and complaint to the individual personally or (ii) using any form of mail that the clerk addresses and requires a signed receipt. Does subsection (c)(ii) permit the clerk to design forms that will accommodate emergency conditions without a rule change? If so, then may not need to include within the rules implicated by a rules emergency.

--Separate Q about relying on use of mail. Aside from the current controversy over the adequacy of mail, are there any concerns about relying on mail. Should the rule be included among those addressed in a rules emergency to allow for service by electronic mail with a means of ensuring receipt by the addressee.

Rule 4(h)(1)(B): The rule provides that service on a corporation can be achieved by delivering a copy to an officer, managing or general agent. Should the rule be included among those implicated in a rules emergency to permit service by electronic mail or by other means that are "reliable."

Rule 4(i)(1)(A)(i): The rule provides for service on the US by delivering a copy to the U.S. Attorney. Should the rule be included among those implicated in a rules emergency to permit service by electronic mail or by other means that are "reliable."

Rule 4(j)(2)(A): The rule provides that service on a state or local government may be achieved by delivering a copy to the chief executive officer. Should the rule be included among those covered by a rules emergency to permit service by electronic mail or by other means that are "reliable."

Rule 4.1(a): The rule provides that service of other process may be achieved by the US Marshal or other specially designated person anywhere within the state where the forum district is located or beyond where a statute permits. As this service is expressly contemplated to be achieved in person, it seems we will need to include this rule among those implicated by a rules emergency.

Rule 5(b)(2)(B): this rule provides that service in general may be achieved by handing the papers to the person to be served or leaving it at the person's office or dwelling or mailing to the last known address. As this rule does not permit service by remote means, other than by first class mail, this rule should be included among those implicated by a rules emergency.

Rule 5(b)(2)(D): This rule provides that, by default, service on someone with no known address is to be achieved by leaving the papers with the court clerk. Assuming the rule permits the papers to be left with the clerk electronically, it may be unnecessary to include this rule among those implicated by a rules emergency.

Rule 5(b)(2)(E): This rule permits service by through the ECF or transmission to another person authorized to receive service electronically. As this rule ordinarily accommodates service remotely, there shouldn't be a need for its inclusion among those implicated by a rules emergency.

Rule 5(d)(3)(c): This rule provides for signatures to be made electronically on filed documents. As the rule already permits signatures to be transmitted remotely, there shouldn't be a need for inclusion among those implicated by a rules emergency.

Rule 6(a)(1)(c): This rule provides for particular occasions when filings may be made beyond the prescribed time period. As emergencies that could qualify as a rules emergency are not included in the enumerated list of occasions permitting out-of-time filings, this rule should be included among those implicated by a rules emergency.

Rule 6(a)(3): This rule provides for extra time to file when the clerk's office is inaccessible. As the rule already provides for filings out-of-time when the clerk's office is unavailable, it be unnecessary to include among the rules implicated by a rules emergency.

Rule 11(b) & (c)(2): The rule provides for 21 days in which writings alleged by a party to violate Rule 11(b) can be withdrawn or corrected in order to avoid possible sanctions. As the rule

already permits courts to set a longer period than 21 days to withdraw or correct alleged deficiencies, it may be unnecessary to include among the rules implicated by a rules emergency.

Rule 16(a): The rule provides that courts may require attorneys and/or parties to "appear" for pretrial conferences. As the rule does not indicate whether an appearance can be achieved remotely, it should be included among the rules implicated by a rules emergency.

Rule 26(c)(1): The rule requires that parties seeking protective orders certify that they "conferred or attempted to confer" before submitting a motion. As the rule permits parties to attempt to confer before seeking a protective order, difficulties created by an emergency should not impede the ability to seek a protective order. Accordingly, it shouldn't be necessary to include this rule among those covered by emergencies.

The rule also already authorizes courts, for good cause, to specify terms, including time and place for the discovery (26(c)(1)(B)) and to prescribe a different method of discovery than the one sought by a party (26(c)(1)(c)). Those provisions should afford the court sufficient flexibility to adjust the means or other features of discovery to accommodate emergency conditions.

Rule 26(f): The rule requires parties to meet and confer no later than 21 days before a scheduling conference except "when the court orders otherwise." That language should suffice to afford the court the needed flexibility to adjust the meet and confer time to accommodate emergency conditions.

Rules 28 & 29: Pertinent parts of these rules prescribe persons before whom depositions may be taken and permit parties to stipulate that depositions may be taken before any other person. As Rule 28 (a)(1)(B) permits courts to appoint anyone to administer the oaths and take testimony, it appears that the Rule may already afford the court sufficient authority to accommodate emergency conditions.

Rule 30(b)(4): The rule permits depositions to be taken by telephone or other remote means either by party stipulation or as "the court may on motion order." As provision for depositions to be conducted remotely either requires a party stipulation or an order of the court but apparently only by motion, it may not be necessary to include the rule among those implicated by a rules emergency.

Rule 30(c)(3): The rule permits use of written questions as an alternative to oral examination, in which an officer asks the written questions and records the responses. As long as the officer is not required to be physically present with the witness, this rule should not require it to be included among the emergency rules.

Rule 30(d)(1): The rule provides for the duration of depositions "unless otherwise stipulated or order by the court" or if "any other circumstance impedes or delays the examination." The rule seems sufficient to accommodate emergency conditions.

Rule 31(b): The rule prescribes the duties of officers who conduct deposition by written questions. As nothing in the rule seems to require the officer to be physically present with the witness or otherwise to perform duties that cannot be performed remotely or on a flexible schedule, it seems sufficient to accommodate emergency conditions.

Rule 32(a)(4): The rule provides circumstances when a deposition may be used because the witness is unavailable. While there is no provision for emergency circumstances, subsection (E) permits the court to allow a deposition to be used "on motion and notice" when "the interest of justice and with due regard to the importance of live testimony in open court" permit. The rule seems sufficiently flexible to allow for emergency conditions and therefore it may be unnecessary to include among those implicated by a rules emergency.

Rule 32(a)(4)(c): The rule limits circumstances when a witness cannot attend or testify to those of age, illness, infirmity or imprisonment. Courts should be allowed to add emergency. Therefore the rule should be included among the rules that can be amended upon a rules emergency.

Rule 34(b)(2)(E): The rule governs the production of documents and ESI. In its present form, the rule provides a rigid protocol for production. But the preamble to the subsection permits modification of the rule where the parties stipulate or is "ordered by the court…." The preamble should provide sufficient flexibility to accommodate emergency conditions.

Rule 35: The rule governs physical and mental examinations. Clearly this rule should be included among those subject to modification in an emergency. While some forms of examination might be conducted remotely, such as some mental examinations, virtually all physical examinations, or parts of them, could not ordinarily be conducted remotely.

Rule 37(b)(2)(B): This rule governs when sanctions may be imposed for failing to produce persons for a Rule 35 examination. The rule does provide an exemption from sanctions when a party shows "it cannot produce the other person." But a party should not have to risk exposure to sanctions before it can avoid the imposition of sanctions. Accordingly, this rule should be included among those subject to modification in an emergency.

Rule 38: This rule, which provides for the demand of a trial by jury, does not address in any way modifications to the jury trial process that may be warranted in an emergency. As the rule is entitled: "Right to a Jury Trial; Demand," either the rule may need

to be re-titled and a new subsection added or a new rule should be inserted to authorize the court to adopt procedures to serve the safety and convenience of the jurors while permitting jury trials to proceed upon a finding that statutory and constitutional rights to a jury trial will be protected.

Rule 43(a): The rule requires that trial testimony be taken in open court except that, among other things, upon "good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." While the rule may be sufficiently flexible to permit a court to take testimony from a witness in a remote location, it still seems to require that the testimony be taken in open court. As such, in its current form, the rule may not accommodate circumstances in which the court may be presiding from a remote location as well. If trials can proceed in circumstances in which the court and its staff are located remotely, then this rule should be included among those subject to modification in an emergency.

Rule 43(c): The rule governs the evidence on which a motion may be heard, including "on oral testimony." Whether this rule subsection warrants modification in an emergency should be governed by the way Rule 43(a) is treated.

Rule 45(c)(1): This rule, which governs the power of subpoenas to command a person's attendance at a trial, hearing or deposition permits the person to be commanded to attend proceedings away from his/her home. As such, it should be subject to modification in an emergency.

Rule 45(c)(2)(A): This rule, which governs the power of subpoenas to command production of things, also commands production up to 100 miles from the place of employment or regular transaction of business. As such, compliance may not be achieved remotely and, therefore the rule should be subject to modification in an emergency.

Rule 45(d): While R 45(d)(1) cautions parties to refrain from imposing an undue burden or expense on a subpoena recipient, R 45(d)(2) places the burden on the recipient of the subpoena to lodge a timely objection and R

Rule 45(d)(3) prescribes grounds on which a subpoena may be quashed. As no provision for emergency conditions is provided as a basis for relief from a subpoena, this rule should be subject to modification in an emergency.

Rule 53(a)(1)(B)(i): The rule provides for appointment of masters "to hold trial proceedings . . . if appointment is warranted by: (i) some exceptional circumstances" There doesn't seem to be any reason this could not include a rules emergency and, therefore, the may not need to be subject to modification in an emergency.

Rule 63: The rule provides for continuation of a trial or hearing when a judge is unable to proceed. While the committee notes make clear that the rule was intended to apply in circumstances personal to the judge, there is nothing in the text of the rule that so limits its scope. Therefore, it may unnecessary to include this rule among those implicated by a rules emergency.

Rule 65(a)(2): The rule governs consolidation of a preliminary injunction hearing with a trial on the merits. Nothing in the rule requires that evidence be taken in open court. As long as Rule 43 is subject to modification in emergency conditions, to allow for the taking of testimony by remote means, it may not be necessary to include this rule in the list subject to modification in rules emergencies.

Rule 67(a): The rule governs deposits in the court of funds or other things in satisfaction of a judgment. As long as electronic funds transfers are available in the courts, the deposits themselves should not require any modification for rules emergencies. The rule also requires the depositing party to "deliver to the clerk a copy of the order permitting deposit." As the committee note characterizes the delivery as service of the order on the clerk, it would seem service could be achieved by ECF. Therefore, it may not be necessary to include this rule among those subject to modification upon a rules emergency.

Rule 71.1(d)(1): This rule governs procedures for condemnation of real and personal property by eminent domain. This subsection provides that the plaintiff must "promptly deliver to the clerk joint or several notices directed to the named defendants." Nothing in the rule or in the committee note seems to preclude the provision of notice by ECF. Therefore, it may not be necessary to include this rule among those subject to modification upon a rules emergency.

Rule 71.1(d)(3)(B): This rule governs notice by publication, which is only warranted when the plaintiff certifies that the defendant cannot be served personally pursuant to Rule 4. The rule also does not prescribe the type of publication required. While nothing in the rule seems to impose requirements that could not be satisfied in a rules emergency, it may be safer to include the rule among those subject to modification in a rules emergency to ensure adequate notice is achieved when unforeseen impediments to notice may arise.

Rule 77(a): The rule provides that the court is considered "always open for filing . . . ." While electronic filing may be available in emergency conditions, filings by persons without access to the ECF may be impaired by an emergency. Therefore, the rule should be included among those covered in a rules emergency.

Rule 77(b): This rule provides that "every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom." Therefore, the rule seems to require that all

trials be conducted "in open court" and the "so far as convenient" language appears only to apply to the provision that trials be conducted in "a regular courtroom." These provisions seem to distinguish between trials that are open to the public and those open to the public that are held in a regular courtroom. As such, the current rule language seems to permit trials on the merits by remote means as long as the public has electronic access to the proceedings. And the provision that, where convenient, the trial should be conducted in a regular courtroom seems to allow for circumstances in an emergency where trials in a courtroom would not be convenient. As long as Rule 43 allows for testimony to be taken by remote means, this rule should permit trials in emergency circumstances.

Rule 77(c)(1): The rule provides that the clerk's office must be open, and a clerk or deputy on duty, during business hours every day, except weekends and holidays. As the clerk's staff may be unable to be present in the office, provision may be needed to allow for alternative ways to access clerk's office staff. Therefore, the rule should be included among those covered in a rules emergency.

Rule 77(d)(2): The rule provides that lack of notice of judgment does not affect the time for appeal. Although Appellate Rule 4(a)(5)(c) permits some additional time to note an appeal when a party shows it failed to receive notice of the judgment or order appealed, this is an area that might be appropriate for modification in a rules emergency, after consultation with the Appellate Rules Committee, in order to avoid the prejudice from a lost right of appeal when an rules emergency may cause chaos or poor communications.

Rule 80: The rule provides that testimony in a hearing or trial may be used in a later trial when "the transcript is certified by the person who reported it." Assuming certification of the transcript is no different from certification provided by any stenographer or other person authorized to record testimony, emergency circumstances shouldn't interfere with providing this certification. Ordinarily, therefore, it may be unnecessary to include this rule among those subject to modification in a rules emergency.

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RULE 4(c)(3): SERVICE BY THE U.S. MARSHALS SERVICE

Suggestion 19-CV-A

A possible ambiguity in the text of the Rule 4(c)(3) provision for service by the marshal in actions brought in forma pauperis or by a seaman has been on the agenda since Judge Furman raised it at the Standing Committee meeting in January, 2019. It has been discussed three times, and carried forward each time in the hope that better practical information can be obtained.

It is appropriate to continue to carry these questions forward without attempting present action. The COVID-19 pandemic has made it impracticable to distract the Marshals Service with requests for deeper consultation. Practices adopted in response to the pandemic may, when there is time to reflect on them, provide a new source of useful information. And, perhaps most importantly, the CARES Act Subcommittee recommendations with respect to Rule 4 may point the way toward general revisions that reduce the burdens imposed by Rule 4(c)(3). If service by mail, commercial carrier, or even e-mail becomes available, service can be accomplished at much lower cost. 28 U.S.C. § 1915(d) directs that "the officers of the court shall issue and serve all process, and perform all duties in such cases." Rather than the marshal, a court clerk may find it feasible to make service. And i.f.p. plaintiffs may more often make service themselves, as seems to happen frequently now when the plaintiff is represented by a lawyer.

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RULE 17(d): NAMING OFFICE IN OFFICIAL CAPACITY CASES

Suggestion 19-CV-FF

This proposal is to amend Rule 17(d) to require that a public officer who sues or is sued in an official capacity be designated by official title only, deleting the present alternative of designation by name. It was presented to the April meeting by the materials set out below. The April Minutes reflect the balance of competing considerations that caused it to be carried forward to this meeting. There may be some advantages to the change. But it also presents potential difficulties. It may not be clear whether the title used by a public official is an "official title" that attaches to an office that should continue to be a party after the incumbent leaves the titled position. These difficulties may be augmented when they depend on state or local law. And they may be aggravated when the Eleventh Amendment fiction embraced by *Ex parte Young* requires suit against the official by name, even though the purpose is to compel official action. The sense of the April meeting was that issues of succession when the initial official leaves office generally are handled as a matter of routine. The Department of Justice described the process as "seamless."

It may be that renewed consideration will point the way, either to work toward a proposal for publication or to remove this subject from the agenda.

Excerpt from April 1, 2020 Agenda Book

> This proposal by Sai suggests that Rule 17(d) be revised to require, rather than permit, using the official title to designate a public officer who is a party in an official capacity. A major purpose is to avoid the need for automatic substitution of the official's successor when the official leaves the office. An added benefit would be to eliminate the difficulty of tracking the history of an action that goes through one or more changes of caption as new public officers are substituted into the action.
>
> The convenience of avoiding substitution seems a worthy goal. The most obvious concern is that some "public officers" may hold offices that cannot be made a party. Rule 17(d) applies to all public officers, federal, state, and local. The Eleventh Amendment fiction that a suit against a state official to restrain official action is a suit against the official as an individual, not a suit against the state, is essential but not always clear. It may be better to add a qualification that limits the mandate to use the official title to circumstances in which suit can be brought against the office. That limit is included in the second alternative draft.

The potential complications that may follow the proposed amendment are identified indirectly by asserting answers in the draft committee note that follows. It remains unclear whether the potential efficiencies that would flow from avoiding formal substitution as officers enter and leave public office justify whatever risks of complication may be encountered. As most recently advised, the Department of Justice position seems essentially neutral. This topic deserves careful study.

Rule 17. Plaintiff and Defendant; Capacity; Public Officers

* * *

Alternative (1)

(d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity ~~may~~ must be designated by official title rather than name, but the court may order that the officer's name be added.

Alternative (2)

(d) PUBLIC OFFICER'S TITLE AND NAME. A public officer who sues or is sued in an official capacity ~~may~~ must be designated by official title rather than name~~,~~ when suit can be brought by or against the office. The officer must be designated by name when:

(1) suit cannot be brought against the office,

(2) the officer is sued in an individual capacity, or

(3) ~~but~~ the court ~~may~~ so orders ~~that the officer's name be added~~.

This second version may be more elaborate than necessary. Courts have managed for years without rule text suggesting that care should be taken to make sure that the office can be made a party, and without a reminder that an officer may sue or be sued in both official and individual capacities or in an individual capacity alone. And the 1961 committee note to the substitution of parties provision in Rule 25(d)(1) (now (d)) addressed the Eleventh Amendment by stating that the rule applies to "actions to prevent officers * * * from enforcing unconstitutional enactments, *cf. Ex parte Young*, 209 U.S. 123 (1908)." The pretense that a state official sued to restrain unconstitutional official action is sued in an individual capacity was addressed by indirection: the rule applies "to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action." This view of substitution of parties when a public

official leaves office apparently carried over to what then was Rule 25(d)(2), now Rule 17(d). The committee note described the provision for designating a public official by official title as "applicable in 'official capacity' cases as described above * * *."

The more elaborate rule text likely would lead to a more elaborate committee note. This draft Note addresses many issues that might be omitted even if the more elaborate rule text were adopted. Almost all of it would be omitted if the simplest rule amendment is adopted.

Committee Note

Rule 17(d) is amended to require, not simply permit, designation by official title of a public officer who sues or is sued in an official capacity. The requirement applies only if the officer holds an office that can sue or be sued as an office. The court's power to require that the officer's name be added is retained. Designating the office as party means that there is no need to substitute parties under Rule 25(d) when a particular public official leaves the office, with or without immediate appointment of a successor. But if the office is transformed or abolished, substitution of a different office may be required, at least so long as there is an appropriate office to sue or be sued.

The rule does not attempt to address the question whether the office held by any particular public official can sue or be sued. Rule 17(d) applies to all public officials, federal, state, and local. If it is unclear whether the office can be joined as a party, both the office and the officer's names may be used. Federal law determines whether a federal office exists and has the capacity to sue or be sued.[11] State and local law applies to state and local offices. The rule, moreover, addresses only the naming of the party. It does not affect the rules that determine when suit against a public official is permitted by sovereign immunity or the Eleventh Amendment. *See* the 1961 committee note to Rule 25(d). Neither does the rule address whether a government can be sued directly, or whether a public agency can be made a party as an agency rather than by joining agency members.

When a public officer is sued in both an official capacity and an individual capacity, the office title must be used for the official-capacity claim when that is

[11] This is inevitably correct, even though Rule 17(b)(3) might be read to say that state law governs capacity in this situation. *See* 6A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 1566 (2010).

possible, and the officer's name must be used for the individual claim. The officer's name must be used for both claims when the office cannot be sued.

The Rule 4(i)(2) and (3) provisions for making service when a United States officer or employee is sued in an official capacity continue to apply when the office is designated as a party.

A wrong designation should be cured by amending the pleadings.

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RULE 5(d)(3)(B): E-FILING BY AN UNREPRESENTED PERSON

Suggestions 20-CV-J, K, L, M, N, O, P, Q, S, U, V, W, and X

Rule 5(d) was amended in 2018 to provide for nonelectronic filing (Rule 5(d)(2)), and for electronic filing and signing (Rule 5(d)(3)). Ordinarily, a person represented by an attorney must file electronically, with some exceptions. A person not represented by an attorney ordinarily may file electronically only if allowed by court order or by local rule, but may be required to file electronically by court order or by a local rule that includes reasonable exceptions.

The provision limiting e-filing by unrepresented persons was considered at length. E-filing has significant advantages for the filer, the court, and all parties when an unrepresented person successfully navigates the court's system. It may be anticipated that the skills required for e-filing will continue to expand among would-be filers. The 2018 committee note recognized this prospect, suggesting that willingness to allow e-filing by unrepresented persons "may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication."

The COVID-19 pandemic has prompted a flurry of proposals that e-filing be made generally available to unrepresented persons. The health hazards involved in mailing or physically delivering a paper to the court are emphasized, along with pleas that unrepresented persons should be protected equally with attorneys and those they represent. These suggestions include 20-CV-J, K, L, M, N, O, P, Q, S, U, V, W, and X.

These suggestions tie closely to the whole set of questions raised by experience with the responses of courts and litigants to the current pandemic. As discussed in the report of the CARES Act Subcommittee, it may be that information about these responses, carefully gathered and evaluated, will provide solid foundations for proposing amendments to general rules provisions.

One path would be to put e-filing by unrepresented parties on the long-term agenda. Experiences, both in courts that expanded access to e-filing and in those that did not, could be gathered and evaluated. That path would be particularly helpful if experience showed either that many or most unrepresented persons successfully managed e-filing, or that many did not.

Another path would be to attempt to advance this subject for immediate attention. It might even be published in August 2021, at the same time as any emergency rule might be published. But it would make sense to move ahead now only if there is enough solid experience to show that e-filing by unrepresented persons works well enough, often enough, to provide significant benefits. Initial informal inquiries suggest that experience is mixed. Holding this subject for the long-term agenda seems advisable.

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IN FORMA PAUPERIS DISCLOSURES

Suggestion 19-CV-Q

At the October 29, 2019 meeting the Advisory Committee considered a proposal by Sai that addressed four topics relating to in forma pauperis practices. One argued that the relevant Administrative Office forms call for too much information, and indeed that some of the information cannot constitutionally be required. The proposal was removed from the agenda, with the thought that it might raise questions better considered by the Court Administration and Case Management Committee. The only vestige that has survived is the ongoing consideration of Appellate Rules Form 4 by the Appellate Rules Committee.

Sai continues to press arguments that requiring disclosure of information about a litigant's spouse is prohibited by the Constitution. Appellate Form 4 provides illustrations in requirements to disclose such matters as a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; spouse's employment history; spouse's cash and money in bank accounts or in "any other financial institution"; a spouse's other assets; and persons who owe money to the spouse and how much.

No action is called for now. If the Administrative Office should come to reconsider its forms, whether in reaction to proposals to revise Appellate Form 4 or otherwise, these questions may be brought back for further consideration.

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E-FILING DEADLINE JOINT SUBCOMMITTEE

Suggestion 19-CV-U

The several committees are studying a suggestion to reconsider the provisions in the rules that set the end of the last day for electronic filing "at midnight in the court's time zone." For the Civil Rules, this provision appears in Rule 6(a)(4)(A).

The FJC has undertaken a broad quest for information about actual filing practices. Its work remains ongoing. This topic will be taken up again after the FJC reports its findings.

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RULE 9(b): GENERAL PLEADING OF MALICE, INTENT, ETC.

Suggestion 20-CV-Z

Advisory Committee member Dean and Professor A. Benjamin Spencer has submitted a proposal to amend the second sentence of Rule 9(b) to restore the meaning it enjoyed up to the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2009). The proposal is supported by an article, A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 Cardozo L. Rev. 1015 (2020). The article is appended below.

Because the Court interpreted the second sentence of Rule 9(b) against the first sentence, the entire subdivision is important:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The proposed amendment would revise the second sentence:

> Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

This proposal is presented as an information item rather than an item for action at this meeting. The aim is to provide an introduction to a challenging topic and to invite engaged study over a period longer than the time between delivery of agenda materials and this Advisory Committee meeting. Careful preparation during the interval before the spring meeting will be important.

The *Iqbal* opinion elaborated now-familiar general Rule 8(a)(2) standards for pleading "a short and plain statement of the claim showing that the pleader is entitled to relief." The details of the *Iqbal* complaint deserve a brief summary to pave the way for the Rule 9(b) ruling. The plaintiff, "a citizen of Pakistan and a Muslim," was arrested on fraud charges, pleaded guilty, served a term of imprisonment, and was removed to Pakistan. He did not challenge the arrest or the confinement as such. But he did claim that he was designated a "person of high interest" in connection with the terrorist attacks of September 11, 2001, and placed in administrative maximum confinement, "on account of his race, religion, or national origin." The Court accepted the prospect that he had pleaded claims against some of the many defendants. The case came to it on qualified immunity appeals by two of the defendants — John Ashcroft, the former Attorney General, and Robert Mueller, the Director of the FBI. He alleged that Ashcroft was the principal architect of the unconstitutional policy, and that Mueller was instrumental in its adoption. He further alleged that they "knew of, condoned, and willfully and maliciously agreed to subject" him

to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

The Court found these allegations failed to push the claim beyond mere possibility into plausibility. It applied a legal standard that "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' * * * It instead involves a decisionmaker's undertaking a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'" Knowledge of, and acquiescence in, discriminatory acts by their subordinates would not suffice to hold the Attorney General and Director of the FBI liable. The allegations of these defendants' purpose "are conclusory, and not entitled to be assumed true." "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." The allegations were "consistent with" an unlawful discriminatory purpose, but did not plausibly establish this purpose "given more likely explanations." Lower-ranking government officials may have designated the plaintiff a person of high interest and subjected him to unlawful conditions of confinement for unlawful reasons, but nothing more could be inferred against these two defendants than seeking "to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."

The Court addressed Rule 9(b) after setting the general pleading requirements. It characterized the plaintiff's argument to be that by allowing discriminatory intent to be pleaded "generally," Rule 9(b) permits a conclusory allegation without more. This argument was rejected on the face of the rule text. "Generally" is used to distinguish allegations of malice, intent, knowledge, or other conditions of a person's mind from the particularity standard established for fraud or mistake. "Generally" "does not give [a party] license to evade the less rigid — although still operative — strictures of Rule 8. * * * And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."

Member Spencer's article is too rich to be summarized with any justice. It is set in a background of evident dissatisfaction with the general pleading standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and restated in the *Iqbal* opinion. But it seems to be accepted that after the Advisory Committee has studied multiple suggestions for restoring Rule 8(a)(2) to its pre-*Twombly* meaning, "it appears that ship has sailed." p. 1054, n. 145. The focus instead is confined to Rule 9(b). The proposed amendment, set out above, "would alter the outcome in *Iqbal*." The entire argument is aimed at that goal. But as an alternative, if that argument is not accepted, "making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue."

The article unfolds in several steps that should be read carefully. First, it annotates the proposition that lower courts are following the new interpretation of Rule 9(b), applying it to such claims as actual malice in defamation of a public figure, or discriminatory intent in employment cases. Then it argues that the Court "got the interpretation of Rule 9(b) terribly wrong" as compared to the original understanding. The 1937 committee note says simply to see English Rules. The English rule cited provided that when alleging "malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred." This text provides the basis for the Rule 9(b) amendment proposed to set matters right.

Perhaps worse than departing from intended meaning, severe difficulties are found in the Court's reading of Rule 9(b). Often a pleader cannot "provide the particulars of a person's state of mind" without benefit of discovery. Employment discrimination cases are a leading example. Requiring a complaint to articulate facts to substantiate an alleged state of mind, indeed, may run afoul of the First Amendment's prohibition of any law prohibiting the right of the people to petition the Government for the redress of grievances. The general pleading standard that looks to "judicial experience and common sense," moreover, invites "decisions based on various biases and categorical or stereotypical reasoning," particularly when lacking complete information about an individual or a situation. "A civil claim is all about deviation from the norm"; pleaders should not be obliged "to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible."

There is much more in the article than this bald introduction. It provides a comprehensive framework to hold the simpler reaction of those who were surprised by the Court's reading of Rule 9(b). At least some procedure mavens had continued to believe that "generally" allowed pleading of a state of mind as if a fact, just as the English rule said more explicitly. On this view, sufficient notice was given by pleading the facts whose legal consequences are measured by the defendant's state of mind.

Pursuing this invitation toward actual proposal of an amendment for publication will require careful development.

One task might be to examine the development of Rule 9(b) practices in the lower courts before the *Iqbal* decision. The story of general "notice" pleading practices before the *Twombly* and *Iqbal* decisions was decidedly mixed, not only in the lower courts but in the Supreme Court itself. Broad and frequent repetitions of the "no set of facts" phrase retired by the *Twombly* opinion were interspersed by decisions that not only departed from any (and improbable) literal meaning, but went well into the realm of fact pleading. The story of Rule 9(b) may prove to have been similar, offering an example of hard-earned judicial experience that, whether or not aware of the intentions communicated only by citing

a mid-late nineteenth century British practice, found a need for more detailed pleading. A standard suited to pleading common-law claims and such statutory claims as existed then in England might well prove inadequate in the civil-action environment of the Twentieth and Twenty-First Centuries.

Apart from the evolution of substantive law, the procedural framework also has evolved. In the general pleading part of the *Iqbal* opinion, the Court observed that while Rule 8 departs from "the hypertechnical, code-pleading regime of a prior era, * * * it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." The Committee has frequently wrestled with the prospect that at least some guided discovery should be permitted to support an amended complaint based on information not available to the plaintiff but often available to the defendant, or perhaps to nonparties. Writing a provision for discovery in aid of pleading into the rules has not proved an easy task.

A more pointed set of questions about the role of substantive law is illustrated by the Advisory Committee's deliberations about enhanced pleading during the period from the *Leatherman* decision in 1993, when the Supreme Court ruled that heightened pleading can be required only as specifically provided in rule text, and 2007, when the *Twombly* opinion was announced. The issue began with qualified official immunity cases. That example expanded into questions about the difficulty of identifying which substantive theories might be required to satisfy heightened pleading requirements. Those questions in turn led both to abstract concerns about transsubstantivity and to practical concerns about the need to have a solid grasp of litigation realities in any substantive area that might be captured in a specific pleading rule. The present proposal recognizes this possibility by suggesting that a desire to protect defendants who may be entitled to official immunity could be vindicated by a pleading rule specific to those cases, "not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b)." p. 1052 n. 137.

The official immunity example finds parallels in the examples recounted by the proposal. What elements of underlying substantive law, and what realities of litigation practice, might distinguish the pleading standards appropriate for actual malice in an action for defamation of a public figure? For discrimination in employment? For malicious prosecution? For "fraudulent" conveyances? Rule 9(b), as some had understood it from 1938 to 2009, and as it might be revised, covers a wide universe of substantive law. One approach might be to examine multiple areas of the law where a claim depends on proving malice, intent, knowledge, or other conditions of a person's mind, seeking to develop an appropriate pleading standard for each. But if that task seems as unmanageable as a parallel task seemed from 1993 to 2007, which general rule would be better? Whatever practices emerge from adapting the general and highly variable standards of Rule 8(a)(2) as mandated by the Supreme Court? Or a return to a practice that

treats as a sufficient allegation of fact a direct averment of "malice," "intent," "knowledge," or some other condition of a person's mind as required by the substantive claim asserted in the pleading?

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WILLIAM & MARY
LAW SCHOOL

OFFICE OF THE DEAN

August 28, 2020

Honorable John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Proposed Amendment to Rule 9(b)

Dear Judge Bates:

Please find attached a copy of an article in which I propose an amendment to Rule 9(b) of the Federal Rules of Civil Procedure. In brief, the proposal is to amend the rule as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~without setting forth the facts or circumstances from which the condition may be inferred.

Although a full explanation of the motivations and justifications for this proposed amendment are reflected in the attached article, the following draft proposed committee note aptly summarizes the design of the change:

> **Subdivision (b).** Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media*, LLC, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against

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> the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [year], defendant [name of defendant 1] conveyed all of defendant's real and personal property to defendant [name of defendant 2] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
>
> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

As I point out in the attached article, Rule 9(b) was based on an English rule that manifestly did not require the pleading of facts in support of allegations pertaining to conditions of the mind. Justice Kennedy's interpretation of Rule 9(b) in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has unfortunately been taken to mean the exact opposite of that, which is unfortunate given the inordinate difficulty of factually substantiating condition-of-the-mind allegations at the pleading stage.

I urge you to review the article in its entirety to fully appreciate the complete set of arguments in favor of revising Rule 9(b) as I propose. I look forward to being able to discuss this item at one of our next meetings and am hopeful that the committee will determine that the proposal warrants further consideration, perhaps by a newly formed subcommittee.

Best regards,

A. Benjamin Spencer
Dean & Chancellor Professor

Cc: Hon. Robert M. Dow, Jr.
Prof. Ed Cooper
Prof. Rick Marcus
Ms. Rebecca A. Womeldorf, Esq.

PLEADING CONDITIONS OF THE MIND UNDER RULE 9(b): REPAIRING THE DAMAGE WROUGHT BY *IQBAL*

A. Benjamin Spencer†

"There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail."

—Charles E. Clark, 1937[1]

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† Bennett Boskey Visiting Professor of Law, Harvard Law School; Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. I would like to thank those who were able to give helpful comments on the piece.

1 Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

INTRODUCTION

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*,[2] in which it pronounced—among other things[3]—that the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure—which permits allegations of malice, intent, knowledge, and other conditions of the mind to be alleged "generally"—requires adherence to the plausibility pleading standard it had devised for Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.[4] That is, to plead such allegations sufficiently, one must offer sufficient facts to render the condition-of-the-mind allegation plausible. This rewriting of the standard imposed by Rule 9(b)'s second sentence—which came only veritable moments after the Court had avowed that changes to the pleading standards could only be made through the formal rule amendment process[5]—is patently unsupportable for two reasons.

First, the *Iqbal* Court's interpretation of Rule 9(b) is at odds with a proper text-based understanding of the Federal Rules: (1) The plausibility pleading obligation purports to be derived from the Rule 8(a)(2)

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2 556 U.S. 662 (2009).

3 To view a fuller discussion of the *Iqbal* decision, see A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) [hereinafter Spencer, Iqbal *and the Slide Towards Restrictive Procedure*].

4 550 U.S. 544, 555 (2007).

5 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); Hill v. McDonough, 547 U.S. 573, 582 (2006) ("Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."). The Supreme Court has never indicated that rules promulgated pursuant to the Rules Enabling Act may be interpreted more loosely by the Court because of the Court's unique role in promulgating such rules; to the contrary, the Court has steadfastly adhered to the notion that it is not free to revise such rules through judicial interpretation. *See, e.g.*, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed [through the Rules Enabling Act process] limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2000))); Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.").

obligation to "show[]" entitlement to relief,[6] an obligation that reflects the standard for sufficiently stating claims, not the standard for sufficiently stating the individual component allegations thereof—which is found in Rule 8(d)(1), not Rule 8(a)(2); (2) text from elsewhere in the Federal Rules and from the Private Securities Litigation Reform Act (PSLRA) reveals that the *Iqbal* interpretation of Rule 9(b) is unsound; and (3) evidence from the now-abrogated Appendix of Forms—in effect at the time of *Iqbal*—contradicts any attempt to place a plausibility pleading gloss on Rule 9(b).

Second, the Court's alignment of Rule 9(b)'s second sentence with the 8(a)(2) plausibility pleading standard runs counter to the original understanding of Rule 9(b), which was borrowed from English practice extant in 1937. A review of the English rule that formed the basis of Rule 9(b), as well as the English jurisprudence surrounding that rule at the time, make clear that Rule 9(b) cannot be faithfully interpreted as requiring pleaders to set forth the circumstances from which allegations pertaining to conditions of the mind may be inferred.

Beyond reflecting an errant interpretation of Rule 9(b), the *Iqbal* understanding has resulted in tremendous harm to litigants seeking to prosecute their claims. Lower courts have embraced the *Iqbal* revision of Rule 9(b) with zeal, dismissing claims for failure to articulate facts underlying condition-of-mind allegations left, right, and center. This is undesirable not only because it turns on its head a rule that was designed to facilitate rather than frustrate such claims, but also because it contributes to the overall degradation of the rules as functional partners in the larger civil justice enterprise of faithfully enforcing the law and vindicating wrongs. In light of these ills arising from *Iqbal*'s adulteration of Rule 9(b), it should be amended to make the original and more appropriate understanding of the condition-of-mind pleading requirement clear, or at least revised to conform its language to the *Iqbal* Court's reimagining of it. What follows is an exploration of these points.

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[6] *Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."); *see also Iqbal*, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (quoting FED. R. CIV. P. 8(a)(2))).

I. THE ADULTERATION OF RULE 9(b)

A. Iqbal *and Pleading Conditions of the Mind*

Although there are multiple aspects of the *Iqbal* decision worthy of critique,[7] our focus here will be on its perversion of the standard applicable to alleging conditions of the mind found in Rule 9(b). Rule 9(b) reads, in its entirety, as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.[8]

The question is what pleading standard does the second sentence of Rule 9(b)—which I will refer to as the conditions-of-the-mind clause—impose?

According to Justice Kennedy—the author of the *Iqbal* opinion—the conditions-of-the-mind clause should be read to mean that allegations of malice, intent, knowledge, and other conditions of mind must be pleaded consistently with the plausibility pleading standard of Rule 8(a)(2). Justice Kennedy made this pronouncement in the following way:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—

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[7] *See, e.g.*, Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–201(criticizing *Iqbal* for its endorsement of a subjective approach to scrutinizing pleading that will permit courts to restrict claims by members of social outgroups). I have criticized the *Twombly* decision as well. *See, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013) [hereinafter Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*]; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) [hereinafter Spencer, *Plausibility Pleading*].

[8] FED. R. CIV. P. 9(b).

> though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.[9]

In this passage, Justice Kennedy declared that in pleading conditions of the mind, one must apply the "still operative strictures of Rule 8." Those strictures require "well-pleaded factual allegations"—not mere legal conclusions—that "show[]" plausible entitlement to relief:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." FED. RULE CIV. PROC. 8(a)(2).[10]

In *Iqbal*, the condition of the mind being pleaded was discriminatory intent: that the defendants undertook the challenged course of action—the detention of certain individuals and subjugation of them to harsh conditions of confinement—"solely on account of" the plaintiff's race, religion, or national origin.[11] Justice Kennedy declared that this was a "bare" assertion, amounting to nothing more than a "'formulaic recitation of the elements' of a constitutional discrimination claim."[12] He acknowledged, however, that "[w]ere we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[13] But, alas, they (the *Iqbal* majority) could not accept it as true because the allegations' "conclusory nature . . . disentitle[d] them to the presumption of truth"[14] and "the Federal Rules do not require courts to

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[9] *Iqbal*, 556 U.S. at 686–87.

[10] *Id.* at 678–79.

[11] *Id.* at 680.

[12] *Id.* at 681 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[13] *Id.* at 686.

[14] *Id.* at 681.

credit a complaint's conclusory statements without reference to its factual context."[15] Thus, the plaintiff's claims against Ashcroft and Mueller were dismissed.[16] Although this was an adverse outcome for Mr. Iqbal's individual case, the consequences of this view of Rule 9(b) have reverberated throughout the lower courts, facilitating the dismissal of a countless number of claims involving condition-of-mind allegations.[17]

B. *Lower Courts and Rule 9(b) after* Iqbal

By interpreting Rule 9(b) in a way that subsumed it within the pleading standard applicable to stating claims, the *Iqbal* Court empowered lower courts to apply the "still operative strictures of Rule 8"—the plausibility requirement—to the determination of whether an allegation pertaining to a condition of the mind is sufficient, thereby infusing fact skepticism into an analysis in which the Court purports that alleged facts are assumed to be true.[18] What this has meant operationally

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15 *Id.* at 686.

16 *Id.* at 687.

17 *See infra* Section I.B. A perhaps unexpected distinct consequence of the *Iqbal* Court's interpretation of the term "generally" in Rule 9(b) has been that lower courts have adopted and applied that interpretation to the use of the term "generally" in Rule 9(c), which permits the satisfaction of conditions precedent to be pleaded generally. *See, e.g.*, Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017) ("This Court agrees, and holds that the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)."); Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc., 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements should likewise be indistinguishable."); Napster, LLC v. Rounder Records Corp., 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (deeming the allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement" an insufficient "legal conclusion," and recognizing that the cited cases suggesting that such "general statement[s]" are sufficient under Rule 9(c) "all predate *Twombly* and *Iqbal*"). This interpretation of Rule 9(c) is as inappropriate as, I will endeavor to show, the *Iqbal* Court's interpretation of Rule 9(b). However, this Article will maintain a focus on the erroneousness and implications of the *Iqbal* Court's misinterpretation of Rule 9(b). For a discussion of the history and purpose of Rule 9(c), as well as coverage of post-*Iqbal* cases interpreting it, see 5A CHARLES A. WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE §§ 1302–1303 (4th ed. 2018).

18 *See* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 192 ("[T]he *Iqbal* Court's rejection of Iqbal's core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.").

is that lower courts require what Justice Kennedy called "well-pleaded facts"[19] in support of their allegations: Pleaders must offer specific facts plausibly showing an alleged condition of the mind.[20] Many examples of

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[19] *Iqbal*, 556 U.S. at 679.

[20] Lower courts have also expanded the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) into Rule 8(a)(1), requiring the pleading of facts sufficient to support the plausible inference that there are grounds for the court to exercise subject matter jurisdiction, notwithstanding the fact that Rule 8(a)(1) does not impose a requirement to "show" that there is jurisdiction and that abrogated Form 7 did not reflect any such requirement. *See, e.g.*, Wood v. Maguire Auto., LLC, 508 F. App'x 65, 65 (2d Cir. 2013) (complaint failed to properly allege subject matter jurisdiction because allegation of amount in controversy was "conclusory and not entitled to a presumption of truth" (citing *Iqbal*, 556 U.S. 662)); Norris v. Glassdoor, Inc., No. 2:17-cv-00791, 2018 WL 3417111, at *7 n.2 (S.D. Ohio July 13, 2018) ("To establish diversity jurisdiction, a complaint must allege facts that could support a reasonable inference that the amount in controversy exceeds the statutory threshold. . . . Here, the Amended Complaint leaves the amount in controversy to pure speculation. Therefore, 28 U.S.C. § 1332 does not provide a basis for the Court's jurisdiction over Mrs. Norris's breach of contract and fraud claims."); Weir v. Cenlar FSB, No. 16-CV-8650 (CS), 2018 WL 3443173, at *12 (S.D.N.Y. July 17, 2018) ("[J]urisdictional [dollar] amount, like any other factual allegation, ought not to receive the presumption of truth unless it is supported by facts rendering it plausible."); Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 156 (D. Conn. 2016) (plaintiff required to "allege facts sufficient to allow for a plausible inference that the amount in controversy meets the jurisdictional threshold").

this practice abound both at the circuit[21] and district court levels[22] and are too numerous to list in full.[23] A few examples will illustrate the point.

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21 *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 525 (5th Cir. 2016) ("The complaint must thus set forth specific facts supporting an inference of fraudulent intent." (citing Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994))); Biro v. Condé Nast, 807 F.3d 541, 544–45 (2d Cir. 2015) ("*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent."); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377 (4th Cir. 2012) ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated."); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012) ("[T]o make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred."). Although particularity is required for allegations of *fraud*, alleging fraudulent *intent* may be done generally. *See, e.g.*, *In re* Cyr, 602 B.R. 315, 328 (Bankr. W.D. Tex. 2019) ("As previously explained, [Bankruptcy] Rule 7009(b) [the counterpart to Rule 9(b) in the bankruptcy context] distinguishes between pleading the circumstances of the alleged fraud and the conditions of the defendant's mind at the time of the alleged fraud. Thus, the heightened standard requiring the specifics of the 'who, what, when, where, and how' of the alleged fraud applies to the circumstances surrounding the fraud, not the conditions of the defendant's mind at the time of the alleged fraud.").

22 *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients' indebtedness made by Samaritan Hospital. . . . Indeed, the Amended Complaint provides no facts . . . from which the Court could draw a reasonable inference that ORDD and O'Brien knew or should have known that Plaintiff did not owe the debt."); Rovai v. Select Portfolio Servicing, Inc., No. 14-cv-1738-BAS-WVG, 2018 WL 3140543, at *13 (S.D. Cal. June 27, 2018) ("Although th[e] general averment of intent and knowledge may be sufficient for Rule 9(b), '*Twombly* and *Iqbal*'s pleading standards must still be applied to test complaints that contain claims of fraud.' This means that '[p]laintiffs must still plead facts establishing *scienter* with the plausibility standard required under Rule 8(a).'" (citations omitted)); Mourad v. Marathon Petroleum Co., 129 F. Supp. 3d 517, 526 (E.D. Mich. 2015) ("Plaintiffs have also failed to sufficiently allege facts in support of their claim that Defendant's acts, though lawful, were malicious. This is because Plaintiffs have not alleged facts from which this Court can reasonably infer that Defendant acted with the requisite state of mind. Although Plaintiffs correctly point out that Federal Rule of Civil Procedure 9(b) permits '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally[,]' this Rule does not, as Plaintiffs insist, permit a party to simply parrot the state of mind required by a particular cause of action. Rather, to withstand dismissal, factual allegations corroborating Defendant's malicious intent are necessary." (citation omitted)); United States *ex rel.* Modglin v. DJO Glob. Inc., 114 F. Supp. 3d 993, 1024 (C.D. Cal. 2015) (dismissing allegations "that defendants 'knew that they were falsely and/or fraudulently claiming reimbursements' and 'knew [their devices] were being unlawfully sold for unapproved off-label cervical use'" because "[n]one of the facts relators plead[ed] . . . support[ed] their conclusory allegation that defendants knowingly submitted false claims," and therefore, notwithstanding "that Rule 9(b) does not require particularized

The Second Circuit fully embraced the *Iqbal* interpretation of Rule 9(b) in *Biro v. Condé Nast*, a defamation case involving a public figure.[24] After noting the requirement of showing "actual malice" to prevail on a defamation claim in the public figure context, the court rebuffed the plaintiff's claim that Rule 9(b) absolved him of the duty "to allege facts sufficient to render his allegations of actual malice plausible" with the following retort: "*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent. . . . It follows that malice must be alleged plausibly in accordance with Rule 8."[25] The Seventh Circuit similarly cited *Iqbal* in imposing a requirement that allegations of bad faith be backed up with allegations of substantiating facts:

> Bare assertions of the state of mind required for the claim—here "bad faith"—must be supported with subsidiary facts. *See Iqbal*, 556 U.S. at 680–83, 129 S. Ct. 1937. The plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels—that the unnamed union officials acted "invidiously" when they failed to process the grievances, or simply that the union's actions were "intentional, willful, wanton, and malicious." They supply no factual detail to support these conclusory allegations, such as (for example) offering facts that suggest a motive for the union's alleged failure to deal with the grievances.[26]

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allegations of knowledge," the complaint "f[e]ll short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*"), *aff'd*, 678 F. App'x 594 (9th Cir. 2017).

[23] A more comprehensive citation to the relevant cases illustrating this trend may be found in WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301. An example of a case in which this trend was bucked is *United States ex rel. Dildine v. Pandya*, in which the court accepted the government's bald allegations of state of mind as sufficient to plead scienter. 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) ("Since Federal Rule of Civil Procedure 9(b) provides '[m]alice, intent knowledge, and other conditions of a person's mind may be alleged generally' and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.").

[24] *Condé Nast*, 807 F.3d 541.

[25] *Id.* at 544–45; *see also* Krys v. Pigott, 749 F.3d 117, 129 (2d Cir. 2014) (indicating that based on *Iqbal*, one must plead nonconclusory facts that give rise to an inference of knowledge).

[26] Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009)).

The Eleventh Circuit too, confronting this issue in 2016, concluded that the *Iqbal* approach to Rule 9(b) with respect to allegations of malice had to carry the day:

> Indeed, after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings.[27]

District courts are imposing *Iqbal*'s condition-of-mind particularity requirement with respect to allegations of malice as well.[28] For example, in *Moses-El v. City and County of Denver*[29] the court wrote:

> [W]here Mr. Moses-El must plead a defendant's malicious intent, coming forward with a set of facts that permit the inference that the defendant instead acted merely negligently will not suffice; rather, Mr. Moses-El must plead facts that, taken in the light most favorable to him, dispel the possibility that the defendant acted with mere negligence. As noted in *Iqbal*, Fed. R. Civ. P. 9(b)'s allowance that facts concerning a defendant's *mens rea* may be "alleged generally" does not alter this analysis.[30]

As a result of embracing this stringent view of the second sentence of Rule 9(b) in light of *Iqbal*'s interpretation of it, the court in *Moses-El* dismissed

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[27] Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016) (citations omitted).

[28] *See, e.g.*, Diehl v. URS Energy & Constr., Inc., No. 11-cv-0600-MJR, 2012 WL 681461, at *4 (S.D. Ill. Feb. 29, 2012) ("Although paragraph 18 of Count V establishes that Plaintiff Diehl is proceeding against Defendant Walls under the theory that Walls was acting in his own self-interest when he terminated Diehl's employment, like paragraph 17, paragraph 18 is merely a conclusory statement. Count V (and the Complaint as a whole), does not set forth any factual content from which the Court can reasonably draw the inference that Diehl was acting maliciously and in his own self-interest."); Ducre v. Veolia Transp., No. CV 10-02358 MMM (AJWx), 2010 WL 11549862, at *5-6 (C.D. Cal. June 14, 2010) ("Ducre alleges that her supervisors at Veolia knew she had a disability that required her to wear a leg brace, and that they unjustly discriminated against her because of this disability by reassigning her to 'light duty' work and eventually terminating her. She asserts that she lost income and suffered hardship as a result of these actions. These factual allegations adequately allege malice and oppression under Rule 8(a) and *Iqbal*.").

[29] 376 F. Supp. 3d 1160 (D. Colo. 2019).

[30] *Id.* at 1172.

the plaintiff's malicious prosecution claim—in the face of an express allegation of malice—on the ground that the substantiating facts did not *rule out* the possibility of negligence as an alternate explanation of the defendant's actions:

> The sole allegation in the Amended Complaint that purports to demonstrate that malice is Paragraph 118, which reads "[g]iven [Dr. Brown's] qualifications and experience, as well as her previous testimony where she recognized the significant inferences that could be deduced by results such as those described above, her gross mischaracterization of the serological evidence in this case as inconclusive . . . was malicious." But the conclusion—maliciousness—does not necessarily flow from the facts: that Dr. Brown was experienced and qualified and that she recognized that inferences about the perpetrator could be drawn from the blood test results. Although malice is one inference that might be drawn from these facts, other equally (if not more likely) permissible inferences are that Dr. Brown was mistaken in her testing or analysis or that she conservatively chose not to ignore the (admittedly) small possibility that the test did *not* exclude Mr. Moses-El. Once again, *Iqbal* requires Mr. Moses-El to plead facts that establish a *probability*, not a *possibility*, that Dr. Brown acted with malice against him, and describing a set of facts that could readily be consistent with mere negligence does not suffice. Accordingly, the malicious prosecution claim against Dr. Brown is dismissed.[31]

This is a truly remarkable decision: although Rule 9(b) states that "Malice . . . may be alleged generally," and the plaintiff in this instance alleged that the actions were "malicious"—and the court acknowledged that "malice is one inference that might be drawn from these facts"—the claim was still dismissed for insufficiency under the *Iqbal* Court's perverse interpretation of Rule 9(b).[32]

Moving beyond allegations of malice for defamation claims, the Sixth Circuit has shown that it is on board with the *Iqbal* interpretation of Rule 9(b) as well. In the context of a claim under the Family and Medical Leave Act (FMLA), a Sixth Circuit panel wrote as follows:

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[31] *Id.* at 1173–74.

[32] *Id.* at 1174.

> [A]fter the Supreme Court's decisions in *Iqbal* and *Twombly*, a plaintiff must do more than make the conclusory assertion that a defendant acted willfully. The Supreme Court specifically addressed state-of-mind pleading in *Iqbal*, and explained that Rule 9(b) . . . does not give a plaintiff license to "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). As we have explained in a non-FMLA context, although conditions of a person's mind may be alleged generally, "the plaintiff still must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).[33]

Imposing a requirement to "plead facts" that "make the state-of-mind allegation 'plausible on its face,'" the court concluded that the "complaint contains no facts that allow a court to infer that [the defendant] knew or acted with reckless disregard of the fact that it was interfering with [the plaintiff's] rights."[34]

The Third Circuit offers yet another instance of this trend, here in the context of an allegation of knowledge. In *Kennedy v. Envoy Airlines, Inc.*, a New Jersey district court reflected *Iqbal*'s heightened intent pleading requirement when it wrote, "Plaintiff has not alleged any particularized facts which, if true, would demonstrate that Ms. Fritz or any other Envoy employee actually *knew* that the positive test results were false."[35] The court went on to indicate that it could not accept the plaintiff's allegation of the defendant's knowledge of falsity because "such generalized and conclusory statements are insufficient to establish knowledge of falsity."[36] On appeal to the Third Circuit, the court questioned the district court's conclusion, but not because it disagreed with the standard the district court applied.[37] Instead, the Third Circuit

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33 Katoula v. Detroit Entm't, LLC, 557 F. App'x 496, 498 (6th Cir. 2014).

34 *Id.* (quoting Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 247 (6th Cir. 2012)).

35 Kennedy v. Envoy Airlines, Inc., No. 15-8058 (JBS/KMW), 2018 WL 895871, at *5 (D.N.J. Feb. 14, 2018).

36 *Id.*

37 Kennedy v. Am. Airlines, Inc., 760 F. App'x 136 (3d Cir. 2019).

embraced the standard but concluded that the plaintiff arguably satisfied it by offering additional facts showing the basis for the allegation of the defendant's knowledge:

> However, we conclude that this is a closer question than the District Court's opinion postulates. Here, while Kennedy does generally assert Appellee "should have known" of the falsity, he also offers several reasons *why* Appellee should have known. In addition to his assertion that Appellee has "administered thousands of tests and is aware of the uniform and constant rate at which alcohol is metabolized," he also references Judge Ferrara's findings on the matter in an exhibit to his complaint .... These facts, perhaps, lend themselves to a reasonable inference that Appellee knew, or should have known, the results from the breathalyzer were inaccurate—at least for purposes of surviving a Rule 12(b)(6) motion.[38]

Thus, we have here the endorsement of a requirement to offer "particularized facts" that "would demonstrate"[39] the defendant's knowledge or "lend themselves to a reasonable inference"[40] that the defendant had the requisite knowledge.

Again, district courts are requiring the allegation of substantiating facts in support of allegations of knowledge as well, citing *Iqbal*'s interpretation of Rule 9(b).[41] For instance, in *United States ex rel. Morgan v. Champion Fitness, Inc.*,[42] although the court recognized the tension between the language of Rule 9(b) and the *Iqbal* Court's interpretation of it, the district court felt it was bound to adhere to that interpretation, finding that the plaintiff in the case before it could survive a motion to dismiss only because "the Complaint's representative examples have sufficient detail to support a reasonable inference providing the necessary factual support for the assertion of Defendants' knowledge."[43]

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[38] *Id.* at 140–41.

[39] *Kennedy*, 2018 WL 895871, at *5.

[40] *Kennedy*, 760 F. App'x at 141.

[41] *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients indebtedness made by Samaritan Hospital.'").

[42] No. 1:13-cv-1593, 2018 WL 5114124 (C.D. Ill. Oct. 19, 2018).

[43] *Id.* at *7.

II. ASSESSING THE *IQBAL* VIEW OF RULE 9(b)

Certainly, as a matter of common sense, one would be hard pressed to suggest that the pleading requirements that have been outlined above are faithful reflections of what it means to permit conditions of the mind to be "alleged generally." As we have seen, courts are imposing a requirement for "well-pleaded facts," "specific facts," or "particularized facts" that "demonstrate," "show," or "establish" an alleged condition of the mind, which is the epitome of what plausibility pleading requires.[44] But does Justice Kennedy's analysis of Rule 9(b)—which has wrought all of this—stand up to scrutiny?

A. *Textual Evidence*

Justice Kennedy's determination that the conditions-of-the-mind clause must be read to incorporate the pleading standard of Rule 8(a)(2) was a facile—if not thoughtless—conclusion based on apparent logic: If "with particularity" in the first sentence of Rule 9(b) means a heightened pleading standard, "generally" in the second sentence of Rule 9(b) must mean the ordinary pleading standard of Rule 8(a)(2), which now—post *Twombly*—requires plausibility pleading. This "reasoning" represents an abject failure of statutory interpretation for multiple reasons,[45] three of which are text-based and the fourth of which is historical.[46]

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[44] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

[45] *See, e.g.*, McCauley v. City of Chicago, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("*Iqbal* is in serious tension with these other decisions [Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Erickson v. Pardus, 551 U.S. 89 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)], rules, and forms, and the Court's opinion fails to grapple with or resolve that tension.").

[46] See *infra* Section II.B for a discussion of historical evidence demonstrating the erroneous nature of Justice Kennedy's interpretation of Rule 9(b).

First. The object of the admonitions of Rule 9(b)—and its close cousin, Rule 9(c)[47]—are distinct from that of Rule 8(a)(2). Rule 8(a)(2)—the provision the Court was interpreting and applying in *Twombly* and *Iqbal*—supplies a standard for sufficiently stating a *claim for relief*, which requires making a "showing" of entitlement to relief,[48] and which, according to the Court, requires the satisfaction of the plausibility pleading standard.[49] Rule 9(b), on the other hand, supplies a standard for sufficiently stating *allegations*,[50] which are the building blocks of claims. In other words, when the *allegations* of a complaint are joined with one another and viewed as a whole, one asks whether they amount to a *claim*, i.e., do they show entitlement to relief under the applicable law.[51] The plausibility pleading standard of Rule 8(a)(2) applies to an assessment of the latter question—whether the allegations add up to *a claim*—not to the assessment of whether *an allegation* has been properly stated. This distinction tracks the intended distinction between a motion to dismiss for failure to state a claim under Rule 12(b)(6)—which challenges *claims* based on the plausibility standard of *Twombly*—and a motion for a more

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47 FED. R. CIV. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.").

48 FED. R. CIV. P. 8(a)(2) ("CLAIM FOR RELIEF. A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."); *see also Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.—Also termed *claim for relief*.").

49 Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("[*Twombly* and *Iqbal*] concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, [*Twombly* and *Iqbal*] instruct, must plead facts sufficient to show that her claim has substantive plausibility.").

50 Prior to the restyling of the Rules in 2007, references to "allegation" and "allege" in the rules were to variations of the term "averment" instead. *Compare* FED. R. CIV. P. 9(b) (2006) ("In all *averments* of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be *averred* generally." (emphasis added)), *with* FED. R. CIV. P. 9(b) (2007) ("In *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be *alleged* generally." (emphasis added)); *see also Allegation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or illegal. 2. Something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved; AVERMENT.").

51 FED. R. CIV. P. 8(a)(2).

definite statement under Rule 12(e)[52]—which challenges *allegations* as being "so vague or ambiguous that the party cannot reasonably prepare a response."[53] Thus, in *Iqbal*, Justice Kennedy carelessly conflated the standard for articulating allegations—the province of Rule 9(b)—with the standard for judging the sufficiency of entire claims.

In fact, the Federal Rules of Civil Procedure do set forth the general standard for stating *an allegation* in a pleading, but not in Rule 8(a)(2). Rather, one finds the standard applicable to stating allegations in Rule 8(d)(1), which reads as follows: "(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required."[54] This provision was meant to solidify the notion that the Federal Rules of Civil Procedure—which took effect in 1938—were intended to be a departure from the highly technical pleading requirements of the past.[55] Indeed, the

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52 *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *Hearing*] (statement of Professor Stephen B. Burbank) ("The architecture of *Iqbal*'s mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e).").

53 FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(e). I have previously argued that a complaint containing insufficient factual details to render a claim plausible under *Twombly* should be the target of a motion for a more definite statement under Rule 12(e), not dismissal under Rule 12(c). *See* Spencer, *Plausibility Pleading*, *supra* note 7, at 491 ("[When faced with] a complaint with insufficient detail . . . [t]he appropriate remedy for such defects is the grant of a motion for a more definite statement, not dismissal of the claim. The defendant . . . is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.").

54 FED. R. CIV. P. 8(d)(1). Prior to the restyling of the Rules in 2007, this provision was found in Rule 8(e)(1) and read, "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1) (2006) (amended 2007).

55 Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942) (indicating that subsection (e) (now subsection (d)) of Rule 8 was designed "to show that ancient restrictions followed under certain more technical rules have no place"); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) ("Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady."); *see also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1281 (3d ed. 2004 & Supp. 2019) ("By including a provision such as Rule 8(d)(1) the draftsmen of the original federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued English and American courts under common law

Supreme Court—prior to *Iqbal*—cited this provision as evidence of the simplified notice pleading regime ushered in by the Federal Rules.[56] Why Justice Kennedy did not cite Rule 8(d)(1) when attempting to understand what Rule 9(b)'s second sentence required is unclear. What is clear, however, is that Rule 8(d)(1) does not require pleaders to state supporting facts to make a proper factual allegation.[57] Neither does the conditions-of-the-mind clause of Rule 9(b) impose such a requirement.

Second. Evidence from elsewhere in the Federal Rules and from the PSLRA reveals that the *Iqbal* interpretation of Rule 9(b) is not sound from a textualist perspective. Requiring facts that make state-of-mind allegations plausible amounts to a requirement for particularity, which the first sentence of Rule 9(b) only requires for allegations of fraud and mistake.[58] Further, it is only in an adjacent provision—Rule 9(a)(2)—that one finds an express obligation to state supporting facts; a party who wants to raise the issues of capacity or authority to sue or be sued, or the legal existence of an entity, must do so "by a specific denial, which must *state any supporting facts* that are peculiarly within the party's knowledge."[59] If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot

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and code practice."). This provision has also been applied to curtail overly lengthy or convoluted allegations. *See, e.g.*, Gordon v. Green, 602 F.2d 743 (5th Cir. 1979) (verbose pleadings of over four thousand pages violated the rule).

56 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) ("Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required.'").

57 Abrogated Form 15 provided an illustration of pleading in conformity with Rule 8(d)(1): "On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*." FED. R. CIV. P. Form 15 (2014) (abrogated 2015). No facts supporting the allegation of conversion are supplied in the form, which was authoritative at the time *Iqbal* was decided. *See also* Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." (citing FED. R. CIV. P. 8(d)(1))).

58 *See* FED. R. CIV. P. 9(b); *see also* Brief for Respondent at 33, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at *33 ("If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with 'particularity,' that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity.").

59 FED. R. CIV. P. 9(a)(2) (emphasis added); *see also* WRIGHT, MILLER & SPENCER, *supra* note 17, § 1294 (discussing Rule 9(a)(2)).

be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts sub silentio. *Expressio unius est exclusio alterius.*[60] Interpreting the general standard for stating allegations to require the statement of supporting facts would render Rule 9(a)(2)'s express imposition of a requirement redundant surplusage.[61] Finally, in the PSLRA Congress imposed a requirement for plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[62] If Rule 9(b)'s second sentence imposes a requirement to plead facts that support an inference of intent and other conditions of the mind, Congress's move to impose a particularity requirement with respect to state of mind in the PSLRA would have been largely unnecessary.[63]

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60 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Swierkiewicz*, 534 U.S. at 513 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); *cf.* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1064 (2019) (Thomas, J., dissenting) ("The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. . . . Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court."); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). . . . That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released.").

61 *See* Jay v. Boyd, 351 U.S. 345, 360 (1956) ("We must read the body of regulations . . . so as to give effect, if possible, to all of its provisions."); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

62 15 U.S.C. § 78u-4(b)(2)(A) (2018).

63 Retirement Bd. of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc., 767 F. App'x 139, 141 (2d Cir. 2019) ("While Federal Rule of Civil Procedure 9(b) provides that 'conditions of a person's mind may be alleged generally,' under the Private Securities Litigation Reform Act ('PSLRA'), a securities plaintiff must nevertheless allege facts that suggest a 'strong inference' of scienter.").

Third. What used to be Official Form 21—now conveniently abrogated,[64] but in force at the time *Iqbal* was decided—provided the definitive and authoritative[65] illustration of what both sentences of Rule 9(b) permit and require. It read, in pertinent part, as follows:

> 4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.[66]

In this example we have both an allegation of fraud and two allegations of intent, each of which must look to Rule 9(b) for the applicable standard of sufficiency. Regarding the allegation of fraud—the "circumstances" of which must be stated "with particularity"—Form 21 taught that offering the "who, what, when, where and how" of the fraud is sufficient, an understanding innumerable courts have recognized.[67] When we turn to the two allegations relating to intent—(1) that the aforementioned actions by the defendant were undertaken "for the purpose of defrauding the plaintiff" and (2) that those same actions were done "for the purpose of . . . delaying the collection of the debt"—Form 21 taught that bald,

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[64] FED. R. CIV. P. 84 (2014) (abrogated 2015); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (2013) ("[T]he pleading forms live in tension with recently developing approaches to general pleading standards."); *see generally* A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015) [hereinafter Spencer, *The Forms Had a Function*] (discussing the significance of the abrogated Official Forms and the motivation behind their abandonment).

[65] Prior to its abrogation in 2015, Rule 84 provided: "The forms in the Appendix of Forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84 (2014) (abrogated 2015). That the forms were sufficient under the rules was an important component of the rule that was added in a 1946 amendment for the very reason that courts were treating the forms as merely illustrative rather than authoritative. *See* Spencer, *The Forms Had a Function*, *supra* note 64, at 1122–24.

[66] FED. R. CIV. P. Form 21 (2014) (abrogated 2015).

[67] WRIGHT, MILLER & SPENCER, *supra* note 17, § 1297 ("A formulation popular among courts analogizes the standard to 'the who, what, when, where, and how: the first paragraph of any newspaper story.'"); *see, e.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 490 (3d Cir. 2016) (applying the formulation to a securities fraud class action); Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015) (applying the formulation to a claim of aiding and abetting fraud); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 36 (1st Cir. 2013) (applying the formulation to a qui tam action under False Claims Act).

conclusory, and factless statements suffice to allege intent properly.[68] What we undeniably do not have in Form 21 is the slightest support for Justice Kennedy's homespun, improvised diktat that allegations of intent and other conditions of the mind must be supported by facts that render the allegations plausible. That such lawless imperialism—which would be derided as judicial activism if it came from another quarter—was endorsed by the sometimes textualists Antonin Scalia[69] and Clarence Thomas[70] is a dismaying but unsurprising instance of the inconsistency that has too often characterized their purported interpretive commitments.[71]

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68 FED. R. CIV. P. Form 21 (2014) (abrogated 2015); *see* Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940) ("The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments."); Spencer, *Plausibility Pleading*, *supra* note 7, at 474 ("The allegation [in Form 21], however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate.").

69 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16, 22 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter. . . . The text is the law, and it is the text that must be observed.").

70 *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000) (Thomas, J.) ("[O]ur inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members.").

71 Justice Thomas's inconstancy is manifestly self-evident on this score, having admonished in *Swierkiewicz v. Sorema N.A.* that the pleading requirements imposed by Rule 8(a)(2) cannot be amended by the Court outside the rule amendment process but then signing on to two opinions doing just that in *Twombly* and *Iqbal*. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))). For an example of Justice Scalia's fair-weather textualism, one can consult *Walmart Stores, Inc. v. Dukes*, in which Justice Scalia abandoned a faithful application of the plain text of Rule 23(a)—which requires questions "common to the class"—to impose his own wished-for requirements that there be a common injury among class members and that the common issues must be central to the dispute. 564 U.S. 338 (2011); *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) ("Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*. The language of Rule 23(a)—that 'there are questions of law or fact common to the class'—expresses no need for class members to have suffered the 'same injury.'"); *id.* at 474 ("Rather than follow his own textualist diktats, Justice Scalia pronounces efficiency as the objective policed by the commonality rule, then uses that to banish those common questions that do little to further

B. *The Original Understanding of Rule 9(b)*

Although the textual arguments against the *Iqbal* Court's interpretation of Rule 9(b) provide compelling evidence of its waywardness, and the review of the caselaw on this point above demonstrates that this erroneous interpretation of Rule 9(b) has real world negative implications for claimants, there is historical support for the view that *Iqbal* got the interpretation of Rule 9(b) terribly wrong. When Rule 9(b) was originally promulgated in 1938, the drafters of the rule provided helpful guidance as to its meaning in the committee notes. The note pertaining to Rule 9(b) read as follows: "See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22."[72] What this citation refers to is Order 19, Rule 22 of the English Rules of the Supreme Court (the English Rules) that were promulgated under the Judicature Acts of 1873 and 1875.[73] That rule—which the Advisory Committee indicated was the source of Rule 9(b)—read as follows:

> 22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.[74]

Here we see that the lineage of the second sentence of our Rule 9(b)—the conditions-of-mind clause—is an English rule that provides that conditions of the mind may be alleged "as a fact without setting out the circumstances from which the same is to be inferred."[75] Given that the 1938 rulemakers cited to Order 19, Rule 22 as their source—or at least as their inspiration—for Rule 9(b),[76] it is reasonable to suspect that "averred generally" (now "alleged generally") must have been intended to mean something akin to "without setting out the circumstances from which the

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efficiency from its ambit, without regard to the fact that commonality, not efficiency, is the unambiguous requirement of Rule 23(a)(2).").

72 FED. R. CIV. P. 9 advisory committee's note to 1937 adoption.

73 Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, *as amended by* Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77.

74 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

75 *Id.*

76 *See, e.g.*, Love v. Commercial Cas. Ins. Co., 26 F. Supp. 481, 482 (S.D. Miss. 1939) ("This rule [Rule 9(b)] very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22.").

same is to be inferred."[77] What did this language mean and how was it interpreted at the time the 1938 rules of procedure were first crafted?

Commentator's Notes and Official Forms Accompanying the English Rules. As the notes that appear following Order 19, Rule 22, in the 1937 edition of the Rules of the Supreme Court explain, to plead knowledge under the rule, "[i]t is sufficient to plead, 'as the defendant well knew,' or 'whereof the defendant had notice,' without stating when or how he had notice, or setting out the circumstances from which knowledge is to be inferred."[78] Respecting allegations of malice, the notes remark, "But he [the plaintiff] need not in either pleading [the statement of the claim or the reply] set out the evidence by which he hopes to establish malice at the trial."[79] The same was said of allegations of fraudulent intent; although under the English Rules allegations of fraud had to be specified by stating the acts alleged to be fraudulent,[80] the notes to Rule 22 indicated that "from these acts fraudulent intent may be inferred; and it is sufficient to aver generally that they were done fraudulently."[81]

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77 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22. The Supreme Court has employed similar reasoning when interpreting other Federal Rules of Civil Procedure. For example, in seeking to understand the meaning of Rule 42(a), the Court wrote the following:

> [This case is] about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (internal citation omitted).

78 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22 (note).

79 *Id.*

80 *Id.* O. 19, r. 6 ("In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items if necessary) shall be stated in the pleading . . . .").

81 *Id.* O. 19, r. 22 (note).

Reference to the forms in Appendix C of the English Rules[82] confirms the view set forth in the notes discussed above. For example, one finds there the following model allegation of the defendant's knowledge:

> 3. The wilful default on which the plaintiff relies is as follows:—
>
> *C.D.* owed to the testator 1000*l.*, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. *The defendants were aware of this fact,* but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.[83]

No facts from which it might be inferred that the defendants had such knowledge are offered anywhere within this model form. In another instance of pleading knowledge—this time within a complaint for a "fraudulent prospectus"—Appendix C offered the following example:

> 4. The prospectus contained misrepresentations, of which the following are particulars :—
>
> (a) The prospectus stated ". . . . " whereas in fact . . . .
>
> (b) The prospectus stated ". . . . " whereas in fact . . . .
>
> (c) The prospectus stated ". . . . " whereas in fact . . . .
>
> 5. *The defendant knew of the real facts* as to the above particulars.
>
> 6. The following facts, *which were within the knowledge of the defendants,* are material, and were not stated in the prospectus . . . .[84]

The next form in Appendix C, which is for a "fraudulent sale of a lease," similarly contained an unadorned and unsupported allegation of the defendant's knowledge. It read as follows: "The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by fraudulently representing

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[82] *Id.* O. 19, r. 5 ("The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings . . . .").

[83] The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § II, No. 2 (emphasis added).

[84] *Id.* § VI, No. 13 (emphasis added).

to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, *to the defendant's knowledge.*"[85]

Allegations of malice—like allegations of knowledge—were protected from particularized pleading by Order 19, Rule 22;[86] thus, it is helpful to find an example of such pleadings in Appendix C as well. The malicious prosecution form read as follows: "The defendant *maliciously* and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon . . . ."[87] Here, consistent with Order 19, Rule 22, we find no greater specificity than was presented in the context of the allegations of the defendant's knowledge outlined above.

English caselaw. The scant but available contemporaneous decisions of English courts interpreting and applying the pleading rules confirm that they did not require the pleading of any facts substantiating the basis for condition-of-the mind allegations. *Glossop v. Spindler*[88] is particularly illustrative. In that case, the plaintiff alleged—in paragraph one—that the defendant maliciously printed and published in a newspaper certain defamatory matter and—in paragraph two—that "the defendant, on previous occasions, and in furtherance of malicious motives on his part towards the plaintiff, maliciously printed and published of the plaintiff various statements and paragraphs in the said newspaper, and these, for convenience of reference, are set forth in the appendix hereto."[89] The defendant sought to have paragraph two and the appendix stricken as a violation of the pleading rules.[90] The court ruled that the allegation of paragraph two itself was sufficient, in that "it contained a statement of material facts upon which the plaintiff would rely at trial as constituting malicious motives."[91] However, the court also ruled that the appendix must be stricken because "it contained the evidence to prove the alleged

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85 *Id.* § VI, No. 14 (emphasis added).

86 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

87 The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § VI, No. 15 (emphasis added).

88 (1885) 29 SJ 556 at 556 (Eng.).

89 *Id.*

90 *Id.* at 557.

91 *Id.*

facts in paragraph 2, and was, therefore, a violation of ord. 19, r. 4."[92] Two things are worth noting here. First, Rule 4, which was cited by the Court, supplied the ordinary pleading standard, which required "only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . but not the evidence by which they are to be proved . . . ."[93] Providing additional details beyond the allegation of malicious intent violated that rule. Second, when the plaintiff went above and beyond what was required, offering (in an appendix) additional facts from which malicious intent could be inferred, that was not lauded as helpful to the presentation of the case but was challenged by the defendant as a pleading offense and thrown out by the court as inappropriate. Thus, not only were facts from which malice might be inferred not required of pleaders under Order 19, Rule 22, the pleading of such factual detail appears to have been affirmatively prohibited by Order 19, Rule 4.[94]

Herring v. Bischoffsheim[95] offers similar insight into the minimal pleading burden under the English Rules in the context of an allegation of fraudulent intent. There, the plaintiff's claim was that the prospectus issued by the defendant was fraudulent to the knowledge of the defendant company; the plaintiff offered extensive evidentiary details in support of that allegation. The court, in response to a motion to strike these details

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92 *Id.*

93 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4. A "material fact" might be described as what in the United States previously was referred to an "ultimate fact" under code pleading, as opposed to evidentiary facts. *See, e.g., In re* Dependable Upholstery Ltd (1936) 3 All ER 741 at 745–46 (Eng.) (holding an allegation that dividends were paid from an improper source to be a "material fact" under Rule 4 and that plaintiffs would not be ordered to give particulars of that fact, which would merely disclose the evidence by which that fact was intended to be proved). *But see* Millington v. Loring (1880) 6 CPD 190 at 190, 194 (Eng.) ("[I]n my opinion those words ['material facts'] are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial."). Thus, in *Glossop v. Spindler* the "material fact" is that the publication was with malicious intent, while the evidentiary facts are those details on which the ultimate fact of malicious intent is based. Glossop v. Spindler (1885) 29 SJ 556 at 557 (Eng.). An innovation of the Federal Rules of Civil Procedure was to avoid distinguishing between ultimate and evidentiary facts by abandoning any reference to pleading facts altogether. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 242 (2d ed. 1947).

94 *See also* Gourard v. Fitzgerald (1889) 37 W.R. 265 (Eng.) (rejecting a lower court's order for particulars pertaining to the plaintiffs' allegation that statements were maliciously published by the defendants).

95 [1876] WN 77 (Eng.).

from the statement of the claim, agreed with the defendant that the pleading violated Order 19, Rule 4, and permitted the plaintiff to amend.[96] In doing so, the court wrote,

> It is unnecessary for the statement of claim to state the motives which led to the issuing of the prospectus, or the scheme of which it is a part. It is sufficient to state generally that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.[97]

Finally, we have some evidence of how allegations of knowledge generally were permitted under these rules. In *Sargeaunt v. Cardiff Junction Dry Dock & Engineering Co.*,[98] the court rejected a request for particulars setting out how certain knowledge on the part of the defendant came to exist, citing and relying on Order 19, Rule 22 in the process. In *Griffiths v. The London & St. Katharine Docks Co.*,[99] the court reported that the plaintiff alleged that the defendant company "knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door" without further elaborating the facts supporting the allegation.[100] No fault was found with this allegation; the claim only failed because the plaintiff failed to allege also that he was unaware of the said defective condition, a critical element of stating the negligence claim asserted in the case.[101]

From the previous discussion, it is readily apparent that the progenitor of Rule 9(b)'s conditions-of-the-mind clause—Order 19, Rule 22 of the English Rules (and the English cases that applied that rule)—give lie to the notion that Rule 9(b) may properly be interpreted to require the pleading of facts that make state-of-mind allegations plausible. That the 1938 rulemakers cited to the English rule in the notes accompanying Rule 9(b) can reasonably be read as evidence of their intent to embrace the associated English practice of not requiring pleaders to allege facts from which conditions of the mind might be inferred. But Rule 9(b)'s

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96 *Id.*

97 *Id.*

98 [1926] WN 263, 264 (Eng.) ("[T]he plaintiff had no right under the rule [Order 19, Rule 22] to obtain the particulars asked for, and they must be refused.").

99 (1884) 12 QBD 493 (Eng.).

100 *Id.* at 494.

101 *Id.* at 496.

admonition must also be understood in the wider context of the liberal general pleading ethos of the English Rules embraced by the drafters of the 1938 rules.[102] As Charles Clark, reporter to the original rules committee, noted at the Cleveland Institute on Federal Rules:

> I think there is no question that the rules can not [sic] be construed to require the detailed pleading that was the theory, say, in England in 1830 .... About the only time when this specialised detailed pleading was really tried was in England in the 1830's, after the adoption of the Hilary Rules. The Hilary Rules were the first step in the procedural reform in England, and they got the expert Stephen to write the rules. He went on the theory, which many experts have, that what you want is more and better and harsher rules, and never at any time in the history of English law was pleading so particularised, and never were the decisions so strict and technical, and never was justice more flouted than in that short period in the '30's, ... which led immediately to greater reform, finally culminating in the English Judicature Act and the union of law and equity.[103]

In other words, the pleading reforms brought about by the English Judicature Acts, which were a response to the highly particularized pleading regime of the Hilary Rules, were the inspiration for much of what Charles Clark and the 1938 drafters were trying to do with their new pleading rules. But the result of the *Iqbal* revision of Rule 9(b)—and the antecedent rewriting of the ordinary pleading standard of Rule 8(a)(2) in *Twombly*—is that we have regressed very nearly to the state of affairs that the 1938 rule reformers sought to save us from. That this was done without due regard for the previously-reviewed evidence of Rule 9(b)'s proper meaning is problematic. Equally (if not more) disconcerting,

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[102] A.B.A., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (Edward H. Hammond ed., 1938) ("I would say this, that I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful.").

[103] A.B.A., RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220–22 (William W. Dawson ed., 1938); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98 (5th ed. 2019) (discussing the Hilary Rules and their development).

however, is that the *Iqbal* interpretation of Rule 9(b) is at variance with the policies that underlie the rule, a topic to which we now turn.

III. THE AFFRONT TO THE POLICY BEHIND RULE 9(b)

By applying the plausibility fact-substantiation standard to allegations of conditions of the mind, this heightened pleading standard is being applied to the very kinds of allegations Rule 9(b)'s second sentence was quite obviously crafted to protect.[104] Requiring pleaders to provide the particulars of a person's state of mind is not something that all pleaders will be able to do without the benefit of discovery,[105] making the imposition of such a requirement at the pleading stage unfair.[106] This is particularly true for plaintiffs asserting discrimination claims, who are more likely (than fraud plaintiffs or public figure defamation plaintiffs, for example) to lack the resources to overcome the information asymmetry that exists at the pleading stage.[107] Wrongful conduct is already something not likely to be broadcast; wrongful intentions—which lurk within a person's mind—are even more likely to be obscured from external view. The drafters of Rule 9(b) understood this, agreeing with the English system that requiring complainants to articulate facts

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104 WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301 ("[T]he trend seems to be an embrace of the more rigid pleading requirements for conditions of mind that the second sentence of Rule 9(b) was designed to suppress.").

105 *Id.* ("The concept behind this portion of Rule 9(b) is an understanding that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery.").

106 *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 160 (2008) ("[T]o the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal. It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain . . . .").

107 *See, e.g.*, Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) ("We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, *i.e.*, that there was an official policy or a de facto custom which violated the Constitution.").

substantiating an alleged condition of the mind would be unreasonable.[108] In a system in which the right to petition courts for redress is constitutionally protected by the Petition Clause of the First Amendment,[109] the pleading standard must be one that avoids blocking potentially legitimate claims solely based on the inability of claimants to articulate supporting facts—such as those pertaining to conditions of the mind—that it would be nearly impossible for them to know.[110] As we have seen, Rule 9(b)'s second sentence was designed with this concern in mind, as was Rule 11(b)'s allowance of making "factual contentions [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[111] The *Iqbal* fact-substantiation interpretation of Rule 9(b) thus has pushed the system over the line that the Petition Clause was designed to protect, something that a reparative revision to Rule 9(b) could address.[112]

An additional consideration suggesting that imposing a heightened burden for condition-of-the-mind pleading is problematic from a policy perspective derived from the *Iqbal* Court's endorsement of the use of "judicial experience and common sense" to inform judges' plausibility assessments.[113] Research has shown that people make decisions based on various biases and categorical or stereotypical reasoning, particularly when they lack complete information about an individual or a situation.

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108 *See supra* Part II.

109 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

110 *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 29–30 (2009) [hereinafter Spencer, *Understanding Pleading Doctrine*] ("[R]equiring particularized pleading in these types of cases [e.g. discrimination cases] effectively prevents some claimants from seeking redress for what could be legitimate grievances. If the constitutional line is drawn at permitting procedural rules to bar 'baseless' claims that lack a 'reasonable basis'—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases." (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983))).

111 FED. R. CIV. P. 11(b)(3).

112 *See* Spencer, *Understanding Pleading Doctrine*, *supra* note 110, at 30 ("Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.").

113 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

Jerry Kang and his collaborators explained this phenomenon in the context of the 12(b)(6) motion to dismiss after *Iqbal*:

> [W]hen judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.
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> . . . .
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> Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas.[114]

The "judicial experience and common sense" that the Court empowered judges to rely upon in assessing claims necessarily complicates the now-imposed duty to offer facts substantiating

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[114] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160, 1162 (2012).

conditions of the mind because pleaders will have to overcome the categorical schemas dominant within the judicial class.[115] Thus, we see Justice Kennedy himself providing exhibit number one: In *Iqbal*, he found insufficient facts to substantiate the allegation that Ashcroft was the "principal architect" of the discriminatory policy, "and that Mueller was 'instrumental' in adopting and executing it," but credited the allegation that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11" and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER . . . ."[116] Because both sets of allegations were articulated with the same level of specificity, it cannot be—as Justice Kennedy suggested—that the difference between them is that the former are conclusory and the latter are factual.[117] Rather, Justice Kennedy is applying a schema that tells him that it is plausible for the FBI Director to have directed the arrests and detention of thousands of Arab Muslim men, and for the FBI Director and the Attorney General to have "cleared" the policy of holding those men in restrictive conditions, while it is not plausible to believe—without substantiating facts—that the same

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115 Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–98 ("Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites."); *Hearing*, *supra* note 52, at 13 ("Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts.").

116 *Iqbal*, 556 U.S. at 681.

117 *Id.* at 699 (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."); *see also* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 193 ("These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say 'Mr. Smith was the "principal architect" of the Chrysler building,' that would be a non-conclusory factual claim, as would the statement that 'Ms. Smith "approved" the design plans for the Chrysler building.' These statements are factual because they make claims about what transpired and who took certain actions.").

men designed and had a hand in the execution of a discriminatory arrest and detention policy.[118]

Because it is well documented that the use of categorical thinking and explicit and implicit biases infect all of us[119]—including judges[120]—and because among those biases are background assumptions about the behaviors and tendencies of members of various groups—whether those groups are public officials, racial,[121] ethnic,[122] or religious groups,[123]

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118 *See Iqbal*, 556 U.S. at 682 (indicating that because "Arab Muslims" were responsible for the September 11 attacks, an "obvious alternative explanation" for the arrests in question was Mueller's "nondiscriminatory intent" to detain aliens "who had potential connections to those who committed terrorist acts").

119 *See, e.g.*, JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx [https://perma.cc/WYQ3-4X27].

120 *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) ("Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued, how corporations are implicitly perceived, and how fundamental legal principles are unconsciously intertwined with group assumptions. This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009) (finding among judges a strong implicit bias favoring Caucasians over African Americans); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) ("I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.").

121 *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (showing biases connecting African-American faces with perceptions of the presence of a weapon).

122 *See, e.g.*, Levinson, Bennett & Hioki, *supra* note 120, at 89–92 (discussing implicit bias against Asians).

123 *See, e.g.*, *id.* at 110–11 ("The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant.").

cultural minorities,[124] or women[125]—allegations of discriminatory intent (for example) will run up against judicial presumptions of non-discrimination, which research has proven are unwarranted.[126] Nevertheless, because of the presumption of non-discrimination, a pleader will be under a particularly stringent burden to offer facts that dislodge judges from this presumption if it is hoped that they will accept an allegation of discrimination as plausible. As I have previously argued,

> [o]nce we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do. When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished.[127]

Freeing pleaders from the obligation to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible is necessary if we wish to give such claimants the opportunity to access a judicial process in which they can employ the tools of discovery to further substantiate and vindicate legitimate claims.

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[124] Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

[125] *See, e.g.*, Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005) (finding study participants shifted their valuation of the worth of various credentials to preference a male in selecting a police chief).

[126] *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (showing that identical applicants with White-sounding versus Black-sounding names received fifty percent more callbacks for interviews).

[127] Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7, at 1734.

More broadly, an interpretation of Rule 9(b) that obligates pleaders to substantiate condition-of-mind allegations with supporting facts is inconsistent with any sound theory of what worthwhile procedural rules should be designed to accomplish. If we want rules that promote the classic law enforcement objectives of general and specific deterrence, as well as the reification of abstract legal rules and the pacification of the governed that comes from its perception of systemic legitimacy and efficacy, then those rules must be—or at least must be seen to be—facilitative of efforts to vindicate transgressions of the law. No rule—or interpretation thereof—that by design shields many wrongdoers from culpability on the basis of the inability of their accusers to perform the metaphysical task of mind reading will succeed at permitting the translation of our laws as written into meaningful prohibitions that would-be transgressors will be inclined to respect.

IV. RESTORING RULE 9(b)

We have seen that the *Iqbal* majority's interpretation of Rule 9(b)—and the lower courts' subsequent application of it—are inconsistent with the proper and original understanding of Rule 9(b). Further, we have seen that the more faithful understanding of the rule laid out in this Article has the benefit of reflecting a wiser approach to the kind of pleading obligations that are sensible to impose with respect to state-of-mind allegations. Rule 9(b) should thus be restored to its intended meaning, which can happen in one of two ways. The first would be for the Supreme Court to correct its error in *Iqbal* in a future case concerning the application of Rule 9(b). Lower courts, equipped with the insight it is hoped this Article will provide, could (and should) make an effort to interpret and apply Rule 9(b) in ways that honor the language, history, and intent behind it. However, because both of these responses seem unlikely, a second approach—a restorative amendment to Rule 9(b)—should be pursued.

To revise Rule 9(b) to eliminate *Iqbal*'s requirement that sufficiently alleging conditions of the mind requires the statement of well-pleaded facts that render the allegation plausible, the rule should be amended as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the

> circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

This revised language borrows directly from Order 19, Rule 22—the original source of the admonition that was promulgated as the second sentence of Rule 9(b) in 1938. It also has the benefit of directly and unambiguously addressing what has become problematic about lower court application of Rule 9(b)—the imposition of a requirement to state facts that provide the basis for condition-of-the-mind allegations.

An accompanying committee note for this revision would need to be crafted to ensure that there is no room for courts—including the Supreme Court—to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*. The following may be a possible approach:

> *Subdivision (b).* Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in

> Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [*year*], defendant [*name of defendant 1*] conveyed all of defendant's real and personal property to defendant [*name of defendant 2*] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
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> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

Were Rule 9(b) to be revised in this manner, one might argue that it would entirely undo the *Iqbal* and *Twombly* regime, permitting conclusory legal allegations to receive credit that permits claims to proceed without having to demonstrate plausibility. Not so. Take *Twombly* itself, for instance. There the key allegation was that the defendants entered into an unlawful agreement to exclude certain players from the market; the Court's beef was that there were not sufficient facts to which one could point that would assure courts that that allegation was more than mere speculation.[128] The proposed revision of Rule 9(b) would not alter this result because the allegation of an unlawful agreement is not

[128] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

a condition of the mind that would be covered by Rule 9(b). Rather, it is an allegation pertaining to something that the defendants have done.[129] Thus, the Court would have still been able to hold (under its plausibility pleading approach) that the complaint fell short under Rule 8(a)(2).

Amended Rule 9(b) would comport with the result that the Court produced in *Swierkiewicz v. Sorema N.A.*,[130] a result the Court endorsed in *Twombly*. In *Swierkiewicz*, the plaintiff alleged that he had been discriminated against in employment based on his nationality but—in the district court's words—"ha[d] not adequately alleged circumstances that support an inference of discrimination."[131] The Court disagreed and found the complaint to be sufficient.[132] As the *Twombly* Court explained it, "Swierkiewicz's pleadings 'detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination'" and indicated that "[w]e reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[133] The proposed revision of Rule 9(b) simply honors the approach to pleading discrimination endorsed by the Court in *Swierkiewicz* and *Twombly*—specific facts substantiating an allegation of discrimination are not necessary; the sufficiency of a discrimination complaint will rest on whether the facts alleged beyond those pertaining to conditions of the mind plausibly show entitlement to relief. In the context of Swierkiewicz's discrimination claim, by alleging that he had been fired and replaced with a younger person of a different nationality, coupled with his allegations of negative age-based comments from his supervisor,[134] Swierkiewicz crafted a complaint that satisfied the Rule 8(a)(2) standard without having to provide the substantiation of

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129 *Id.* at 551 (reporting that the plaintiff alleged that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another").

130 534 U.S. 506 (2002).

131 *Id.* at 509.

132 *Id.* at 515.

133 *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz*, 534 U.S. at 508, 514).

134 *Swierkiewicz*, 534 U.S. at 508–09.

discriminatory intent that the defendants and lower courts had demanded.

That said, amending Rule 9(b) as proposed would alter the outcome in *Iqbal*. A key requirement for being able to state a claim against the government officials in *Iqbal* was that their conduct was done with discriminatory intent. Justice Kennedy declared that a bald allegation of discriminatory intent was not entitled to the assumption of truth because it was conclusory and not supported by well-pleaded facts.[135] He reached this conclusion by interpreting Rule 9(b)'s second sentence as imposing a plausibility requirement as described above.[136] However, Justice Kennedy acknowledged that a rule obligating the Court to accept an allegation of discriminatory intent as true would require a different result: "Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[137] Allegations of discriminatory intent, like all allegations pertaining to a defendant's state of mind, are factual contentions because they pertain to experienced reality rather than to the legal consequences that flow therefrom. Thus, once conditions of the mind are permitted to be simply stated under revised Rule 9(b), those allegations of fact will be entitled to benefit from the accepted assumption-of-truth rule that the Court continues to endorse.[138]

Similarly, revised Rule 9(b) would undo the position that the circuit courts have taken in this field, abrogating the decisions in which they have dismissed claims based on a determination that substantiating facts must

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135 Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) ("These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy '"because of," not merely "in spite of," its adverse effects upon an identifiable group.' As such, the allegations are conclusory and not entitled to be assumed true." (citations omitted)).

136 *See supra* Section I.A.

137 *Iqbal*, 556 U.S. at 686. Were there to be an interest in providing a greater degree of protection against litigation for defendants who are potentially entitled to qualified immunity (as may have characterized the defendants in *Iqbal*), it would be appropriate to vindicate that interest through an amendment to the Federal Rules (or via a legislative enactment) tailored to such cases, not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b).

138 *Id.* at 678 (referring to "the tenet that a court must accept as true all of the allegations contained in a complaint"); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation omitted)).

be offered to support allegations pertaining to conditions of the mind. This, of course, is by design and is the principal purpose behind the revision. Thus, in a case like *Biro*,[139] in which the Sixth Circuit required the plaintiff to offer facts substantiating the allegation of actual malice,[140] the result would be different. There, the plaintiff alleged as follows regarding actual malice:

> Biro generally alleged that each of the New Yorker defendants "either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them," and that they "acted with actual malice, or in reckless disregard of the truth, or both."[141]

Malice and knowledge are conditions of the mind protected from particularized pleading by Rule 9(b). As revised, Rule 9(b) would treat the quoted allegations as sufficient. As in *Iqbal*, crediting these allegations as true would result in rendering the complaint sufficient under Rule 8(a)(2). Indeed, there are certainly a great many cases in which crediting allegations of condition of the mind as true will render them impervious to attack under Rule 8(a)(2). If such a result is not desired, then making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue.[142]

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139 807 F.3d 541 (6th Cir. 2015).

140 *Id.* at 542.

141 *Id.* at 543.

142 Codifying the *Iqbal* interpretation of Rule 9(b)'s second sentence could be achieved by revising it to read as follows: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ by setting forth the circumstances from which the condition may be inferred." Codification might also be achieved by deleting the second sentence of Rule 9(b).

CONCLUSION

Revising promulgated federal rules through judicial decision making is a perilous[143] and illegitimate[144] business. After *Twombly* and *Iqbal*, one cannot know what Rule 8(a)(2)'s "short and plain statement of the claim showing entitlement to relief" is, nor can one know what Rule 9(b) means when it permits a party to allege conditions of the mind "generally," without consulting the judicial interpretation of those rules by courts, notwithstanding the divergence of the latter from the text of the former.[145] If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another,[146] then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation. Stated differently, given that the *Iqbal* interpretation of Rule 9(b) and that which it has spawned among lower courts is manifestly

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143 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting) ("The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.").

144 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity . . . 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation'" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))).

145 My view, as expressed extensively in previous work, is that the Court's interpretation of Rule 8(a)(2)—like its interpretation of Rule 9(b)—diverges from the meaning supported by all relevant textual and historical evidence. *See* Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7; Spencer, *Plausibility Pleading*, *supra* note 7. Restoring the intended meaning of Rule 8(a)(2) could be achieved by revising it as follows: "a short and plain statement of the claim ~~showing that~~ articulating the pleader's grounds ~~is entitled to~~ for relief . . . ." Other approaches have been put forward as well. *See, e.g.*, Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 979–83 (2012) (providing multiple suggestions for revising Rule 8(a)(2) to restore it to its pre-*Twombly* meaning). Unfortunately, it appears that ship has sailed. Hopefully, however, there remains the possibility that the misinterpretation of Rule 9(b) can be repaired.

146 *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80–81 (2006) ("[T]he rich context of common law procedural rules . . . function in conjunction with the 1938 Rules to determine the actual function of the federal district courts . . . . These Other Federal Rules of Civil Procedure . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.").

counter to the intended meaning of Rule 9(b) and to all available textual evidence, the rulemakers have a duty *to at least consider* whether the rule should be revised in a way that better tracks how courts interpret and apply the rule, or be revised to correct the errant construction. Doing nothing, though, should not be an option—unless we[147] want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice.[148] None of us should want that, although I fear that doing nothing is precisely the most likely thing that we will do.[149]

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147 I currently serve as a member of the Judicial Conference Advisory Committee on Civil Rules, which bears responsibility for considering proposals to amend the Federal Rules of Civil Procedure. The views expressed in this piece are my own and do not reflect the position of the Committee or its members.

148 *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369 (2010) ("[P]rocedure's central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure's overarching, unified goal is to facilitate and validate the substantive outcomes desired by society's dominant interests; procedure's veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social out-groups and ensure desired results.").

149 This sentiment arises from my experience as a member of the Rules Committee. Whether it be due to the prioritization that necessarily arises in the context of limited deliberative capacity and bandwidth, the institutional conservatism that comes from being a committee dominated by members of the judiciary, or the awkwardness associated with rebuffing the work of the Court (and the Chief Justice) under whose aegis we operate, the Rules Committee in modern times has shied away from undertaking liberalizing, access-promoting reforms in response to interpretive drift in a restrictive direction. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 927 (2020) ("The second theme—institutional actor timidity—demonstrates how the Committee is quite timid of its role in the Rules Enabling Act process. That process requires the work of other institutional actors, and one of the most fraught relationships is between the Supreme Court and the Committee. After all, the Committee's members are appointed by the Chief Justice, the work of the Committee is delegated from the Court to the Committee, and the Court is part of the process as its approval is required for an amendment to be adopted."). As Charles Clark pointed out long ago, it is not surprising that the judiciary will constantly turn back to restrictive pleading, but it is our job to periodically press for corrective measures that will maintain the access-facilitating ethos that the rules were originally intended to institutionalize. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1941, 1942, 1943) ("With the development of code pleading, from the Field Code first adopted in New York in 1848 to the present time, the emphasis was shifted from the detailed issue-pleading of the common law to a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case. Notwithstanding this history, however, courts recurrently turn back to the course of requiring details. Such a return, on the whole, is not surprising, for all rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment. Moreover, the pressure from one side to force admissions from the opponent and the court's desire to hurry up adjudication and avoid lengthy trials tend somewhat to push in this same direction. It is

necessary, however, always to bear in mind that nowadays we are not willing to enforce harsh rules or to sacrifice a party for his lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions.").

TAB 17

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RULES 26(b)(5)(A) & 45(e)(2): PRIVILEGE LOGS

Suggestion 20-CV-R

The Lawyers for Civil Justice propose that Rule 26(b)(5)(A) be amended to add specifics about how parties are to provide details about materials withheld from discovery due to claims of privilege or protection as trial-preparation materials. The submission focuses on a problem that can produce waste. But it is not clear that any rule change will helpfully change the current situation.

The basic difficulty is that an extremely detailed listing of the withheld materials may sometimes be unworkable or extremely costly to produce without providing significant benefit to the parties or the court.

1993 Adoption of Rule 26(b)(5)

Before 1993, parties withheld materials covered by a privilege from discovery without enumerating what was withheld. Often they relied on some sort of "general objection" that no privileged materials would be produced. Indeed, since Rule 26(b)(1) says only "nonprivileged matter" is within the scope of discovery, one might have asserted that the objection was not needed. In any event, it would often be very difficult for other parties to determine what had not been turned over based on a claim of privilege. There were suspicions that sometimes parties were overly aggressive in their privilege claims.

In 1993, therefore, Rule 26(b)(5)(A) was added. It now provides:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

This provision (modeled on a similar provision added to Rule 45 in 1991) sought to dispel the uncertainty that existed before it went into effect, but did not seek to impose a heavy new burden on responding parties. Hence, the committee note accompanying the 1993 amendment advised:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details

> concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Notwithstanding this directive, there is reason to worry that overbroad claims of privilege still occur. As Judge Grimm noted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008): "[B]ecause privilege review and preparation of privilege logs is increasingly handled by junior lawyers, or even paralegals, who may be inexperienced and overcautious, there is an almost irresistible tendency to be over-inclusive in asserting privilege protection."

But privilege logs —— the customary expectation for complying with Rule 26(b)(5)(A) —— were a poor solution to the problem, as Judge Grimm also recognized:

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.

Id.

For further discussion, see 8 Fed. Prac. & Pro. § 2016.1.

2008 Advisory Committee Consideration

At the April 2008 Advisory Committee meeting, Prof. Gensler (then the academic member of the Advisory Committee) raised concerns about the actual experience implementing Rule 26(b)(5)(A). An excerpt of the April 2008 meeting minutes is included in the appendix to this report. For the November 2008 meeting, Prof. Gensler provided a memorandum about these issues, and Prof. Marcus also provided a memorandum. An excerpt of the November 2008 agenda book is included in the appendix to this report.

At the November 2008 meeting, there was further discussion, including reference to the local rule in the District of Connecticut. This discussion was about both the content of privilege logs and the timing for them. One point made was: "Vendors have become insistent that electronic screening software can do the job at much lower cost." Several members reported that the parties usually work out arrangements that cope with the potential difficulties. The matter was continued on the Advisory Committee's agenda, but no further action has been taken. An excerpt of the November 2008 meeting minutes is included in the

appendix to this report.

Pertinent Post-1993 Rule Changes

Since 1993, other rule changes have, however, added provisions that could affect the possible burden of complying with Rule 26(b)(5)(A).

First, in 2006 Rule 26(b)(5)(B) was added, providing that any party could make a belated assertion of privilege, after production, which would require all parties that received the identified information to sequester the information unless the court determined that the privilege claim was unsupported. At the same time, Rule 26(f) was amended to add what is now in Rule 26(f)(3)(D), directing that the parties' discovery plan discuss issues about claims of privilege. But these rule changes did not precisely address the question whether production constituted a waiver, particularly a subject-matter waiver.

Second, in 2008 Congress enacted Evidence Rule 502. In Rules 502(d) and 502(e), that rule gives effect to party agreements that production of privileged material will not constitute a waiver of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent production against privilege waiver if the producing party "took reasonable steps to prevent disclosure." Rule 502 *does* directly address the question whether a waiver has occurred.

Owing to these post-1993 rule changes, therefore, one may conclude that the burdens of complying with Rule 25(b)(5)(A) have abated somewhat. A significant concern had been that failure to log a particular item would work a waiver even if the item was not produced. But it seemed that courts finding such waivers did so only as a sort of sanction for disregard of the Rule 26(b)(5)(A) obligation, not for a simple slip-up. Due to Rule 26(b)(5)(B), there is now a procedure to retrieve a mistakenly-produced privileged item, leaving it to the party that obtained the item to seek a ruling in court that it is not privileged. Rule 502, then, directs that no waiver be found for inadvertent production of a privileged item if reasonable steps were taken to review before production, and that even if reasonable steps were not taken the parties could guard against waiver by making an agreement under Rule 502(d). In short, the pressure of a waiver due to oversight —— particularly the risk of a subject-matter waiver —— has abated considerably since 1993.

Meanwhile, it may be that technology now exists to provide a useful assist to the parties in preparing a privilege log. Technology-assisted review (TAR) is often or routinely employed to review large volumes of electronically-stored information to identify responsive materials. As discussed in 2008-09 by the Advisory Committee, software was then being promoted as effectively identifying not only responsive materials, but also materials that might be claimed to be privileged. It may be that such programs

could then also generate at least a draft privilege log.

Nonetheless, there have also been criticisms of the reported requirement of some courts that parties prepare a "document-by-document" privilege log. As Judge Facciola observed in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

> [I]n the era of "big data," in which storage capacity is cheap and several bankers' boxes of documents can be stored with a keystroke on a three inch thumb drive, there are simply more documents that everyone is keeping and a concomitant necessity to log more of them. This, in turn, led to the mechanically produced privilege log, in which a database is created and automatically produces entries for each of the privileged documents. * * *
>
> But, the descriptor in the modern database has become generic; it is not created by a human being evaluating the actual, specific contents of that particular document. Instead, the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. * * * This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive as it is useless.

Cost of Responding to Discovery and Withholding Privileged Materials without Preparing a Privilege Log

It seems worth noting that preparing the privilege log may often be a relatively minor cost in comparison to responding to discovery of ESI more generally. Whether or not a privilege log is prepared, much work is necessary to respond to discovery of ESI. Responsive materials must be located in what is sometimes an enormous quantity of digital data. In addition, either simultaneously or after the responsive materials are extracted, the specific items potentially covered by privilege must be identified and set apart.

After those potentially privileged items are identified, a legally trained person must verify that it would indeed be legitimate to withhold them from production on that ground. And then care must be taken at least to keep a record of what was withheld on this ground. It would seem that all of these steps would have been required under the pre-1993 rules, and that they would continue to be necessary if Rule 26(b)(5)(A) were amended. So it may be that the additional cost of preparing a privilege log is not a large part of this overall cost of responding to discovery, even though preparing a document-by-document log may in many cases require a disproportionate effort, or at least be a waste of time.

LCJ Submission

The LCJ submission stresses the difficulties of privilege logs in an era of ESI, emphasizing Judge Facciola's views. Indeed, along with Jonathan Redgrave, Judge Facciola proposed in 2010 that "the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement." *Facciola & Redgrave Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2010). Implementing what Judge Facciola urged by rule could be difficult, however.

The LCJ submission describes some local district court rules about privilege logs, and also some state court rules. It acknowledges the good sense of what the committee note to the 2006 amendment to Rule 26(f) said about discussion and cooperation among counsel, but reports that "the suggestion has been largely ignored." It also urges that a rule provide for "presumptive exclusion of certain categories" of material from privilege logs, such as communications between counsel and the client regarding the litigation after the date the complaint was served, and communications exclusively between in-house counsel or outside counsel of an organization. Invoking proportionality, it emphasizes that "flexible, iterative, and proportional" approaches are more effective and efficient than document-by-document privilege logging. But even though the 1993 committee note accompanying Rule 26(b)(5)(A) recognized that detailed logging is not generally appropriate, "the case law has largely missed the Committee's perspicacity." One might say that the Advisory Committee's urgings did not produce the desired outcome.

The specific LCJ proposal seems more limited. It is to add the following to Rule 26(b)(5) and also to Rule 45(e)(2) on subpoenas:

> If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

Would a Rule Amendment Improve Matters?

There is a limit to what rules can prescribe. The more general concern with proportionality calls for common-sense judgments about what discovery is really warranted under the circumstances of specific cases. That is difficult or impossible to prescribe in the abstract in a rule.

It may be that improvement by rule of the handling of what Rule 26(b)(5)(A) requires is not really possible because so much

depends on the circumstances of the individual case. "Presumptive exclusion of certain categories" (not actually proposed by the submission, as quoted above) could introduce additional grounds for litigation about whether the categories apply in specific circumstances. And it may be worth noting something said during the November 2008 Advisory Committee meeting (minutes, pp. 14-15):

> An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents.

Alternatively, one might urge that Rule 26(b)(5)(A) should be abrogated. Perhaps the experience for more than a quarter century under this rule shows that it did not work, or does not now work. This submission does not urge doing that, and it is likely that valid concerns about unrevealed but overbroad claims of privilege mean that the rule should be retained.

But it is not clear that a rule can do more than the rule already does, particularly when augmented by the directive in Rule 26(f)(3)(D), calling for the parties to address "any issues about claims of privilege." And it seems that the committee notes accompanying the original rule in 1993 and the revision of Rule 26(f) in 2006 speak to the concerns raised by the LCJ submission.

The question for discussion during the October 2020 meeting is whether the problems are so severe as to warrant trying to draft a rule amendment, and whether a rule amendment would likely improve matters.

SUGGESTION FOR RULEMAKING
to the
ADVISORY COMMITTEE ON CIVIL RULES

PRIVILEGE AND BURDEN: THE NEED TO AMEND RULES 26(b)(5)(A) AND 45(e)(2) TO REPLACE "DOCUMENT-BY-DOCUMENT" PRIVILEGE LOGS WITH MORE EFFECTIVE AND PROPORTIONAL ALTERNATIVES

August 4, 2020

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Suggestion for Rulemaking to the Advisory Committee on Civil Rules ("Committee"), recommending amendments to Rule 26(b)(5)(A) and Rule 45(e)(2) of the Federal Rules of Civil Procedure ("FRCP") that would modernize the procedure for withholding otherwise discoverable information under claims of privilege or other protection and replace "document-by-document" privilege logs with more effective and proportional alternatives. Rule 25(b)(5)(A), adopted prior to the explosion of electronically stored information ("ESI"), has remained untouched for over twenty-five years. The time has come to amend rule 26(b)(5)(A) to reflect best practices and eliminate the disparities among local rules.

I. INTRODUCTION

"[T]he modern privilege log [is] as expensive to produce as it is useless."[2] This conclusion – widely shared by judges, litigants, and litigators – is based on common experience with producing, receiving, and ruling on "document-by-document" privilege logs. Importantly, this indictment of the status quo is not a castigation of counsel preparing logs but a critique of prevailing practices and existing rules. The inherent difficulties in describing applicable privileges for all withheld documents individually have been compounded by the geometric growth of ESI, often resulting in claims by requesting parties that privilege logs fail to meet the standard of Rule 26(b)(5)(A)(ii) or provide sufficient information to resolve privilege claims.

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C 2012).

These challenges provoke a large amount of satellite litigation unrelated to the merits of the case.[3]

The burdens of preparing privilege logs, the inherent futility of many logging exercises, and the resulting collateral disputes arise from Rule 26(b)(5)(A) and its case law progeny. Some courts interpret the Rule as establishing a *de facto* default to "document-by-document" logs by interpreting the "expressly make the claim" language to require document-by-document logging. While the 1993 Advisory Committee Note indicates that alternative approaches could be considered, few litigants or courts follow that advice. That such a "default" expectation exists is evident in a plethora of cases requiring that producing parties must provide "document-by-document" logs in order to maintain claims of privilege.

Recognizing the ineficiencies of document-by-document privilege logs and collateral disputes, several district courts have adopted local rules or guidance that embrace the flexibility intended by the Advisory Committee Note. Consequently, a patchwork of different standards has emerged, resulting in today's lack of uniformity among federal districts.[4]

The Committee should modernize the procedures for privilege logs to provide greater procedural clarity and consistency and make them more useful, efficient, and proportional to the needs of the case. The amendments proposed in Attachment A and Attachment B (the "Proposed Amendments") are targeted to reduce the disputes that ultimately require judicial attention and resolution as well as promote procedural consistency and predictability without imposing an inflexible standard for form and content. The Proposed Amendments motivate and enable parties (and subpoenaed non-parties) to customize logging procedures and log content proportional to the needs of each case, while assuring the appropriate scope of information subject to logging, clarifying the standards, and reserving a role for the court in the event that the parties need guidance. The Proposed Amendments endorse: (1) categorical logs where appropriate in cases (with sampling and provisions to ascertain whether privilege claims are factually and legally sound); (2) iterative logging (moving from broad categories or summary logs to more detailed logs for subsets of important, material documents); (3) excluding from logging categories of communications that are facially privileged; (4) alternative logging protocols for particular types of linked/serial communications (e.g., emails); (5) procedures for privilege challenges and limitations of challenges to truly material and unique information; and (6) other procedures and protocols that either technology or the creativity of parties, counsel, and the bench may devise.

[3] The authors used a Westlaw search (lasted updated on 1/9/2020) in the ALLFEDS databases using the following search syntax "privilege /s index log /s insufficient waiv! fail! & date(aft 10/01/2006)" to find cases where there was an attack on a privilege log as being insufficient, a failure, or should result in a waiver of privileges. The search pulled back 4,018 cases and more than 10,000 "trial court documents." A cursory examination of selected cases demonstrates the extraordinary amount of time and effort invested in logging, logging disputes, and court involvement in resolving these disputes.

[4] *See The* Sedona Conference *Commentary on Protection of Privileged ESI, 17 SEDONA CONF. J.* 95, 156 (2016) ("The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs.").

II. BACKGROUND

Since 1993, Rule 26(b)(5)(A) and Rule 45(e)(2) have directed litigants and non-parties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim."[5] The *de facto* default method of doing so (reflected in most relevant case law) is for the withholding entity to prepare a log of all withheld records on a "document-by-document basis."[6] But a comprehensive document-by-document logging method should be used only infrequently, when clearly justified by the needs of the case and the materiality of the information. Such logs are expensive to produce and inefficient in conveying useful information,[7] and they frequently lead to disputes that require *ex parte* and *in camera* reviews by courts. The default to document-by-document logging is based, in part, on a flawed premise that each document (or portion of document) should be treated with equal detail when, in reality, documents and the foundation of the privilege and protection claims differ greatly. Some categories of documents and communications are by their authorship, exchange, or content transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 has rendered the current practices unworkable.

Although the Committee has retooled many rules to equip parties, counsel, and the courts to address discovery issues related to ESI, Rule 26(b)(5) largely has been left behind. And despite

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[5] Specifically, Fed. R. Civ. P. 26(b)(5)(A) provides:

> **(5)** Claiming Privilege or Protecting Trial-Preparation Materials.
> **(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:
> **(i)** expressly make the claim;
> **(ii)** describe the nature of the documents, communications or tangible things not produced or disclosed−and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

[6] *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 159 comment 10.h (2018) ("[T]he precise type and amount of information required to meet the general standard set forth in Rule 26(b)(5)(A)(ii) varies among courts…").

[7] *See* Hon. John M. Facciola & Jonathan M. Redgrave, ASSERTING AND CHALLENGING PRIVILEGE CLAIMS IN MODERN LITIGATION: The Facciola-Redgrave Framework, 4 FED. CTS. L. REV. 19 (2010) ("The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement."); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (emphasis added):

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves. *Few judges find that the privilege log is ever sufficient to make the discrete fact-findings needed to determine whether a privilege/protection was properly asserted and not waived.*

the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging,[8] rulemaking is required to provide guidance about optional methods due to the continued adherence to inflexible, archaic standards.

Adopting the Proposed Amendments would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to develop new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extracting information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

III. CURRENT PROCUDRES GOVERNING PRIVILEGE LOGS ARE OVERBURDENSOME, DISPROPORTIONAL, AND OFTEN UNHELPFUL

A. Document-by-Document Privilege Logs are Very Time Consuming and Expensive to Produce.

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly and wasteful parts of pretrial discovery in civil litigation,[9] and many courts have interpreted current rules 26(b)(5)(A) and 45(e)(2) as making document-by-document logs the default form. The costs associated with creating traditional privilege logs have become a significant - possibly the largest - category of pretrial spending for litigants in document-intensive litigation.[10] The Sedona Conference has recognized that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more. . . ."[11] Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document

[8] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described categories.

[9] *See* New York State Bar Association, REPORT OF THE SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.").

[10] *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 155 ("Privilege logging is arguably the most burdensome and time-consuming task a litigant faces during the document production process.").

[11] *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 103; *see also* New York State Bar Association, *Report of the Special Committee on Discovery and Case Management in Federal Litigation*, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document intensive case, especially one with many e-mails and e-mail strings.").

without disclosing privileged or protected information. In jurisdictions where all emails in an email chain must be separately itemized on a privilege log, the degree of difficulty is increased many fold.[12] For example, metadata that can be used to populate the log entry automatically, e.g., author and recipients, is available only for the most recent email in a chain, and information for all other emails in the chain must be manually entered on the log. Even in cases with relatively modest quantities of discoverable documents and ESI, this labor-intensive procedure results in substantial costs.[13]

B. Document-by-Document Privilege Logs Are, By Their Nature, Rarely Proportional to the Needs of the Case.

The resources devoted to identifying, logging and resolving disputes about privileged documents are often out of proportion to the needs of the case, particularly when the parties do not have or anticipate disputes over withheld documents. It is a rare case in which privileged documents, whether the claim is sustained or overruled, are introduced as evidence and have any discernible effect on the outcome of the litigation. Although there are exceptional instances where documents withheld as privileged are central to resolving the issues, the current default of "boiling the ocean" is unjustified when rules with sufficient flexibility (such as the Proposed Amendments) would enable targeted identification and adjudication when appropriate.

A proportional approach is perhaps even more important for non-parties facing the prospect of producing a privilege log pursuant to Rule 45. While Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it. There is no current mechanism in Rule 45 to facilitate scaled and proportional approaches to privilege logs by non-parties.

The logic behind revising Rule 45 is highlighted by the January 2020 release of The Sedona Conference's revised Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition (Public Comment Version).[14] The document specifically notes the need to consider alternative logging:

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[12] *See In re Universal Serv. Fund Tel. Billing Practices Litig*., 232 F.R.D 669, 674 (D. Kan. 2005). The court in *In re Universal Serv. Fund* recognized:

> requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel. And, of course, that task adds considerable expense for the clients involved; even for very well-financed corporate defendants such as those in the case at bar, this is a very significant drawback to modern commercial litigation. But the court finds that adherence to such a procedure is essential to ensuring that privilege is asserted only where necessary to achieve its purpose.

Id.

[13] *See First Horizon Nat'l Corp. v. Houston Cas. Co*., No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268 at *6 (W.D. Tenn. Oct. 5, 2016) ("[p]laintiffs assert that production of a document-by-document privilege log would cost them $150,000 and take three to four weeks.") (plaintiff's log in *First Horizon* was to describe 5,941 documents, a cost of $25.25 per entry. ECF No. 186, Plaintiff's Opposition).

[14] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas.

> Practice Pointer 15. Rule 45(e)(2)(A) and (B) require a non-party subpoena recipient to, among other things, expressly make a "claim [of privilege] and the basis for it" and set forth a process for the handling of the inadvertent production of such information. The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party, where appropriate, should agree to alternatives to the traditional privilege log.[15]

C. Document-by-Document Privilege Logs Frequently Fail to Assist Parties or Courts to Resolve Privilege Issues.

Privilege disputes are most often collateral to the issues in the case and often involve form over substance. Unfortunately, document-by-document privilege logs are frequently of marginal value to the requesting party and the court in assessing the privilege claims, despite the time, effort and money spent preparing them.[16] Privilege logs also rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5). Nor do the logs achieve the other goal of the rule - to 'reduce the need for *in camera* examination of the documents.' "Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production. In short, the procedure and process for protecting privileged ESI from production is broken."[17]

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[15] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas at p.43.

[16] *TheSedona Principles, supra* note 6, at p. 81 ("[o]ften, the privilege log is of marginal utility."); *id at* p. 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege."); *Auto. Club of New York, Inc., v. Port Authority of New York and New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.") (internal citation omitted); *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 155. ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

[17] *The Sedona Conference, Commentary on Protection of Privileged ESI, supra* note 4, at 103 (internal citation omitted). Judge Paul Grimm previously recognized the current incentive for collateral disputes:

> Requesting parties also know of the limited utility of privilege logs (for they likely have served similar privilege logs in response to their adversary's discovery requests), and thus, when they receive the typical privilege log, they are wont to challenge its sufficiency, demanding more factual information to justify the privilege/protection claimed. This, in turn, is often met with a refusal from the producing party, and it does not take long before a motion is pending, and the court is called upon to rule on the appropriateness of the assertion of privilege/protection, often with the producing party's "magnanimous" offer to produce the documents withheld for *in*

D. Disparate Local Rules Regarding Privilege Logs Demonstrate the Need for Amendments to the FRCP that Update and Unify Privilege Log Practices.

In the absence of new national rulemaking many district courts across the country have attempted to address the problems with Rules 26 and 45 by adopting local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging.[18] While some of these rules reduce the burdens in creating logs, others create new burdens. And while some are consistent with each other, others are in conflict.[19] But all indicate a need to modernize the current regime and address procedural inconsistencies that result in uncertainty and the consequential inability to predict and meet differing logging procedures. Here is a sampling:

- In the District of Connecticut, Local Rule of Civil Procedure 26(e) reduces the scope of privilege logs by providing that a party need not prepare a privilege log for "written or electronic communications between a party and its trial counsel after commencement of

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> *camera* review. *In camera* review, however, can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned.

Victor Stanley, Inc., 250 F.R.D. at 265.

[18] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g.*, *Asghari-Kamrani v. U.S. Auto. Ass'n*, No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose"); *Companion Prop. and Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-cv-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016); *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp.*, 2013 WL 11090763, at*7 (permitting categorical privilege log).

[19] LCJ has conducted a review of local rules and guidelines pertinent to the scope, form and content of privilege logs. The review reflects the disparate approaches among districts. Although pertinent local district court rules can be classified in a number of ways, LCJ has identified four general groupings that have emerged:

> (1) Federal district courts in 28 states do not address Rule 26(b)(5)(A)(ii) in their local rules. Accordingly, each judge and magistrate may apply the current rule in accordance with their interpretation of whether a document-by-document log is required and whether the content of the log complies with the (A)(ii) standard.
>
> (2) Local district court rules or guidelines in 13 jurisdictions expressly follow the (A)(ii) standard and either require document-by-document logs or document-by-document logs are the *de facto* default.
>
> (3) The local rules or guidelines in two jurisdictions emphasize the importance of addressing privilege logs at the parties' 26(f) discovery conference.
>
> (4) Ten jurisdictions emphasize alternatives to document-by-document logging, specifically exclude certain categories of attorney-client privileged communications and trial preparation materials from logging, and, in several instances mandate discussion of privilege logs at the 26(f) conference, but generally do not expressly address or modify the 26(A)(ii) standard.

the action and the work product material created after commencement of the action." [20] The local rule further provides that "[t]he parties may, by stipulation narrow or dispense with the privilege log requirement, on the condition that they agree not to seek to compel production of documents that otherwise would have been logged."[21]

- In the Southern and Eastern Districts of New York, the Committee Note to Local Rule 26.2 recognizes that, with the proliferation of emails and email chains, traditional privilege logs are expensive and time-consuming to prepare. To address the problem, the Committee Note states that parties should cooperate to develop efficient ways to communicate the information required by Local Rule 26.2 without the need for a traditional log and otherwise proceed in accordance with Rule 1 to ensure a just, speedy and inexpensive termination of the case. The rule states, "For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form."[22] The Western District of New York has adopted the same local rule.[23]

- The District of Colorado's ESI Discovery Guidelines specifically addresses the escalating costs of document-by-document privilege logs, urges counsel to confer in good faith "in an effort to identify types of document (*e.g.*, email strings, email attachments, duplicates, or near-duplicates, communications between counsel and a client after litigation commences) that need not be logged on a document-by-document basis pursuant to FED. R. CIV. P. 26(b)(5)(A) or at all, if the parties so agree. "The end-result should be a more useful log for a narrowly defined range of documents, thereby minimizing the need for judicial intervention."[24]

- The Southern District of Florida's detailed local rule both expands the requirements for logging while also exempting post-complaint materials:

> (i) The party asserting the privilege shall in the objection to the interrogatory or document demand, or subpart thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

[20] D. Conn. Civ. R. 26(e).

[21] *Id.*

[22] S.D.N.Y. Civ. R. 26.2(c).

[23] W.D.N.Y. Civ. R. 26(d)(4).

[24] D. Colo. Guidelines Addressing the Discovery of Electronically Stored Information 5.1.

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents or electronically stored information, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word, MS Excel); (2) general subject matter of the document or electronically stored information; (3) the date of the document or electronically stored information; and (4) such other information as is sufficient to identify the document or electronically stored information for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document or electronically stored information, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(b) For oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and the place of communication; and (3) the general subject matter of the communication.

(C) This rule requires preparation of a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a 44 claim of privilege or work product protection except the following: written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action.[25]

- District of New Mexico Local Rule 26.6 provides 21 days to challenge entries on a privilege log.[26]

- The District of Maryland promulgated "Principles for the Discovery of Electronically Stored Information in Civil Cases" recognizing that discovery of ESI is a source of "cost, burden, and delay" and instructing parties to apply the proportionality standard to all phases of ESI discovery.[27] The Principles contemplate conferral amongst the parties to

[25] S.D. Fla. R. 26.1(B) and (C).

[26] *See Sedillo Elec. v. Colorado Cas. Ins. Co.*, No.15-1172 RB/WPL, 2017 WL 3600729, at *7 (D.N.M. Mar. 9, 2017) (holding that a challenge to a privilege log is subject to Rule 26.6).

[27] District of Maryland Principles for the Discovery of Electronically Stored Information in Civil Cases 1.01 and 1.02.

determine whether categories of information may be excluded from logging and explore alternatives to document-by-document privilege logs.[28]

- The District of Delaware created a "Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI)" that contemplates the parties will confer to determine "whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged."[29]

- A judge in the Northern District of Ohio has a case management order stating: "Where the dispute involves claims of attorney-client privilege or attorney work product, it is not necessary, unless I order otherwise, to prepare and submit a privilege log." [30]

In parallel to such local rulemaking by federal districts, many state courts are also modernizing procedures for privilege logs. For example, the New York Commercial Division recognizes a preference for categorical privilege logs and requires the parties to meet and confer to discuss "whether any categories of information may be excluded from the logging requirement."[31] The Commercial Division guides parties to agree, where possible, to utilize a categorical approach to privilege designations.[32] To the extent the requesting party refuses to agree to a categorical approach in favor of a document-by-document privilege log, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log.[33]

Similarly, the New Jersey Complex Business Litigation Program has adopted a preference for the use of categorical designations in privilege logs to reduce the time and cost associated with document-by-document privilege log preparation.[34]

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[28] *Id.* 2.04(b).

[29] District of Delaware Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI). Similarly, the Model Stipulated Order Regarding Discovery of Electronically Stored Information for Standard Litigation" in the Northern District of West Virginia clarifies that the use of a categorical privilege log is acceptable. ("Communications may be identified on a privilege log by category, rather than individually, if agreed upon by the parties or ordered by the Court.").

[30] Judge Carr Civil Cases - Case Management Preferences.

[31] *See* Rules of the Commercial Division of the Supreme Court [22 NYCRR] § 202.70, Rule 11-b.

[32] "The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." *See id.*

[33] *Id*. at 11-b(2).

[34] N.J. R. 4:104-5(c).

IV. AMENDING THE PRIVILEGE LOGGING RULES WOULD ENCOURAGE NATIONWIDE BEST PRACTICES AND DELIVER NEEDED PROCEDURAL UNIFORMITY

A. Encouraging Meaningful Meet-and-Confers and Enabling Early Judicial Management Would Lead to Sensible Handling of Privilege Issues.

The 2006 Committee Notes to Rule 26(f) recommend that parties address issues concerning privilege during the Rule 26(f) conference. Unfortunately, the suggestion has been largely ignored, and the current practice appears to have been largely parties proceeding in silence at their own peril. At the same time, early discussions when the matter has not been fully framed for discovery could be counterproductive. The Proposed Amendments contemplate that the parties take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.[35] The discussion may be initiated at the parties' 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to is best incorporated in a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. Such agreements are likely to be proportional to the needs of the case and would reduce, if not eliminate, satellite litigation over collateral disputes regarding the sufficiency of privilege logs. If needed, court guidance regarding the parameters of the legal and factual contours of privilege as applied to the matter at the outset of discovery would get the parties heading in the right direction and reduce the burden on judicial resources including *in camera* review.

B. Presumptive Exclusion of Certain Categories of Documents and ESI Would Improve the Effectiveness of Privilege Logs and Help Ensure Proportionality.

Some categories of documents and ESI are facially privileged or protected and can be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. Similarly, the Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel or outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

[35] The Proposed Amendments to Rules 26(b)(5(A) and 45(e)(2) do not expressly incorporate recommendations regarding the parties' meet and conferral process and the court's involvement when and if necessary. LCJ believes that Advisory Committee Notes are more appropriate for such recommendations and permit the flexibility required for parties to address issues as the case progresses.

C. Flexible, Iterative and Proportional Approaches Are More Effective and Efficient than Document-by-Document Privilege Logging.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information in needed to assess the privilege claims.[36] Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed logging (i.e. document-by-document privilege logs) is appropriate when only a few items are being logged, but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. Unfortunately, the case law has largely missed the Committee's perspicacity. The time has come to expand this correct analysis into the Rule text.

Iterative logging prioritizes the most important areas of inquiry. This practical application of proportionality mirrors what courts and local rules have done to tier discovery that has been widely accepted as a means to reduce burdensome ESI discovery.[37] This approach also recognizes the reality that identifying and asserting privileges is an inherently difficult task[38] that

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[36] The proposed amended rules substitute "understand" for "assess" which better reflects the intent of the initial identification and the concepts of flexible and iterative logging set forth herein.

[37] *See Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (citing The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010), the court ordered parties in longstanding case to meet and confer on phasing of discovery "to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action"). For examples of local rules and guidelines that encourage phasing discovery as a means to achieve proportionality, *see* Northern District of California *Guidelines for the Discovery of Electronically Stored Information*, (as a potential Rule 26(f) topic "where the discovery of ESI is likely to be a significant cost or burden"); Eastern District of Michigan *Model Order Relating to the Discovery of Electronically Stored Information*, Principle 2.01(4) ("the potential for conducting discovery in phases or stages as a method for reducing costs and burden").

[38] "The analysis of any privilege is… historical, common law based, and judge-made. The benefit of codification – uniform rules that apply on a national basis, the hallmark of the rest of the Federal Rules of Evidence – is lost. This

should not made even more cumbersome by a process proven to yield a higher number of disputes than resolutions.

D. Prioritization of Privilege Claims Reduces the Need for Judicial Intervention.

By prioritizing the most important issues, categorical and iterative logging procedures reduce the number of privilege claims at issue between the parties. Under the Proposed Amendments, parties (and non-parties) would be empowered to address procedures for challenging and resolving challenges to claims of privilege. Such procedures could include meet-and-confers to address samples or categories of claims in which the producing party can provide additional information regarding the factual and legal bases of the claims(s) without detailed document logging. Such flexible procedures are sure to reduce the number of claims subject to motions to compel and adjudication of claims requiring *in camera* review.

E. Amending the Rules Governing Privilege Logs Would Enhance Parties' and Courts' Ability to Identify Specious Claims.

Some defenders of document-by-document logging assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Setting aside that such conduct would violate the rules of ethics in every jurisdiction, the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. Flexible rules such as the Proposed Amendments would allow for new mechanisms for accountability, such as the use of sampling procedures and a challenge process,[39] although all stakeholders must recognize that identifying and describing privileged information is an inexact science and there must be room for good faith disputes and error.[40] It is also important to note that document-by-document logs have often been seen as inherently flawed no matter how well-intended the parties and counsel involved[41]

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creates a dramatic need for [guidance] that must exhaustively cover all the relevant judicial opinions for differences in approach, from the most nuanced to outright contradiction of each other.… [This guidance should be] as thorough an analysis of the case law as can be imagined to lead judges and lawyers through a difficult forest." Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court for the District of Columbia, *Forward* to 1 David M. Greenwald et al., *Testimonial Privilege*, at xxiii, xxiv (2015-2016 ed. 2015).

[39] The Facciola-Redgrave Framework, *supra* note 7, at 52-53.

[40] *See, e.g., Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of the United States*, 406 F.3d 867, 878 (7th Cir. 2005) (reversing district court's imposition of discovery sanctions based on the magistrate judge's determination that a significant number of sampled documents on defendant's log were not privileged and stating that "[defendant] was sanctioned for having too many good-faith differences of opinion with the magistrate judge. That is unacceptable. Simply having a good-faith difference of opinion is not sanctionable conduct."); *Ackner v. PNC Bank, Nat'l Ass'n*, No. 16-CV-81648, 2017 WL 1383950, at *3 (S.D. Fla. Apr. 12, 2017) ("[A]s there has been a good faith dispute [over privileged documents] . . . an award of costs and attorney's fees would be unjust."); *Rogers* at *3 ("[B]ecause Defendants put forth a cogent argument, supported by caselaw, that the [relevant document] was protected by the attorney-client privilege and work product doctrine, an award of costs and fees is inappropriate.").

[41] *See, e.g., Victor Stanley, Inc.*, 250 F.R.D. at 264-65 (noting limitations and challenges to privilege logs). *See also* The Facciola-Redgrave Framework, *supra* note 7, at 19 ("The volume of information produced by electronic

F. Amending the Rules Would Provide an Opportunity to Include a Helpful Cross-Reference to Federal Rules of Evidence 502(d) and 502(e).

Rule 502 of the Federal Rules of Evidence is one of the most beneficial yet least used tools for an improved privilege log process because it protects all parties from inadvertent waivers. One of the main drivers for the rule's adoption was the recognition that "the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information."[42] Unfortunately, many observers have recognized that the rule is underutilized in practice.[43] An explicit cross-reference to FRE 502, such as that included in the Proposed Amendments, would improve the handling of privilege log issues by increasing awareness among practitioners and providing an important roadmap for its use.

V. CONCLUSION

Rules 26(b)(5)(A) and 45(e)(2) establish a *de facto* default obligation to prepare document-by-document privilege logs. Notwithstanding the 1993 Committee Note suggesting that other

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discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure."). Similarly, any process must recognize that the obligation to protect client confidences necessarily and typically yields initially conservative calls and over-inclusion of documents in the privilege net in large document productions *Cf. American Nat. Bank and Trust Co. of Chicago*, 406 F.3d at 878-79 (Because privileged attorney-client communications are "worthy of maximum legal protection, it is "expected that clients and their attorneys will zealously protect documents believed, in good faith, to be within the scope of the privilege.") (internal quotation omitted).

[42] U.S. Judicial Conference's Letter to Congress on Evidence Rule 502 (Sept. 26, 2007). *See also* A BILL TO AMEND THE FEDERAL RULES OF EVIDENCE TO ADDRESS THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, U.S. Rep. No. 110-264, at 2–3 (Feb. 25, 2008):

> In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

[43] A 2010 survey of federal magistrate judges found that "[a]lmost 6 in 10 respondents…indicated that the parties rarely or never employ FRE 502(d)." Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure, 11 SEDONA CONF. J. 201, 212 (Fall 2010). This level of awareness may not have changed much in the intervening years: "Despite the obvious benefits of agreeing to a Rule 502 order, I have found that the bar in general is largely uninformed about the rule and what it offers. So, to avoid problems down the line, the standard discovery order that I issue contains a Fed. R. Evid. 502(d) order that protects them automatically from inadvertent waiver of these important protections." Hon. Paul W. Grimm, District Judge, U.S. District Court for the District of Maryland, *Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases*. 51 Akron L. Rev. 721, 739 (2017). *See also Arconic Inc. v. Novelis Inc.*, No. 17-1434, 2019 WL 911417 at *3 (W.D. Pa. Feb. 26, 2019) for a similar example of 'making the horse drink' approach ("[t]he court's model Rule 26(f) report adopts Rule 502(d) as the default standard and provides a model order in Local Rule 16.1. An overwhelming majority of parties in civil cases in this district choose the default standard and a Rule 502(d) order is entered.").

procedures might be employed, this entrenched default remains by far the common expectation and practice. Local districts have embraced alternatives resulting in a "swiss-cheese" approach to privilege logging that defies the Rule's goal of uniformity. The status quo puts substantial burdens on the parties, non-parties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. In light of the 2015 FRCP amendments and consistent with the spirit of those amendments, the time is ripe for the Committee to replace the default logging obligation with a modern approach such as the Proposed Amendments that encourages the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoiding later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable of the parties [and the court] to assess the claim[s]."

Attachment A: Proposed Amendment to Rule 26(b)(5)

(5) *Claiming Privilege or Protecting Trial-Preparation Materials*

(A) *Information Withheld*: When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party, unless otherwise agreed to by the parties or ordered by the court, must:

(i) expressly make the claim; and
(ii) furnish information, without revealing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter, to enable other parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

Attachment B: Proposed Amendment to Rule 45(e)(2)

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material, unless otherwise agreed to or ordered by the court, must:

(i) expressly make the claim; and

(ii) furnish information, without disclosing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter that will enable the parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

If the person and the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

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Excerpt from April 2008 Minutes

Professor Gensler has suggested that the Committee investigate the advisability of adopting a national rule on privilege logs. Practice under Rule 26(b)(5)(A) is now governed in large part by local rules. That may not be a good thing. Loss of privilege for failure to comply with one local rule can easily mean loss of the privilege for all purposes. The national rule sends no message, or perhaps mixed messages, on questions like the time to provide the privilege log. It would be useful to learn whether practitioners find problems in this area. One Committee member observed that the subject at least deserves consideration. Privilege-log practice is intertwined with e-discovery, which has effected a sea change in dealing with privilege and privilege logs. Compiling privilege logs is the biggest expense in discovery today; it can easily run up to a million dollars in a complex case. A second member concurred — privilege logs are a source of huge expense, satellite litigation, and traps for the unwary. It was agreed that Professor Gensler will prepare a memorandum to support further inquiry.

It was further suggested that Professor Marcus should carry on his exploration of the ways in which the e-discovery amendments are working out with an eye to determining whether there are problems that need to be fixed. Professor Marcus pointed out that evaluating the development of e-discovery practice will be a difficult task. "Big bucks are involved." One widely quoted estimate is that annual revenues for consultants on e-discovery compliance will soon reach four billion dollars. Privilege logs are an example. The rule has stood unchanged since 1993. Some vendors of e-discovery products say that it is easy to compile a log if only you buy their product. It is difficult to get reliable, dispassionate advice on e-discovery in general. It may be equally difficult if the focus is narrowed to privilege logs. "Looking hard may be a good thing, but it will be hard to do anything."

The perspective shifted a few degrees with the observation that it is a good idea to begin looking at these topics. But the "shifting sands" problem is always present. Evidence Rule 502 is at least well on the way to adoption by Congress. One impact may be that the resulting protection against inadvertent privilege waiver will increase the pressure to reply promptly to discovery requests, affecting the time to prepare a privilege log. Technology changes, whether in hard- or software, could change still further both practice and the problems of practice. There is no question that the time will come when it is important to look hard at all aspects of e-discovery. The first challenge will be to know when

the time has come. It may be too soon now. Dissatisfactions are bound to arise now, but the need will be for a systematic inquiry. The "when" and "how" of the inquiry remain uncertain. It may be premature to designate a Subcommittee until the Committee has a good view of the landscape as a whole.

A Committee member agreed that the passage of time will be beneficial. The e-discovery rules have been good. Their intersection with things like privilege logs has had a material effect on the economics of law practice. Large firms now have "staff lawyers" or "contract lawyers" who work full time reviewing documents for privilege and responsiveness. The expense is substantial.

It is an unusual dynamic. Another Committee member noted that consulting firms are growing up. They offer services directly to general counsel, at a stated price per page. These consulting firms may take the place of staff lawyers or contract lawyers hired by law firms.

It was noted that the American College of Trial Lawyers is funding research into the actual cost of discovery. The project is just beginning, but it may provide information about the cost of privilege logs.

Thomas Willging noted that the Federal Judicial Center has "a pretty full workload," but might be able to assist a discovery project. The 1997 survey that supported earlier discovery amendments might provide a model.

APPENDIX
Excerpt from November 2008 Agenda Book

MEMORANDUM

To: The Honorable Mark Kravitz
Chair, Advisory Committee on Civil Rules

From: Steve Gensler

Date: October 13, 2008

Re: Issues Regarding Assertion of Privilege and Work-Product Protection

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Privileged information is not discoverable, even if relevant. Fed. R. Civ. P. 26(b)(1). The discovery rules also grant a rebuttable protection to material that qualifies for work-product protection under Rule 26(b)(3).

In 1993, Rule 26 was amended to add subdivision (b)(5). It requires parties withholding otherwise discoverable information on the basis of privilege or work-product to "expressly make the claim" and to describe the documents or information withheld in a manner that will allow others to scrutinize the claim (but without so much detail that the privilege or work-product protection is thereby waived by disclosure). Fed. R. Civ. P. 26(b)(5).[1]

In the ensuing 15 years, several questions have arisen regarding compliance with Rule 26(b)(5), including:

(1) What must be furnished in order to meet its requirements?;

(2) When must that material be furnished?; and

(3) What is the consequence of failing to timely furnish the required information?

Ultimately, it may be that only the second question would be profitably addressed by rule language. I provide background on all three below, however, in order to place the issues in context.

[1] In 2006, new subdivision (b)(5)(B) was added as part of the e-discovery package. It supplies a mechanism for parties to assert privilege or work-product protection *after* it has been produced. Fed. R. Civ. P. 26(b)(5)(B). This provision is not at issue here.

I. Background.

A. What Must Be Furnished to Meet the Requirements of Rule 26(b)(5)?

Rule 26(b)(5) requires the party claiming privilege or work-product protection to "*describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.*"

It does not expressly require a privilege log. Partly this is because privilege and work-product protection can apply to non-document communications. For example, it would not make sense for a party asserting a privilege objection at a deposition or in an interrogatory answer to do so via a privilege log. Moreover, the Advisory Committee notes to the 1993 amendment suggest a desire for flexibility to accommodate the varied circumstances in which a privilege or work-product protection issue might arise. For example, the manner of asserting privilege might reasonably differ depending on whether a party was withholding an entire document or supplying a document with slight redactions.

Nonetheless, it has become customary for litigants and courts to expect that parties will supply privilege logs when they withhold documents or ESI due to a claim of privilege or work-product protection. The friction point tends to be the level of detail required. Courts universally reject "naked" or "boilerplate" objections that supply no detail whatsoever. And courts increasingly are criticizing the insufficiency of the details that are provided. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263-267 (D. Md. 2008).

It is important to note that, ultimately, there are two separate questions concerning the specificity of privilege and work-product claims. The first is the level of detail required for the withholding party to make the claim. That is clearly addressed by Rule 26(b)(5). The second is the level of proof required to sustain the claim if it is challenged (and the parties cannot work it out) and presented to the court either by way of a motion for protective order or a motion to compel production. That issue is not, I think, addressed by Rule 26(b)(5), which requires enough detail to "enable *other parties* to assess the claim," but which does not speak to the burden of sustaining the claim before a court.

B. When Must the Party Make the Claim of Privilege or Work-Product Protection and Furnish the Information Required by Rule 26(b)(5)?

Rule 26(b)(5) does not expressly state when the party claiming privilege or work-product protection must either: (1) make its claim; or (2) supply the required information.

Courts consistently hold that the claim must be made at the time for responding to the discovery request in question. First, courts generally view this as implicit in Rule 26(b)(5). Second, courts point to timing provisions in other discovery rules. Under Rule 33, for example, all objections to interrogatories must be "stated with specificity" in the response. Fed. R. Civ. P. 33(b)(4). Similarly, Rule 34 requires a party responding to a document request to either state that inspection will be permitted or to "state an objection, including the reasons." Fed. R. Civ. P. 34(b)(2)(B). Courts generally read these provisions as collectively requiring parties to at least assert their claims of privilege or work-product protection at the time the discovery response is due.

The more complicated question is when the detailed information – generally, the privilege log – is due. Some courts have held that, absent a court order or party agreement, the privilege log is due when the discovery response is due. *See, e.g.*, *Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 at *1 (S.D. N.Y. 2006) (applying Local Civil Rule 26.2(c)[2]). Other courts hold that the withholding party may supply the detailed information within a reasonable time, thereby "perfecting" the claim of privilege. The Ninth Circuit is the only circuit to have addressed this issue. It adopts the "reasonable time" test but picks the discovery response due date as the default reasonable time. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); s*ee also Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 695 (M.D. Fla. 2005) (following Burlington Northern).

There are substantial practical issues here. In large document productions, it is probably impossible to produce a privilege log within the default 30-day response period. Moreover, it makes sense to allow parties to claim privilege initially – and get on with the production of the unobjected to materials – and then follow up with the supporting details later.

C. What Is the Consequence of Failing to Make or Perfect a Timely and Sufficient Claim of Privilege or Work-Product Protection?

Rule 26(b)(5) says nothing about the consequence of failing to make or perfect a timely and sufficient claim of privilege or work-product protection. The Advisory Committee notes to the 1993 amendment suggest that waiver might result, but do so in passing and without elaboration.

[2] Local Civil Rule 26.2(c) provides: "Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, [a privilege log] shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court."

The specific discovery rules present a mixed bag. Rule 33 states that "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4). In contrast, Rule 34 does not mention waiver.[3]

For the most part, the courts recognize waiver as a possible but not automatic consequence. Rather, the courts look at many factors to determine whether waiver is appropriate under the circumstances, including how much detail was provided in a timely fashion and whether the document production was particularly difficult in its magnitude or otherwise. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 902 F. Supp. 1356, 1360-65 (D. Kan. 1995) (extensive discussion of waiver factors).

D. Subpoenas.

Rule 45(d)(2) is parallel to Rule 26(b)(5). It contains its own timing provisions which, unfortunately, have caused confusion in the courts.

Under Rule 45(c)(2)(B), a party may respond to a subpoena duces tecum with objections. The objections must be served within 14 days. Rule 45 does not expressly address whether a privilege log must be filed within that 14-day period. One district court has held that the privilege log may be provided within a reasonable period but has selected the 14-day deadline is the default deadline for what is reasonable. *See Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 698 (M.D. Fla. 2005)

The situation is further complicated by a possible ambiguity in Rule 45. Under Rule 45(c)(3), a party may move to quash a subpoena. The motion to quash must be filed before the time to comply with the subpoena. Oftentimes, the return date on the subpoena is longer than 14 days. Many courts hold that the failure to make objections within 14 days waives the ability to rely on those objections in a motion to quash. Other courts hold that a party may either object under Rule 45(c)(2)(B) or move to quash under Rule 45(c)(3). The research I have done so far has not identified any cases discussing when a party who moves to quash on the basis of privilege or work-product protection must supply a privilege log.

II. Topics for Consideration.

Neither the level of detail required nor waiver seem to be good candidates for new rules. Given the myriad contexts in which claims of privilege and work-product protection arise, it is unlikely that a new rule could express in general language any meaningful guidance about what details are required for any particular claim. Waiver

[3] Rule 32 provides that "correctable" errors in deposition questions are waived if not made at that time. Fed. R. Civ. P. 32(d)(3)(B).

also seems to be a topic that will defy general expression, and it is a topic further complicated by questions of rulemaking authority.

New rule language clarifying when the details supporting a claim of privilege must be provided seems more promising, at least at this stage of the inquiry. The existing rules do seem to be delinquent in not supplying a coordinated answer to the timing question. In particular, it would seem helpful for Rule 26(b)(5) and Rule 34 to provide a clear signal to parties about when to furnish the detailed information justifying their claims of privilege. The need for clear guidance is highlighted by the possibility of waiver should the court later conclude that the claim was not sufficiently justified in a timely fashion.

Whether we can identify rule language that would improve upon what the courts have been doing is perhaps a different question. While there might be any number of possible ways to clarify the due date, I will mention two here.

One option would be to require that the privilege log be supplied within the time required to respond to the discovery request absent a court order or party agreement. This approach would assume that, in most cases, the preparation of the privilege log is not so difficult that it cannot be provided with the discovery response. And in those cases where it is impractical to do so, the party will know that it needs to either work out the due date with the opposing party or obtain a court order setting a later due date. This appears to be the approach adopted by the Local Civil Rules of the Southern District of New York.

Another option would be to expressly allow the privilege log to be supplied within a reasonable time of the production. Courts and parties would then be left to determine what was reasonable under the circumstances of each case.

In any event, articulating a clear deadline for submitting privilege logs or their equivalent would not intrude into the waiver arena. Courts would remain free to determine whether the failure to meet the deadline warrants a finding of waiver under the circumstances.

If we were to propose a new rule setting a deadline applicable to claims under Rule 26(b)(5), it would make sense to propose a parallel change to Rule 45.

APPENDIX

Excerpt from November 2008 Agenda Book

MEMORANDUM

To: Steve Gensler
CC: Mark Kravitz, Ed Cooper
From: Rick Marcus
Date: Oct. 11, 2008
Re: Rule 26(b)(5)(A)

This memo addresses the ideas you raise in your draft memo for the Advisory Committee. I thought it would be worthwhile to write down my reactions should we move forward -- educated by a discussion with the Advisory Committee -- on how (and whether) this rule might be revised. And I thought you might find them of interest.

Your message prompted me to go back and re-read § 2016.1 of vol. 8 of Fed. Prac. & Pro., which I originally wrote more than 15 years ago before Rule 26(b)(5)(A) went into effect. It actually reads fairly well, and foresees some of the issues to be resolved. I guess the question now is whether, with 15 years experience, it's come time to resolve those issues by rule in light of diverse judicial responses. At least the Ninth Circuit regards those rulings as quite diverse:

> A survey of district court discovery rulings reveals a very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit. In general, a strict per se waiver rule and a permissive toleration of boilerplate assertions of privilege both represent minority ends of the spectrum.

Burlington Northern Ry. Co. v. U.S. District Court, 408 F.3d 1142, 1148 (9th Cir. 2005), cert. denied, 126 S.Ct. 428.

Since 1993, it appears about 100 reported cases have dealt with the rule, but the number of unreported cases is probably larger. You mention that criticisms of the lack of specifics in the rule have increased, but it seems to me that Judge Grimm's citations in the *Victor Stanley* case include quite a few that predate the rule. Maybe this is just a longstanding problem.

To my mind, the background for this discussion includes a number of things, and I'll mention several of them. The starting point for the rulemaking response to this problem was the 1991 amendment of Rule 45, which produced a requirement that was then added to Rule 26(b) in 1993. Before that, "boilerplate" privilege objections would be all that would normally be provided about what was held back on grounds of privilege. It might be worthwhile to ask whether anyone on the Advisory Committee thinks going back to that regime would be desirable. If not, it is important to keep in mind why the current regime is preferable. For some background, see Cochran, Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims, 13 Rev. Litig. 219 (1994).

My recollection is that during the April meeting we heard some remarkable estimates of the cost of preparing a privilege log -- $1 million in cases of the dimensions some of our lawyer members handle. I wonder how much of that cost is due to the provisions of Rule 26(b)(5)(A). I recall a number of discussions of privilege waiver a decade and more ago during which some lawyer members would decry the idea of a "quick peek" whether or not that would work a waiver because "I'm not going to let the other side look at anything until I look at it, and I'm not going to let the other side look at anything I have a legal right to withhold."

Those discussions from long ago cause me to wonder whether the advent of Rule 26(b)(5)(A) really changed things so much. It could be that, without the rule, producing parties had to spend a lot of time and money reviewing the documents for responsiveness and privilege and culling the privileged ones before production. I imagine they had to do something to keep track of what they held back in case the matter came up later, and (presumably) keep track of why they believed these things were privileged. That sounds a lot like what is necessary to produce a privilege log. For a description of such a review in one case from the 1970s, see Transamerica Computer Co. v. International Bus. Mach. Corp., 573 F.3d 646, 649 (9th Cir. 1978).

After all that work was done, I'm not sure how much more work would have been necessary to prepare a privilege log, and it is quite unclear to me how that work could add up to $1 million in costs. I suspect that the estimates we heard about included activities parties felt they had to do before 1993.

But before 1993, it is probably true that challenges to privilege claims were less frequent. Rule 26(b)(5)(A) makes it a lot clearer what has been held back than was true before. And I suspect that obtaining the kind of information Rule 26(b)(5)(A) requires be disclosed through formal discovery was very difficult. So it was probably easier back then to make unjustified claims for privilege and withhold more. It would be interesting (but not possible) to know whether the opaqueness of discovery then regarding what was held back on grounds of privilege led to a larger number of unjustified assertions of privilege. It does seem clear that the rulemakers then regarded the existing practice as inadequate.

It may be that in the E-Discovery age document review has become so much more costly to do everything that the previous attitude that “I won't let the other side see something until I've looked at it” has passed from the scene. But if that's so, it would seem to me that, given the passage of Fed. R. Evid. 502, the possibility of “sneak peek” agreements could reduce that cost a lot by permitting the producing party to limit its attention to the things the other side says it really wants. Maybe the digital age has made the “sneak peek” irrelevant because there isn't a “peek” -- you just provide CDs with all the stuff to the other side. Otherwise, I would think one value of the sneak peek would be to reduce privilege review costs.

In any event, I would think that the digital age also could conceivably reduce some costs of complying with Rule 26(b)(5)(A). Indeed, I have attended E-Discovery events where vendors claim to have programs that can reliably identify privileged materials. I would think that relatively expeditious methods could be developed to produce some log-like listing for those identified materials, seemingly minimizing the costs of complying with Rule 26(b)(5)(A).

The privilege log idea was borrowed from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, where it was developed to require agencies responding to FOIA requests to reveal what they had not turned over on claims that they could withhold that material. I wonder whether that FOIA requirement has remained viable in that context as we arrived at the digital age.

So it seems to me there is a lot to ponder here, and also that the variety of situations in which privilege logs are prepared makes designing a rule that provides a lot of direction quite difficult. With that background, a few more specific reactions:

(1) What must be furnished: The rule is, of course, quite delphic. It requires that the "nature" of the material be described "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." The 1993 Committee Note acknowledged that "[t]he rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection." It also notes that the wisdom of requiring specifics about each item depends on how much material is involved.

As you note, there are two issues -- the level of detail needed in the log, and the level of proof to back up the claim if challenged. It seems to me that we hope that the first issue is the only one that need be considered for most withheld material; ordinarily the other side should simply back off because the propriety of the privilege claim is clear enough. That's in a way consistent with our inclusion of Rule 26(b)(5)(B), which says that a privilege claim made after production requires all parties to return or quarantine the material unless they challenge the claim. Again, the hope is that there usually won't be a challenge, and that this will be the end of the matter.

The second issue is probably not within our Committee's jurisdiction so far as claims of privilege are concerned. Dealing with the question how to evaluate a crime/fraud challenge to the attorney-client privilege, the Court in United States v. Zolin, 491 U.S. 554 (1989), invoked Fed. R. Evid. 501 and "the developing federal common law of evidentiary privileges." Id. at 574. Perhaps our rulemaking on this topic would be appropriate as a regulation of discovery rather than privilege, but it seems initially to me that this argument is probably weaker on this question (the degree of proof needed) than on the inadvertent waiver issues new Rule 502 addresses.

Putting that aside, I think that some flexibility or slippage is probably not a bad thing here. Compared to what was true before 1993, the privilege log seems a step forward even if sometimes too general. Insisting that it be very detailed in all cases would probably drive up the costs I discussed above, but not be useful if it's true most assertions are not challenged right now. And however we tighten up the required showing, I doubt we could cut off the possibility that a court called upon to make a determination when there is a challenge to a privilege claim would not ask for more. In camera review can be a big burden for a court, and it is probably going to lean on the party whose objections have made that task necessary to provide all the help it can.

So I suspect that the most we can do is what we have done -- to call for enough information to "enable other parties to assess the claim." Once the parties do that and push forward, I think our Committee may well be out of the ball game in terms of devising rules for handling the privilege claim itself.

(2) Timing for providing the log: On one level, you could argue that the rule does include a timing provision, because it says specifics must be provided "[w]hen a party withholds information" on grounds of privilege. That's probably fairly easy with depositions and interrogatories. In a deposition, that happens when the question is objected to and the witness's lawyer (as still permitted by Rule 30) instructs the witness not to answer. Until 1993 (i.e., back in the old days when I was a lawyer), that was followed by a number of questions from the lawyer taking the deposition to probe the assertion of privilege. Perhaps that has changed, and nowadays in depositions the witness's lawyer not only instructs the witness not to answer but also proceeds and volunteers the information that backs up the privilege claim. If so, I wouldn't be surprised if the other side nevertheless asks the witness about these things anyway. With the interrogatory response, the time to say what you are not revealing is presumably when you provide the answer.

With Rule 34 requests, however, things are a good deal more complicated. It seems to me that parties may often provide their Rule 34(b)(2) response a considerable time before they provide the actual documents. With electronically stored information, indeed, our recent amendments require that sequence, because they say that the responding party must declare what form it intends to use for electronically stored information before producing the information. The idea is to permit the other side to object and go to the court before actual production. I suspect that it is often true that the Rule 34(b) response comes in a long time before the actual production occurs. One reason for this time lag is that during that time lag the actual review of documents for responsiveness and privilege occurs. Taking the $1 million figure for preparation of a privilege log that we have heard, I can't see how that kind of cost could be generated within the 30 days now allowed for the Rule 34(b) request. (Maybe that shows I'm out of touch with today's billing rates.)

So my suspicion is that, for a significant number of cases, the Rule 34(b) response comes in well before the actual production. Indeed (besides the question of form for electronically stored information), there may be a considerable advantage in getting any global disputes about what will be produced that can be resolved on the basis of the Rule 34(b) response out of the way before the document gathering is commenced or fully done. If that's right, a rule saying the log has to be done at the same time is probably not a good idea.

The alternative of saying the log should be provided a reasonable time after the Rule 34(b) response is probably much better, but I'm not sure how much that adds to where the courts probably are now. In some cases, a reasonable time may be no time. If only 100 pages of material are involved, why should it take long to pull the three privileged documents and to provide the specifics about them that Rule 26(b)(5)(A) requires? With a terabyte of electronically stored information, things are obviously different. So I approach this topic with diffidence.

(3) Consequences of noncompliance: My thinking is that Rule 37 is the place to look for consequences of noncompliance, and that in general Rule 37(b) should be the resource. My take back in 1993 was that some cases seemed too harsh even then in finding waivers due to failure to provide a log. On one level, those most sensitive to the limitations of 28 U.S.C. § 2074(b) could say that the addition of 26(b)(5)(A) in 1993 raised issues of rulemaking power because they added a requirement that could, if disobeyed, lead to loss of privilege protection. I don't think anyone has gone that far, and suspect that whatever we might do now would not magnify the risk of waiver. So the rulemaking power issue seems to me a bit tangential.

But that does not explain what we could offer that would improve on the multifactor attitudes seemingly displayed by cases under the current rule. Unless the responding party was really flaunting its obligations, I suspect that courts usually say the main consequence of failure initially to satisfy the log requirements is to supplement the log with the needed information. And that strikes me as a reasonable response.

(4) Subpoenas: Whatever the arguments for an understanding attitude toward responding parties with regard to timing and contents of a privilege log, and the consequences of failure to do things right, it seems to me that we should be more accommodating toward those nonparties served with subpoenas.

Maybe a starting point here would be to ask whether the addition of a log requirement to Rule 45 in 1991 was a mistake. Probably the answer is that nonparties are, if anything, more likely to make overbroad claims of privilege, and that the log requirement is therefore important.

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Excerpt from November 2008 Minutes

Discovery Privilege Logs

At the April meeting Professor Gensler observed that the cases show confusion about several aspects of privilege log practice, and suggested that the Committee might want to explore the possible opportunities to address one or more troubling issues. The practicing lawyers agreed that problems do arise, but were uncertain whether there is much opportunity to provide solutions by rule provisions.

Professor Gensler volunteered to explore the matter and report to the Committee. Judge Kravitz thanked him for providing a terrific memorandum to launch the topic. Professor Gensler began by noting that "anxiety and frustration are out there," anxiety arising from uncertainty about the mechanics of complying with Rule 26(b)(5)(A) requirements and frustration at the expense. Most of the expense seems to arise from screening documents for privilege, work product, and other grounds for protection. It is not clear that rules changes can address this problem, although new Evidence Rule 502 may reduce fears about inadvertent privilege waiver.

The questions of mechanics begin with the need to say what is being withheld from discovery and why. At first blush, these questions of how to comply appear to begin with the seeming gap in the failure of Rule 26(b)(5)(A) even to refer to a privilege log. But it seems clear that the manner of asserting privilege will depend on the mode of discovery. Assertions of privilege at deposition will be made on the spot. With Rule 34 requests, responses will vary with the circumstances. Withholding a single document is quite different from withholding many documents; producing part of a document in redacted form is different from withholding the entire document. There does not seem to be much room to improve on the directions now provided by the rule.

The question of timing is less certain. It seems clear that the claim of privilege must be made when responding to the discovery request. It is not as clear when the elements required by Rule 26(b)(5)(A) must be provided. This uncertainty seems to arise most persistently with document production. The possible choices include insistence that the required information be provided at the time of responding to the document request; or that it be provided at the time of producing; or that it be provided within a reasonable time from the response or from the production.

The consequences of failing to comply properly or timely in making the assertion or providing the log also are uncertain. The

1993 Committee Note refers to Rule 37(b)(2) sanctions, and adds that withholding materials without the required notice "may be viewed as a waiver of the privilege or protection." In practice, courts seem to take a flexible approach. The case law tends to say that waiver is possible, but courts consider many factors. The usual result is a stern direction to comply, but waiver may be found. Here too it is unclear whether any rule revisions would provide for anything different than courts are doing now.

That leaves the possibility of amending the rule to provide clear directions as to timing. The most likely approach would be to establish a clear provision subject to alteration by agreement of the parties or court order. Similar provisions could be added to Rule 45, subject to the complication that Rule 45 remains obscure on the opportunity to present a belated — untimely — objection in the guise of a motion to quash.

Discussion began with the observation that the District of Connecticut has a local rule addressing the timing requirements. There do not seem to be any problems.

A practitioner noted that in the last couple of years clients have started to "push back hard" on the costs of screening documents. Some clients take the chore inside. It may be divided up among contract attorneys rather than firm associates, or farmed out to independent screening firms. Vendors have become insistent that electronic screening software can do the job at much lower cost— the software may have developed to a point about equal to screening by a first-year associate. The cost of screening is being reduced. As for privilege logs themselves, the rule itself seems OK. The parties often reach informal agreements. "You want it before the depositions. Usually it is the last thing produced before depositions." One reason for delay is that documents that on their face seem privileged may be unprotected because they have been circulated outside the privilege circle. It may be that nonparties deserve greater consideration and protection than parties, but it would be better to put off consideration for a year.

Another practitioner also noted that there are software programs for identifying privileged documents. At least one in-house lawyer for a client believes that software can screen at least as well as people. Screening takes as much time for a lawyer as it does for a judge, and the task is expanded across far more documents than will be logged or disputed after being logged. In most big document cases it is possible to work out serial production of documents and serial production of privilege logs. The great fear driving the huge amounts of time is subject-matter waiver. As massive volumes of documents come to be involved,

correspondingly enormous amounts of time have been required. And it could be even worse — Georgia state-court rules, for example, require an affidavit to support every claim of privilege. All of this can engender boilerplate objections to the log, then review by a special master or magistrate judge, further review by a district judge, and then collateral-order appeals. But there is not a big body of law on abuse of privilege claims.

It was suggested that one reason to keep this topic on the agenda is to see what consequences flow from new Evidence Rule 502. Lawyers are beginning to craft Rule 502 agreements to protect discovery responses.

It was recalled that in the 1980s there was a move to expedite the process by agreeing to a "quick peek" at less sensitive documents without waiver. The next step would be a no-waiver quick peek at sensitive documents, but on an "eyes only" basis. "That got slapped down." Perhaps that can be revived.

Review by outside vendors was noted again. They can do a first review of documents identified by a software program. "They will give you a price per page." But there are reasons to be reluctant. "I cannot imagine relying on a vendor for the final review." A judge noted that he had recently had a hearing in a case in which the software screening failed miserably — it failed to identify a thousand privileged documents.

Another judge noted that party agreements work in big, sophisticated cases. But it would be useful to have rule guidance for smaller scale, less sophisticated litigation.

Still another judge observed that the problems that arise are not those of timing but of failure to produce a log at all. Yet another judge said that he does not encounter log problems.

An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents. Consider a case that claims an ongoing conspiracy: is counsel obliged to create a log for every letter written to the client while the litigation carries on?

A lawyer member suggested that the only default time that would not be unreasonably early would be "within a reasonable time."

Occasional references to Rule 33 interrogatory answers were picked up at the close of the discussion. Those who spoke agreed

that privilege logs are not used for interrogatory answers —the answers simply provide nonprivileged information.

The discussion concluded by agreeing that the Rule 45 privilege log questions would be among those considered by the Rule 45 working group, and that the remaining questions would be carried forward on the agenda.

TAB 18

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RULE 45: NATIONWIDE SUBPOENA SERVICE STATUTES

Suggestion 20-CV-H

This suggestion focuses on the interaction of the 2013 amendments to Rule 45 and the provision of the False Claims Act (FCA), 31 U.S.C. § 3731(a), that: "A subpoena requiring the attendance of a witness at trial or hearing conducted under section 3730 of this title may be served at any place in the United States."

Rule 45 was amended in a number of ways effective December 1, 2013, as described in more detail below. This submission urges that it inadvertently undercut § 3731(a) and some other statutes. On its face, this seems curious because, as amended in 2013, Rule 45(b)(1) provides that "A subpoena may be served at any place within the United States." So it seems to say the same thing as the FCA. But it may have worked a change, though the evidence of that is limited.

The 2013 Amendments

The Advisory Committee undertook a long and careful review of Rule 45 under the leadership of Judge David Campbell, who described the existing rule as a "three ring circus" that was difficult to use. To serve a subpoena, one had to have it issued by the district court in the district where it would be served, and to have it served in that district. With witnesses who did not move around much, that might not present too much difficulty, but if the party seeking to serve the subpoena did not know for sure where to locate the witness, that could present difficulties in getting a subpoena from the right district and getting it served in that district.

In addition, there were multiple provisions, strewn throughout the rule, on where compliance could be required. So that could complicate the challenge for the attorney serving the subpoena, who not only had to get a subpoena from the correct district court and have it served within the district, but also make sure that the place of compliance conformed to Rule 45's provisions. At least one of those required checking state law for the state in which the federal court sat, for if the state courts of that state could require state-wide compliance, then so could a federal court subpoena, even if the other provisions of Rule 45 did not so authorize.

To uncomplicate Rule 45, the amendments changed the rule's requirements to remove the need to get a subpoena issued from the district where it was to be served, and instead the forum court could issue a subpoena which, under Rule 45(b)(1), can now be served anywhere in the United States. The various place-of-compliance provisions were relocated to present Rule 45(c)(1), which provides:

A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

Thus, under current Rule 45(c)(1)(B) the former need to consult state law no longer applies.

Regarding place of compliance, the amendments did resolve a conflict among the courts about whether a subpoena could compel the attendance at trial of a party witness not within the geographic limits prescribed by the rule. As explained in the committee note:

> Because Rule 45(c) directs that compliance may be commanded only as it provides, these amendments resolve a split in interpreting Rule 45's provisions for subpoenaing parties and party officers. *Compare In re Vioxx Products Litigation*, 438 F. Supp.2d 664 (E.D. La. 2006) (finding authority to compel a party officer from New Jersey to testify at trial in New Orleans), with *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state). Rule 45(c)(1)(A) does not authorize a subpoena for trial to require a party or party officer to travel more than 100 miles unless the party or party officer resides, is employed, or regularly transacts business in person in the state.

As noted below, one of the pre-amendment cases cited in the submission appears to address the idea adopted in the *Vioxx* case that an employee of a corporation can be compelled to attend a distant trial by a subpoena served on the employer. But that court did not embrace the idea.

Before amendment in 2013, Rule 45(b)(2)(D) authorized *service* "at any place . . . that the court authorizes on motion and for good cause, if a federal statute so provides." Since Rule 45(b)(2) now says that "[a] subpoena may be served at any place within the United States," that reference to federal statutory authority was not carried forward.

The 2013 Rule 45 amendments did quite a few other things, including introducing the possibility under Rule 45(f) of a transfer of a subpoena-related motion from the district in which compliance was required consistent with Rule 45(c) to the forum court. That provision and several other provisions attracted considerable commentary, including written comments from:

> The Department of Justice
> The American College of Trail Lawyers, Federal Civil Procedure Committee
> 36 "leadership" representatives of the ABA Section of Litigation
> The Federal Magistrate Judges' Association
> The State Bar of Michigan, U.S. Courts Committee
> The New York State Bar Ass'n Commercial and Federal Litigation Section
> The U.S. Equal Employment Opportunity Commission
> The State Bar of California Committee on Federal Courts
> The Litigation Section of the Los Angeles County Bar Ass'n
> The Defense Research Institute
> The Lawyers for Civil Justice

No comment raised a concern about the effect of the amendments on statutory provisions for nationwide compliance with subpoenas in FCA cases.

The current submission seeks to restore the provisions of former Rule 45(b)(2)(D) by adding a new (c) to Rule 45(c)(1) as follows:

> (c) at any other place that the court authorizes on motion and for good cause, if a federal statute so provides.

FCA Subpoena Background

On April 6, 1978, Assistant Attorney General Patricia Wald wrote to the Speaker of the House, transmitting a proposed bill that she said would solve a serious problem for the Government because: "Under Rule 45(e)(1) [of the pre-2013 rule] the power of the district courts to issue trial subpoenas is limited to the confines of the district." She offered examples, including fraudulent claims for FHA mortgage insurance claims in Detroit. Under the FCA, proceedings would have to be brought where the defendants are "found." That presented the Department with problems:

> Many of those brokers and salesmen [involved in the fraudulent transactions] have moved to California, or other jurisdictions far removed from the Eastern District of Michigan. Because of the 100-mile limitation on effective service under Rule 45(e)(1), Federal Rules of Civil Procedure, we are unable to subpoena essential witnesses from Detroit.

Congress passed the proposed bill, and the provision has been relocated to § 3731(a), quoted above.

Case Law

There are not a lot of cases on whether the 2013 amendment caused a problem, but the submission says that the amendment has caused a conflict in the case law and that "the conflict has also caused confusion among current U.S. Attorneys practicing in the Civil Division." As noted below, a report back from DOJ might be a good way to gauge the importance of this issue, which DOJ did not point up in 2011-12.

What seems to be the most thoughtful and leading case is *U.S. v. Wyeth*, 2015 WL 8024407 (D. Mass. Dec. 4, 2015), in which the court in an FCA case held that the statutory mandate for nationwide compliance applied despite the 2013 amendments to Rule 45. The court noted some other statutes that might present similar issues: 15 U.S.C. § 23 (antitrust suits); 38 U.S.C. § 1984(c) (disputes involving veterans' insurance); 18 U.S.C. § 1965(c) (RICO). It also noted some competing case law authority that is discussed below in the memorandum. Here is the court's reasoning:

> For each of these parallel statutes, not only service but also nationwide enforcement of subpoenas is generally understood to be authorized. This is so even though they speak only of "service" or "issuing" of a subpoena. While it can be dangerous to assume that language in one part of the United States Code has the same effect in every statute, it is clear that language like that of § 3731(a) not only *can* authorize both nationwide service and nationwide enforcement of a subpoena, but usually does. These parallel provisions show that the text of § 3731(a), although it refers only to service of the subpoena, does not compel the interpretation advanced in *Siemens* [discussed below]; rather, the kind of language used in § 3731(a) generally allows nationwide service and enforcement of subpoenas.
>
> On this textual basis alone, I would be likely to find, with the great majority of courts, that the False Claims Act allows a court to compel testimony from witnesses from anywhere in the United States. Any remaining ambiguity is resolved by the legislative history of § 3731(a). The legislative history of § 3731(a) supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in Fed. R. Civ. P. 45[(c)]. Section 3731(a) was added to the False Claims Act in 1978, under the title "An Act to provide for nationwide service of subpoenas in all suits involving the False Claims Act." The House Committee report makes clear that the purpose of this legislation, which came at the recommendation of the Department of Justice, was to

> facilitate the prosecution of False Claims Act cases by ensuring that witnesses from across the country could be brought into court by subpoenas. The same report emphasized that the language of § 3731(a) was modeled after Federal Rule of Criminal Procedure 17(e), which grants a nationwide subpoena power in criminal matters. The clear intent and effect of § 3731(a) is to authorize courts to compel witness testimony nationwide.

Id. at *3-4.

Certainly the Supersession Clause would theoretically permit the 2013 Rule 45 amendment to supersede this statutory provision, but equally surely that was not intended, and Congress was not told that any supersession was in train.

The possibly contrary cases cited in the submission do not seem strongly to undermine this analysis. The one cited in the quotation above is from 2009, before the 2013 amendment to Rule 45 went into effect. In *U.S. v. Siemens AG*, 2009 WL 1657429 (D.V.I. June 12, 2009), defendant in a False Claims Act suit brought in the Virgin Islands moved to transfer to the Eastern District of Pennsylvania. In the course of granting the motion to transfer (not directly ruling on whether to require attendance at trial under the statute), the court dealt with the question whether witnesses located in the E.D. Pa. (where defendant's headquarters were located) could be compelled by subpoena to show up for trial in the Virgin Islands. Disagreeing with an E.D. Pa. decision, the court said that under Rule 45 "mere service of a trial or deposition subpoena does not confer the right to enforce such subpoena." This decision does not address the statutory argument made in the *Wyeth* case quoted above, and if the *Siemens* court's argument was right in 2009 the 2013 amendment did not change things. Indeed, Rule 45 said in 2009 what the submission recommends that it be amended to say again.

The other case is *Guenther v. Novartis Pharmaceutical Corp.*, 297 F.R.D. 659 (M.D. Fla., Aug. 16, 2013), also a pre-amendment case (the amendment became effective on Dec. 1, 2013). In that False Claims Act case, plaintiffs served subpoenas for trial testimony by two Novartis employees who resided and worked in New Jersey. They served Novartis's registered agent in Florida, not the employees in New Jersey (though after the 2013 amendment came into effect they could have served a subpoena from the Florida court in New Jersey under current Rule 45(b)(1)). Plaintiffs claimed that these two employees were officers of the company, which Novartis denied. It seems that the plaintiffs were urging an interpretation of Rule 45 like the one adopted in the *Vioxx* decision cited by the 2013 committee note quoted above, which the amendment rejected. Also rejecting that view of Rule 45, the court held that service of a subpoena on the company's registered agent in Florida did not require attendance at trial of two of the company's employees (or officers) who lived and worked in New Jersey. Instead, the then-existing 100 mile limit applied. There is no citation to § 3731(a)

in the decision, or any indication that the private plaintiffs invoked it as a statutory source of authority to subpoena the New Jersey witnesses for trial in Florida. Had they been relying on the statute, which already authorized nationwide service of subpoenas, plaintiffs would presumably have served the employees in New Jersey.

A Way Forward

It is uncertain whether the current state of the law has caused confusion among Assistant U.S. Attorneys. It is clear that DOJ did not emphasize any such concern in its comments on the 2013 Rule 45 amendments. But if this change has indeed caused a problem in FCA cases or in cases governed by statutes with similar provisions, serious consideration of an amendment along the lines proposed is in order. For the present, however, the question is whether there is a real problem.

May 22, 2020

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Proposed Amendment to Rule 45(c)(1) Regarding Subpoenas

Dear Mrs. Womeldorf:

We write to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 45(c)(1) regarding compliance with subpoenas.

Rule 45 governs the federal practice of issuing and responding to subpoenas. Specifically, Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. *See* Fed. R. Civ. P. 45(c)(1). We propose an amendment to reconcile a discrepancy that has arisen since Rule 45 was last amended in 2013. The 2013 Amendment was intended to "collect[ ] the various provisions on where compliance can be required and simplif[y] them." Fed. R. Civ. P. 45 Committee Note. Instead, the 2013 Amendment has led to confusion among federal courts with respect to compliance with nationwide subpoenas as authorized by specific federal statutes, such as the False Claims Act ("FCA"). The amendment proposed herein harmonizes federal statutes with the amended text of Rule 45(c)(1) by re-instituting language from the former Rule 45(b)(2)(D) that existed prior to 2013.

DISCUSSION

I. Proposed Amendment to Rule 45(c)(1)

We respectfully submit the following proposed amendment to Rule 45(c)(1) for the Committee's consideration[1]:

[1] We defer to the Committee to decide the optimal stylistic placement of our proposed amendment, either as a new provision inserted as Rule 45(c)(1)(B) or added to the end as Rule 45(c)(1)(C) as shown.

Rule 45. Subpoena

* * *

(c) Place of Compliance

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense~~.~~; or

(C) at any other place that the court authorizes on motion and for good cause, if a federal statute so provides.

Currently Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. This rule is in conflict with federal statutes that authorize nationwide subpoena compliance—in other words, the authority of a federal court to compel witnesses anywhere in the United States to testify before it.

A simple amendment to Rule 45 would resolve this conflict. We propose amending Rule 45(c)(1) to allow nationwide subpoena compliance as long as 1) authorized by federal statute and 2) good cause exists. Such an amendment would be minimally invasive and return the statute to its original effect prior to the 2013 Amendment. It would also resolve the current disagreement among courts in regards to the proper interaction between federal statutes authorizing nationwide subpoena compliance and Rule 45(c)(1) in its current form. *Compare Guenther v. Novartis Pharm. Corp.*, 297 F.R.D. 659, 660 (M.D. Fla. 2013) (prohibiting enforcement of nationwide subpoenas) *with United States v. Wyeth*, 2015 WL 8024407, at *3 (D. Mass. Dec. 4, 2015) (allowing enforcement of a nationwide subpoena under the FCA).

II. The 2013 Amendment—Intended to Simplify Rule 45—Also Substantively Changed It

The 2013 Amendment to Rule 45—although intended as a stylistic change to simplify and clarify subpoena power[2]—caused an unintended, substantive change to subpoena compliance.

The purpose of the 2013 Amendment was to simplify Rule 45, as established in the Committee Note published alongside the rule. *See* Fed. R. Civ. P. 45 Committee Note ("The goal of the present

[2] *See, e.g.*, Michael P. Daly & David A. Solomon, *Recent Amendments Offer Treats to Those Tired of Rule 45's Tricks*, Faegre Drinker (Oct. 31, 2013) ("Attorneys wishing to serve a federal subpoena have historically had to navigate a complex web of rules regarding issuance, service and compliance that were either confusing or amusing, depending on one's point of view."); Charles S. Fax, *Taking the Fun Out of Rule 45*, ABA (Sept. 8, 2012) ("Rule 45(c)(1) clarifies that a trial subpoena, deposition subpoena, and documents-only subpoena are returnable only within the state or within 100 miles of where the witness lives, works, or regularly does business, even if the witness is a party or a party's officer, or, in the case of a trial subpoena, elsewhere if such witness would not incur "substantial expense.").

amendments is to clarify and simplify the rule."). The Committee explicitly identified where specific, substantive changes were made to the rule. *See id.* ("Rule 45(a)(4) is added to highlight and slightly modify a notice requirement[.]"). Otherwise, the majority of changes were meant to be stylistic. In particular, the Committee noted that Rule 45(c) was created to "collect[] various provisions on where compliance can be required and simplif[y] them." *Id.* Therefore, the purpose of creating Rule 45(c) was to collect in a new subdivision the previously scattered provisions regarding place of compliance. These changes resolved a conflict that arose after the 1991 Amendment about a court's authority to compel a party or party officer to travel long distances to testify at trial. *See id.*

This understanding of the 2013 Amendment is further reinforced by the minutes from the April 11–12, 2013 Civil Rules Advisory Committee meeting, which make one substantive mention of Rule 45: "The first observation was that the pending amendments of Rule 45 raised questions about the distance witnesses should be compelled to travel to attend a hearing or trial. The Committee concluded that the current limits should remain undisturbed, even though the 100-mile rule goes back to the Eighteenth Century." Thus, the 2013 Amendment was not intended to make any substantive changes, but rather reinforce the long-standing "100-mile" rule for determining required compliance to an issued subpoena.

However, the amended version of Rule 45 omitted former Rule 45(b)(2)(D), which authorized service "at any place . . . that the court authorizes on motion and for good cause, *if a federal statute so provides*." Fed. R. Civ. P. 45(b)(2)(D) (2007) (amended 2013) (emphasis added).[3] Although it is not clear from the historical record why this specific provision was dropped, commentators note that the omission was likely an inadvertent error. *See U.S. v. Wyeth*, 2015 WL 8024407, at *3 ("In the 2013 revisions to Federal Rule of Civil Procedure 45, however, textual support in the rule has disappeared. *In what seems to be an oversight of the revisers*, the provision of the Rule which allowed for the operation of statutes that expand a court's subpoena power, like § 3731(a), was dropped from the current Rule.") (emphasis added). The record shows that the Committee never discussed purposefully eliminating the substance contained in former Rule 45(b)(2)(D). *See id.* ("The 2013 revisions to Rule 45 involved wholesale revision of the text of the rule but were not intended substantively to alter the locations where a court's subpoena power could extend.").

III. The 2013 Amendment to Rule 45 Conflicts with Federal Statutes

The amended Rule 45, at least based on a textual reading, prohibits a subpoena from commanding attendance outside of 100 miles from where a witness resides, is employed, or regularly transacts business in person (aside from specific enumerated exceptions). Yet, this puts the rule in direct conflict with many federal statutes that authorize nationwide service and compliance with subpoenas. The most notable example, and the most currently debated in the courts, is the False Claims Act. 31 U.S.C. §§ 3729–3733. The FCA is a federal law that imposes liability on parties who defraud government programs. Under the FCA, whistleblowers have the opportunity to be rewarded for disclosing fraud that results in a financial loss to the federal government. FCA claims often arise in the healthcare space.

[3] See Appendix for comparison of prior Rule 45 and the 2013 Amendments to Rule 45.

Notably, the FCA provides that a subpoena "requiring the attendance of a witness at a trial or hearing being conducted under [the FCA] may be *served at any place in the United States*." 31 U.S.C. § 3731(a) (emphasis added). If Rule 45 is read—as it is currently written—to prohibit compliance with a subpoena outside the 100-mile rule, then Rule 45 effectively neuters the FCA and other federal statutes that authorize nationwide service of subpoenas. These other federal statutes include the Clayton Act (15 U.S.C. 22), the Federal Trade Commission Enforcement Action (15 U.S.C. 53); Securities Act of 1933 (15 U.S.C. 77v(a)), Securities Exchange Act of 1934 (15 U.S.C. 78aa(a)); Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1965(d)), and Employment Retirement Income Security Act of 1974 (29 U.S.C. 1132(e)(2)).[4]

This conflicting interaction between Rule 45 and federal statutes has resulted in differing opinions among federal courts. The majority of courts addressing this issue have ruled that, in contravention of Rule 45(c)(1)'s literal text, a federal statute can still authorize nationwide subpoena service and compliance, reasoning that the removal of former Rule 45(b)(2)(D) was likely "an oversight of the revisers." *See Wyeth*, 2015 WL 8024407, at *3; *see also United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 WL 5624254, at *3 (D.S.C. Nov. 21, 2017); *Johnson v. Bay Area Rapid Transit Dist.*, 2014 WL 2514542, at *2 (N.D. Cal. June 4, 2014). However, other courts have ruled that Rule 45(c)(1)'s text controls, explicitly disallowing nationwide compliance of subpoenas even when authorized by federal statute. *See Guenther*, 297 F.R.D. at 660; *U.S. ex rel. Thomas v. Siemens AG*, 2009 WL 1657429, at *2 (D.V.I. June 12, 2009).

This confusion is not limited to the courts. Anecdotal evidence confirms that the conflict has also caused confusion among current Assistant U.S. Attorneys practicing in Civil Divisions. This conflict and the ensuing confusion can easily be remedied by amending Rule 45 to include a federal statute exception to the normal subpoena compliance rule.

Furthermore, the Advisory Committee's recent adoption of a similar amendment to Rule 12(a)(1)—arising out of a minor timing conflict with the federal FOIA statute—suggests that our proposed amendment would likely be adopted. *See* Agenda Book, Advisory Committee on Rules of Civil Procedure, page 219 (April 2020).

IV. The Proposed Amendment Resolves Uncertainty and Upholds the Purpose of Rule 45 and Federal Statutes

The proposed amendment would resolve the uncertainty outlined above, explicitly allowing nationwide subpoena service and compliance when authorized by federal statute and where good cause exists. This resolution to the uncertainty upholds both the original purpose of Rule 45 and of the several federal statutes that authorize nationwide subpoena compliance.

The FCA is the federal government's primary tool in combating fraud against the government—and nationwide subpoenas are essential to accomplishing this goal. In his analysis of a False Claims Act

[4] Although the precise formulations vary, these federal statutes generally use language addressing how "process" (or a "summons") may be "served."

case, Judge Woodlock found that "[t]he legislative history of [the FCA] supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in [Rule 45]." The provision authorizing nationwide subpoenas was added to the FCA under the title "An Act to provide for nationwide service of subpoenas in all suits involving the False Claims Act." Pub. L. No. 95–582, 92 Stat. 2479 (1978). The House Committee report states that the purpose of the legislation was to facilitate the prosecution of FCA cases by ensuring that witnesses from across the country could be brought into court by subpoena. *See* H.R. Rep. No. 95-1447 (1978).

History also illuminates the purpose of nationwide subpoenas. At the end of World War I, the Department of Justice (DOJ) actively prosecuted defense contractors that were defrauding the government. But, the DOJ faced difficulties in ensuring the appearance and testimony of necessary witnesses. *See* James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 35 (1992). In 1978, DOJ formally asked Congress to give it the authority for nationwide subpoenas, specifically requesting that the FCA's subpoena provision be modeled after the nationwide subpoena authority found in criminal procedure rules. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). This reflects the importance DOJ assigned to securing witnesses for trial to assist the government's prosecution of fraud and the importance of reinstating the regime supported by Rule 45 prior to the 2013 amendments.

As further protection, the proposed amendment also includes a "good cause" requirement. Prior to 2013, former Rule 45(b)(2)(D) would have superimposed such a good cause requirement. Such a requirement provides procedural limits on the situations in which subpoenas may be enforced. The requirement provides protection "to avoid the imposition of undue burden on persons subject to a subpoena." *Wyeth*, 2015 WL 8024407, at *4. Although courts have not aligned on a precise definition of "good cause," *see State Farm Ins. Co. v. Roberts*, 398 P.2d 671, 674 (Ariz. 1965) ("What constitutes 'good cause' depends to a considerable degree upon the particular circumstances of each case and upon considerations of practical convenience"), at least in the context of a witness who is not a party to a lawsuit, "good cause" is interpreted as a requirement to show that a subpoena is not "unreasonable or oppressive," *see* 5 Moore's Fed. Proc. 1722-23 (Rev. Ed. 1964). Leaving the discretion to judges to decide when "good cause" exists to enforce a nationwide subpoena strikes the proper balance between an undue burden and upholding congressional intent manifested in federal statutes.

We recognize that some commentators may argue that Rule 45's 100-mile limitation *should* in fact trump federal nationwide subpoena provisions, in order to ensure consistency and fairness for all subpoenaed witnesses, regardless of the underlying source of the claim. However, history has demonstrated that securing witnesses is critical to the enforcement of certain federal statutes. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). Congress intentionally and explicitly included nationwide subpoena provisions in these statutes out of recognition of the difficulties federal prosecutors faced in ensuring witnesses for trial.

We also recognize that an additional concern with re-instituting the former Rule 45(b)(2)(D) is that, combined with current Rule 45(b)(1), the proposed amendment could impose an undue burden on subpoenaed parties. Rule 45(b)(1) provides that fees for one day's attendance and mileage are to be paid

by the subpoenaing party, but these fees are not mandatory for any subpoena issued "on behalf of the United States." *See* Fed. R. Civ. P. 45(b)(1). This leaves room for potential abuse by federal agencies subpoenaing witnesses from far distances and refusing to cover their associated travel costs. However, the benefits of the proposed amendment outweigh this minor concern, which should ultimately be mitigated by the ability of a federal court to invoke the "good cause" requirement where it finds undue burden on subpoenaed parties.

CONCLUSION

For the foregoing reasons, we urge the Committee to recommend adoption of the proposed amendment to Rule 45(c)(1). Please let us know if we can provide any more information regarding this proposal. We thank the Committee on Rules of Practice and Procedure in advance for its consideration on these matters.

Sincerely,
Phebe Hong, Harvard Law School Class of 2021
[redacted]

Maxwell Hawley, Harvard Law School Class of 2021
[redacted]

Appendix

Comparison of Prior Rule 45 and the 2013 Amendments to Rule 45: Key Provisions

Old Rule 45(b)(2)	Current Rule 45(b)(2)
(b) Service. *(2) Service in the United States.* Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:	*(b) Service.* *(2) Service in the United States.* A subpoena may be served at any place within the United States.
(A) within the district of the issuing court;	[Omitted]
(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;	[Omitted]
(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or	[Omitted]
(D) that the court authorizes on motion and for good cause, if a federal statute so provides.	[Omitted]

Old Rule 45(c)	Current Rule 45(c)
[Did not exist]	*(c) Place of Compliance.* *(1) For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows: (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party's officer; or (ii) is commanded to attend a trial and would not incur substantial expense. *(2) For Other Discovery.* A subpoena may command: (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and (B) inspection of premises at the premises to be inspected.

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TAB 19

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SEALING COURT RECORDS

Suggestion 20-CV-T

Prof. Eugene Volokh (UCLA) has submitted a proposal for adoption of a Rule 5.3 on sealing of court records, on his own behalf and also on behalf of the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The rule proposal is presented in the Appendix to this memorandum.

The focus of this rule proposal is sealing of materials filed in court. In a broad sense, it focuses on a topic that has been on the Advisory Committee's agenda repeatedly over the last few decades. In the mid-1990s, there were two published drafts of possible amendments to Rule 26(c) that would have modified the standards for protective orders, in part by addressing the question of stipulated protective orders and filing confidential materials under seal pursuant to such rules. These proposals drew much attention and caused some controversy, and were eventually withdrawn. In March 1998, the Advisory Committee concluded that it would no longer pursue possible rule amendments on this topic.

Meanwhile, in Congress there have been various versions of a Sunshine in Litigation Act during recent decades, directed toward protective orders regarding materials that might bear on public health.

Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all advisory committees that responded to concerns then that federal courts had "sealed dockets" in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files, and that most of the ones uncovered resulted from applications for search warrants that had not been unsealed after the warrant was served.

In short, there has been considerable controversy and concern about sealed court files and discovery confidentiality, but the civil rules have not been amended to address those concerns.

The civil rules do not have many provisions about sealing court files. Rule 5(d) does direct that various disclosure and discovery materials not be filed in court until they are used in the action. When filing does occur, that can raise an issue about filing confidential materials under seal. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) does say that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing."

This submission, however, does propose a rule governing sealing that might limit or expand such judicially developed rules.

An initial question might be whether there is a need for such a rule. Prof. Volokh's cover letter says that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded in both the common law and the First Amendment." It adds that more than 80 districts have adopted local rules governing sealing, and says that the rule proposal "borrows heavily from those local rules." Footnotes to the proposal provide voluminous case law authority for these propositions and cite a large number of existing local rules.

According to the cover letter, nevertheless "a uniform rule governing sealing is needed; despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously."

There is no question that inappropriate sealing of court records is an important concern. But it is not clear that the problem is so widespread that an effort to develop a national rule is warranted. And if one were, it is worth noting, that would likely make all the cited local rules invalid. *See* Rule 83(a)(1) ("A local rule must be consistent with —— but not duplicate —— federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 [the Rules Enabling Act]").

If there is a problem that warrants an effort to develop a national rule, the draft by Prof. Volokh (attached as an appendix to this agenda memo) would require extensive work. The following are examples of some of the issues:

Possible additional burdens on courts: Various features of the proposal require courts to make "particularized findings." Rule 52(a)(1) directs a court after a nonjury trial to enter findings of fact and conclusions of law. Rule 23(b)(3) does say a court should certify a class only on finding that the superiority and predominance of common questions standards are met (though it does not have a specific findings requirement). It is not clear that there is a "particularized findings" requirement elsewhere in the civil rules. Cases under Rule 26(c) do say that a party seeking a protective order must make a particularized showing to justify entry of the order. *See* 8A Fed. Prac. & Pro. § 2035 at 157-58. But these cases do not require the court to make particularized findings when entering such an order.

Motion or objection by any "member of the public" without a need first to move to intervene: The rule would empower any "member of the public" to make a motion to unseal documents filed under seal "at any time." The proposed rule would explicitly excuse a motion to intervene for this purpose. There is a developed body of case law on intervention to challenge the seal on filed materials. *See* 8A Fed. Prac. & Pro. § 2044.1. This rule would evidently supplant that body of case law.

Challenges to sealing would be authorized by any "member of the public" at any time: The rule would direct that a motion is

timely at any time, "regardless of whether the case remains open or has been closed." With CM/ECF it may be that accessing a closed case presents little difficulty, but such open-ended re-opening of cases is not the norm in the rules. Compare Rule 60(c)(1) (limiting a motion under Rule 60(b) to "a reasonable time," and for mistake, newly discovered evidence, or fraud to one year).

Defining "member of the public" could be challenging: The draft does not provide a more specific definition. Ordinarily a proposed intervenor under Rule 24 must make some showing in support of a motion to intervene. If that is not required, it could become important to determine who is a "member of the public" entitled to challenge filing under seal without intervening. Would that right belong only to U.S. citizens or permanent residents? Would there be a ground for such a "member of the public" to show some recognized interest in the contents of the sealed filing?

Materials filed under seal would automatically be "deemed unsealed" 60 days after "final disposition" of a case: This "final disposition" standard might resemble the final judgment standard for appeals. It likely means completion of all trial court proceedings and exhaustion or disregard of any proceedings on direct appeal, including a petition for certiorari. It might be taken to resemble Rule 54(a) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies"). But surely that standard would not apply if there were an appeal under 28 U.S.C. § 1292(a)(1) (preliminary injunctions) or § 1292(a)(2) (appointing receivers). It presumably would not apply to interlocutory orders certified for immediate appeal by the district court under 28 U.S.C. § 1292(b). How it would work in cases gathered pursuant to an MDL transfer if final judgment were entered in some but not all is uncertain. Whether the "final disposition" occurs only after all appeals have been exhausted might raise questions. It is not clear who would monitor these developments; if after a notice of appeal was filed, for example, there were a settlement, the clerk's office might not be aware of that development and the need to set the "60 days clock" running.

Motions to renew the seal are presumptively invalid unless filed more than 30 days before automatic unsealing: Coupled with the automatic unsealing mentioned above, this provision could mean, in effect, that 31 days after "final disposition" of a case the court would be without power to keep the materials under seal.

A special website, or a "centralized website" might be required: The proposal seems to direct that there be some special method of posting motions to seal, and suggests that "a centralized website maintained by several courts" might be useful. It also directs that this posting occur "within a day of filing."

A review of the proposal in the Appendix will likely suggest other issues. It does not seem that these issues must arise merely because a sealing rule is promulgated. To the contrary, a rule could likely be drafted that would not raise the specific issues

identified above. But any such rule might be expected to generate considerable controversy. For example, trade secrets and other commercially valuable information are placed under seal with some frequency. Limiting that protection might prompt serious concerns. Although there may presently be occasions in which sealing decisions appear, in retrospect, to be debatable, that alone does not make this topic different from others governed by the rules, on which it may sometimes happen that a court makes a decision later found to be erroneous.

Besides considering whether there is a need for such a rule, one might also reflect on how the rule would relate to existing and future case law on these subjects. The submission emphasizes that the case law is based on the Constitution and a common law right of access. Those grounds for access have developed over decades, and can be found in many cases cited in footnotes in the submission. If a rule were adopted, that might raise questions about whether it is different from that case law. If in a given circuit the case law is arguably more permissive about filing under seal and does not require all that a rule requires, does that mean the rule is supplanting that case law? If the rule is solely implementing the case law, does the rule change if the case law changes?

Developing a rule would call for considerable further work. The question for the Advisory Committee at the October 2020 meeting is whether there is a need to do that work.

Suggestion 20-CV-T (footnotes omitted)

The rule proposal is supported by some thirty-two footnotes, but those are not included in this memorandum. They offer abundant authority in decided cases and also cite many local rules.

Proposed New Civil Rule 5.3

(a) PRESUMPTION OF PUBLIC ACCESS TO COURT RECORDS. Unless the court orders otherwise, all documents filed in a case shall be open to the public (except as specified in Rule 5.2 or by statute). Motions to file documents under seal are disfavored and discouraged. Redaction and partial sealing are forms of sealing, and are also governed by this rule, except insofar as they are governed by Rule 5.2. [Proposed Advisory Committee Note: This rule is intended to incorporate the First Amendment and common-law rights of access, and to provide at least as much public access as those rights currently provide.]

(b) REQUIREMENTS FOR SEALING A DOCUMENT. At or before the time of filing, any party may move to seal a document in whole or in part.

(1) Any party seeking sealing must make a good faith effort to seal only as much as necessary to protect any overriding privacy, confidentiality, or security interests. Sealing of entire case files, docket sheets, or entire documents is rarely appropriate. When a motion to seal parts of a document is granted, the party filing the document must file a publicly accessible redacted version of the document.

(2) If the interests justifying sealing are expected to dissipate with time, the party seeking sealing must make a good faith effort to limit the sealing to the shortest necessary time, and the court must seal the document for the shortest necessary time.

(3) There is an especially strong presumption of public access for court opinions, court orders, dispositive motions, pleadings, and other documents that are relevant or material to judicial decisionmaking or prospective judicial decisionmaking.

(4) Because sealing affects the rights of the public, no document filed in court may be sealed in whole or in part merely because the parties have agreed to a motion to seal or to a protective order, or have otherwise agreed to confidentiality.

(c) RETROACTIVE SEALING. Sealing of a document that has already been openly filed is allowed only in highly unusual circumstances, such as when information protected under Rule 5.2 is erroneously made public.

(d) PUBLIC FILING OF MOTIONS TO SEAL. A motion to seal must be publicly filed and must include a memorandum that:

(1) Provides a general description of the information the party seeks to withhold from the public.
(2) Demonstrates compelling reasons to seal the documents, stating with particularity the factual and legal reasons that secrecy is warranted and explaining why those reasons overcome the common law and First Amendment rights of access.
(3) Explains why alternatives to sealing, such as redaction, are inadequate.
(4) States the requested duration of the proposed seal.

(e) NOTICE AND WAITING PERIOD.
(1) Motions to seal shall be posted on the court's website, or on a centralized website maintained by several courts, within a day of filing.
(2) The court shall not rule on the motion until at least 7 days after it is posted, so that objections may be filed by parties or by others, unless the motion explains with particularity why an emergency decision is required.

(f) ORDERS TO SEAL. If a court determines that sealing is necessary, it must state its reasons with particularized findings supporting its decision. Orders to seal must be narrowly tailored to protect the interest that justifies the order. Orders to seal should be fully public except in highly unusual circumstances; and if they are in part redacted, any redactions should be narrowly tailored to protect the interest that justifies the redaction.

(g) UNSEALING, OR OPPOSING SEALING.
(1) Sealed documents may be unsealed at any time on motion of a party or any member of the public, or by the court sua sponte, after notice to the parties and an opportunity to be heard, without the need for a motion to intervene.
(2) Any party or any member of the public may object to a motion to seal, without the need for a motion to intervene.
(3) The motion to unseal or the objection to a motion to seal shall be filed in the same case as the sealing order or the motion to seal, regardless of whether the case remains open or has been closed.
(4) All sealed documents will be deemed unsealed 60 days after the final disposition of a case, unless the seal is renewed.
(5) Any motion seeking renewal of sealing must be filed within 30 days before the expected unsealing date, and the moving party bears the burden of establishing the need for renewal of sealing.

TAB 20

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RULE 15(a): TIME FOR PLEADING AMENDMENTS AS A MATTER OF COURSE

Suggestion 19-CV-Z

This topic is another example of a recurring dilemma. The text of Rule 15(a)(1) can easily be improved by substituting "no later than" for "within," as explained below. The amendment would eliminate any risk that "within" will be read to mandate an unintended and absurd gap in the period for amending a pleading once as a matter of right. But the risk may be more a creation of fine-grained reading than an actual problem in practice. Does the opportunity to improve the rule text warrant invoking the rulemaking process?

Rule 15(a) was amended in 2009 to make several changes in the provision that allows one amendment of a pleading as a matter of course. The earlier rule cut off the right on service of a responsive pleading. That meant that the pleader might make a long-delayed amendment after a motion to dismiss was made, argued, and submitted for decision. The 2009 amendments allowed 21 days to amend after service of a responsive pleading and also brought several Rule 12 motions into the rule, terminating the right to amend once as a matter of course 21 days after service of the motion. These times were not cumulative. The right to amend terminated after expiration of whichever period was earlier. Serving a motion to dismiss before filing a responsive pleading, for example, cut off the right after 21 days with no opportunity to revive after service of a later responsive pleading.

All of that seems sound. The question arises from the use of "within" to introduce both 15(a)(1)(A) and (B):

> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b)(e), or (f), whichever is earlier.

"Within" appeared in the predecessor of (A) before the Style Project, and was carried forward in the Style Project. "Within" (then) 20 days after serving the pleading works well. "Before" was used in the earlier versions that allowed one amendment as of right before, but only before, a responsive pleading was served. Introducing a right to amend after service of a responsive pleading or a Rule 12 motion led to adopting "within" for both (A) and (B).

Suggestion 19-CV-Z submits that "within" creates an indefensible result by creating a dead zone in the many cases in which a responsive pleading or Rule 12 motion is not served within 21 days after service of the pleading to be amended. Under Rule 15(a)(1)(A), the right to amend once as a matter of course ends 21 days after serving the pleading. That is "within" 21 days

after service of the pleading. After that, the pleader cannot rely on Rule 15(a)(1)(A), but must instead resort to seeking consent or leave of the court under Rule 15(a)(2). But the right to amend once as a matter of course revives under Rule 15(a)(1)(B) upon service of a responsive pleading or motion. That makes little sense. Far better to allow the amendment as a matter of right all the way through the period from serving the pleading until 21 days after service of the responsive pleading or Rule 12 motion.

The reading of "within" that suspends and then revives the right to amend once as a matter of course indeed is foolish. The question is whether this reading is so foolish that it will not often be considered, and will not be taken seriously. It may be hoped that "within" will be understood to make evident sense in this context — any time until the 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

There may be little need to amend the rule text to ensure the sensible interpretation. But the problem is easily remedied. The Style Consultants agree that the intended meaning can be clearly expressed by substituting "no later than" for "within."

ARTHUR B. SPITZER
915 15TH STREET, NW – 2ND FLOOR
WASHINGTON, DC 20005
301-775-4000
ARTSPITZER@GMAIL.COM

September 19, 2019

Hon. John D. Bates
United States District Judge
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: Amending as a matter of course under Fed. R. Civ. P. 15(a)(1)

Dear Judge Bates,

I write to you in your capacity as Chair of the Advisory Committee on Civil Rules.

For the second time in several months, I'm in a position of planning to file an amended complaint in a case well after the complaint was filed, but also well before the defendants have answered or filed a motion to dismiss. Rule 15(a)(1) provides that the opportunity to amend a complaint as a matter of course exists for 21 days after filing a complaint ((a)(1)(A)), and for a period of 21 days after an answer or certain motions are filed ((a)(1)(B)), but it does not provide such an opportunity during any intermediate period, thus requiring a plaintiff to file a motion for leave to file an amended complaint even if a defendant has not answered or filed one of the specified motions. The justification for that on-off-on-again sequence is difficult to discern.

Perhaps the Rules Committee assumed that the periods during which an amended complaint could be filed as a matter of course would be adjacent, because answers or motions to dismiss would be filed within 20 days after service of the summons and complaint. But that's very often not the case. As you know, federal defendants get 60 days to respond, and other defendants often seek and get extensions of time to respond. In other cases, motions for preliminary injunctions may take weeks or months to resolve, and frequently no answer or motion to dismiss is filed during that time. Yet I can't think of a good reason why a plaintiff that wishes to amend its complaint shouldn't be able to do so once as a matter of course at any time before an answer or motion to dismiss is filed, as well as within 21 days after such a filing (which was an excellent change in 2009).

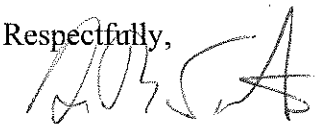
I therefore wonder whether it would make sense to amend Rule 15(a)(1) to provide:

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course ~~within~~:

(A) within 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, at any time until 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f) has expired, whichever is earlier.

Respectfully,



Arthur B. Spitzer

TAB 21

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RULE 72(b): CLERK MAIL OR SERVE

Suggestion 20-CV-F

Suggestion 20-CV-F suggests that one provision in Rule 72(b) should be amended to conform to Criminal Rule 59(b)(1).

Rule 72(b)(1) addresses a magistrate judge's recommended disposition of a dispositive motion or a prisoner petition challenging conditions of confinement. It concludes with this: "The clerk must promptly mail a copy to each party."

Criminal Rule 59(b)(1) addresses a magistrate judge's recommendation for disposing of dispositive matters. It concludes with this: "The clerk must immediately serve copies on all parties."

"Mail" in Rule 72(b) seems unnecessarily confining. Rule 77(d)(1) includes this:

> (1) *Service.* Immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failing to appear. * * *

This amendment makes sense. When a suitable package of amendments is being published for comment, it may be useful to include a proposal to amend Rule 72(b). The amendment might combine parts of Criminal Rule 59(b)(1) with parts of Rule 77(d)(1): "The clerk must immediately serve a copy on each party, as provided in Rule 5(b)."

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From: Patty Barksdale
Sent: Tuesday, May 05, 2020 11:27 AM
To: Julie Wilson
Cc: Jennie Allen
Subject: Suggested Correction to Fed. R. Civ. P. 72(b)

Hello Ms. Wilson.

I have one other matter for consideration.

Fed. R. Civ. P. 72(b), addressing a report and recommendation by a magistrate judge on a dispositive matter states, "The clerk must promptly mail a copy to each party."

The criminal counterpart, Fed. R. Crim. P. 59(b)(1), states, "The clerk must immediately serve copies on all parties."

Why are the two different? Shouldn't Rule 72(b) be the same as Rule 59(b)(1) to bring in the service rules when parties are on CM/ECF? (And as a picky matter of style, shouldn't Rule 59(b)(1) be in the singular, not the plural?)

Thank you for your consideration of these further rule musings.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

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TAB 22

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MEMORANDUM

To: Judicial Conference Advisory Committee on Civil Rules
From: Jason A. Cantone & Emery G. Lee III
RE: Status of Mandatory Initial Discovery Pilot Study
Date: August 24, 2020

As of June 1, 2020, the three-year Mandatory Initial Discovery Pilot (MIDP) period ended in both the District of Arizona and the Northern District of Illinois, but many pilot cases remain pending in both districts. To identify the total universe of pilot cases, FJC researchers electronically searched court records in both districts on July 14, 2020. Those searches identified 5,148 pilot cases filed in Arizona and 12,142 pilot cases filed in Northern Illinois. As of that date, 21% of pilot cases in Arizona and 28% of pilot cases in Northern Illinois were still pending. The FJC study continues to monitor these pending cases. For purposes of this memorandum, "pilot cases" include cases identified with the search terms, even if disclosures pursuant to the MIDP were not made.

PILOT STUDY ACTIVITIES

A. *Closed-Case Attorney Surveys*

At regular intervals, the FJC surveys attorneys in any pilot cases that have been closed since the last survey administration to evaluate their experiences. We provided the advisory committee with a report on the closed-case surveys in the fall of 2019.[1] Since then, closed-case surveys have been conducted in November 2019 and, most recently, in August 2020. The August 2020 surveys, covering the period from November 1, 2019, through July 30, 2020, included cases terminated during the COVID-19 pandemic. Despite this, the response rates for the August 2020 surveys—34% in Arizona and 38% in Northern Illinois—were consistent with the response rates from November 2019: 36% and 35%, respectively.

1. Emery G. Lee III & Jason A. Cantone, Report on the Mandatory Initial Discovery Pilot: Results of Closed-Case Attorney Surveys, Fall 2017–Spring 2019 (Federal Judicial Center 2019), available at https://www.fjc.gov/sites/default/files/materials/49/Mandatory%20Initial%20Discovery%20Pilot%20Report.pdf.

B. *Docket Data Collection*

In addition to the closed-case surveys, FJC researchers have been collecting data from a random sample of pilot cases in both districts. This is a continuing effort, given that many pilot cases are still pending; to date, the study includes information regarding 772 terminated pilot cases in Arizona and 1,234 terminated pilot cases in Northern Illinois.

One caveat before proceeding: Because many pilot cases are still pending in the participating courts, data collection is incomplete. Analysis of incomplete data can suggest patterns or findings that are not supported by the final analysis. The following summaries are intended to provide the advisory committee with a sense of the data being collected only.

Duration time and disposition method. For sampled cases, the median time from filing to disposition was 231 days (7.6 months) in Arizona and 216 days (7.1 months) in Northern Illinois. These relatively short disposition times suggest that longer-pending pilot cases may have yet to terminate in district court.

The data being collected covers many aspects of the pilot cases, including motions activity and disposition method. Table 1, for example, summarizes how the sampled cases were resolved in district court to date.

Table 1. Disposition of Closed Sampled Cases, by District

Outcome	Illinois Northern (%)	Arizona (%)
Settled	51%	56%
Voluntary dismissal	34%	22%
Rule 12 dismissal	6%	9%
Summary judgment	2%	5%
Trial	0.2%	0.1%
Other	6%	8%
N	1242	772

Pilot participation rates. The pilot participation rate, as measured by the percentage of pilot cases in which notices of the making of pilot disclosures were docketed, was higher in Arizona than in Northern Illinois. This is consistent with the survey results, which also point to higher participation rates in Arizona.

In Arizona, notices of pilot disclosures were docketed in more than half of the sampled cases. Plaintiffs filed a notice of pilot disclosures in 58% of sampled dockets; defendants filed a similar notice in 57% of sampled dockets. The obligation to make pilot disclosures is triggered by the filing of a responsive pleading; a responsive pleading was filed in 81% of sampled Arizona pilot cases (624/772). A plaintiff filed a notice of pilot disclosures in 70% of cases in which at least one defendant filed a responsive pleading. At least one defendant filed a notice of pilot disclosures in 70% of such cases, and **both** a plaintiff and defendant filed a notice in 65% of such cases (404/624).

In Northern Illinois, plaintiffs and defendants filed notices of pilot disclosures in 38% of sampled cases. Again, the obligation to make pilot disclosures is triggered by the filing of a responsive pleading; a responsive pleading was filed in 68% of sampled Northern Illinois pilot cases (840/1242). A plaintiff filed a notice of pilot disclosures in 54% of cases in which at least one defendant filed a responsive pleading. At least one defendant filed a notice of pilot disclosures in 56% of such cases, and **both** a plaintiff and defendant filed a notice in 48% of such cases (402/840).

MIDP disputes. Disputes regarding the parties' respective MIDP disclosure obligations were not common or, at least, were not commonly brought to the court's attention.

Parties may report disputes over MIDP obligations in their Rule 26(f) reports. In Arizona pilot cases, only 34 Rule 26(f) reports informed the court of a dispute over MIDP obligations (8%). In Northern Illinois, only 21 Rule 26(f) reports did so (3%).

Parties may, in some cases, file a motion to compel another party's MIDP disclosures. In Arizona, only one such motion has been observed to date. Seventeen motions to compel have been filed in Northern Illinois, which translates to a rate of about 2% of cases in which a responsive pleading was filed.

Discovery disputes in general. Past committee discussions about measuring the pilot's effects on discovery disputes have indicated that the districts differ with respect to how they handle such disputes, either formally by motion or more informally through a telephonic hearing. The study has worked to account for those different practices. In what follows, the term "discovery dispute" covers any docketed discovery motion, any scheduled telephonic hearing on a discovery matter in lieu of a motion, and other references to disputes over discovery matters in docket entries. The study cannot objectively measure discovery disputes that do not appear on the docket.

In Arizona, where formal discovery motions are discouraged, there was at least one discovery dispute in 29% of cases in which a responsive pleading was filed and in which both a plaintiff and a defendant filed a notice of pilot disclosures; there were more than two disputes in less than

2% of such cases. Discovery disputes, especially those made by motion, were more common in Northern Illinois. In that district, there was at least one discovery dispute in 46% of pilot cases in which a responsive pleading was filed and in which both a plaintiff and a defendant filed a notice of pilot disclosures; there were more than two disputes in 7% of such cases.