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

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

FROM: Hon. Robin L. Rosenberg, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 13, 2024

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on October 10, 2024. Members of the public attended in person, and public on-line attendance was also provided. Draft Minutes of that meeting are included in this agenda book.

Part I of this report will present two action items. During its October 10 meeting, the Advisory Committee voted to recommend publication in August 2025 of amendments to two rules:

(a) Rule 81(c): The Advisory Committee proposes publication of an amendment to Rule 81(c) that clarifies when a jury demand must be made after removal if no jury demand has been made at the time of removal.

(b) Rule 41(a): The Advisory Committee proposes publication of amendments to Rule 41 to better facilitate voluntary dismissal of one or more claims in a litigation, as opposed to the entire action.

Part II of this report presents several additional matters under consideration by the Advisory Committee, but there are no current proposals for Standing Committee action on these topics.

(a) Rule 45(b) manner of service of subpoena: The uncertainty about what constitutes "delivering" a subpoena to the witness has produced problems in practice and some conflicting court decisions. After considering a variety of explications, the Discovery Subcommittee is focused on a rule amendment that would authorize certain specific methods already recognized in Rule 4 for service of original process, and authorize a party that has attempted unsuccessfully to employ those methods to seek a court order for an alternative method.

(b) Rule 45(c) subpoena for remote testimony: A new Rule 43/45 Subcommittee has been formed, chaired by Judge M. Hannah Lauck (E.D. Va.). In part, this subcommittee has focused on *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023), holding that current Rule 45 does not permit a court that finds remote testimony justified under Rule 43 to compel a witness by subpoena to provide that testimony from a remote location that is within 100 miles of the witness's residence or place of business but more than 100 miles from the courthouse.

In addition, this new subcommittee is reviewing proposals that Rule 43 be amended to relax the limitations on remote testimony. Presently, Rule 43(a) authorizes remote testimony at trial only upon a showing not only of good cause, but also of "compelling circumstances," in addition to "adequate safeguards." This provision was added in 1996, with a Committee Note saying that such circumstances would usually depend on a last-minute development, and also that deposition testimony (particularly a video deposition) often is preferable to live remote testimony.

Pandemic experience indicates that there may be reason to consider relaxing the restrictions on remote testimony, but the subcommittee is still reviewing these issues. The Bankruptcy Rules Committee has published draft rule amendments to authorize remote testimony in "contested matters," but not adversary proceedings, upon a showing of good cause and adequate safeguards, but not to require "compelling circumstances." In some state courts remote testimony has been used widely. The subcommittee wants to proceed with the proposed revisions to Rule 45 regarding subpoenas for remote testimony while it continues to gather information on Rule 43(a).

(c) Rule 55 use of verb "must" with regard to action by clerk: Rule 55(a) presently says that the clerk "must" enter the default of a party that has failed to plead or otherwise defend, and Rule 55(b)(1) says that when the claim is for a "sum certain" the clerk "must" enter default judgment. An extensive study by the Federal Judicial Center (FJC) of practices in different courts shows that methods of handling defaults vary from district to district. Though it is not clear that this strong command to the clerk ("must") often produces difficulties, it does seem that in several districts the norm is to present applications for entry of default or default judgment to the judge

rather than the clerk. It may be that the rule can be clarified in a helpful manner, and the rule remains under study.

(d) Third Party Litigation Funding: For more than a decade the Advisory Committee has had before it proposals for some sort of disclosure requirements regarding litigation funding. In addition, bills have been introduced in Congress to require such disclosure under various circumstances, and some state legislatures have adopted disclosure requirements.

During its October 2024 meeting, the Advisory Committee appointed a TPLF Subcommittee, chaired by Chief Judge David Proctor (N.D. Ala.). That subcommittee has begun its work and expects to be gathering information about experience with such funding. One possible source of insight is the District of New Jersey's local rule adopted a few years ago; it may be possible to determine whether that local rule has produced benefits or created problems.

At the same time, the litigation funding "industry" seems to continue to evolve, and reports indicate both that there is a great deal of money involved and that large players like insurance companies may be offering competing products.

(e) Cross-border discovery: Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (Univ. of Oklahoma) have proposed a study of whether the rules should be amended to provide for better treatment of cross-border discovery. That topic could include situations in which a party to federal-court litigation argues that the Hague Convention should be applied rather than the federal rules on discovery because the information sought is located abroad (*see* 28 U.S.C. § 1981), and situations in which a party to non-U.S. litigation seeks the assistance of an American federal court to obtain discovery from a nonparty subject to the American court's jurisdiction (*see* 28 U.S.C. § 1982).

This project is being examined by the Cross-Border Discovery Subcommittee chaired by Judge Manish Shah (N.D. Ill.), and is presently focused on the first situation -- discovery of information from outside the U.S. sought from a party to U.S. litigation. Representatives of the subcommittee have already met with bar groups interested in these questions, and at least one additional event is on the calendar.

(f) Rule 7.1: A subcommittee is addressing whether and how to expand the requirement that nongovernmental corporate parties disclose affiliated business organizations that own or control them, in order to better facilitate judges' compliance with their ethical and statutory duty to recuse in cases in which they hold a financial interest in a party.

(g) Use of the term "master" in the rules: The term "master" appears many times in Rule 53, and also in quite a few other rules. It also appears in the rules of the Supreme Court and in a number of statutes. The Advisory Committee has not appointed a subcommittee to study these questions. For the present, the Committee is monitoring developments, including whether the term is being changed in other relevant contexts (including other sets of rules) and whether a widely-recognized substitute term has been recognized.

(h) Random case assignment: Various submissions have urged development of a new Civil Rule to require random assignment across the district in at least a subset of civil cases. For the present, the Advisory Committee is monitoring developments, including the Guidelines recently adopted by the Judicial Conference.

I. ACTION ITEMS

(a) Rule 81(c) -- jury demand after removal

The Standing Committee first saw this issue at its June 2016 meeting, based on submission 15-CV-A, from a lawyer who interpreted restyled Rule 81(c) to mean that he did not need to demand a jury trial in his removed case because state practice did not require that he make such a demand prior to the time of removal. Before 2007, Rule 81(c) said: "If state law *does* not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time." In the 2007 restyling the verb was changed to "did."

That change could produce confusion when a case is removed from a state court that has a jury demand requirement but permits that demand later in the litigation. As written before 2007, the rule excused a jury demand only when the case was removed from a state court that *never* requires a jury demand.

When this matter came before the Standing Committee in 2016, two members of the Committee proposed an alternative that would have mooted the Rule 81(c) concern -- that Rule 38 be amended (parallel with the analogous Criminal Rule) to direct that there always be a jury trial unless both parties consented to a court trial and the court agreed to hold a court trial. That proposal led to an FJC research study that eventually persuaded the Advisory Committee that making such a change to Rule 38 would not be warranted. So the Rule 38 proposal was dropped from the agenda and the Rule 81(c) proposal came back to the fore.

It seems that the former provision exempting parties accustomed to state courts that don't ever require a jury demand unless the court establishes a deadline may have been meant to protect them against losing the right to a jury trial because they assumed they did not have to take any action after removal to obtain a jury trial since that would not be required in the state court.

It is not entirely clear how many states provide a jury trial without requiring a demand at some point. Research by the Rules Law Clerk indicates that there seem to be some such states and that there is considerable variety in the timing requirements of state courts that don't entirely excuse jury demands. A link to that research is provided below.

During the Advisory Committee meeting, two possible amendments were proposed. One would simply change the verb tense from "did" back to what the rule said before 2007 -- "does." That could avoid confusing lawyers who faced very prompt removal. At least they would know that they were not exempt from demanding a jury trial after removal because the state court case had not reached the point where that was required by state court practice.

But that solution could leave uncertainty about whether a given state practice "does" require a jury demand. The Rules Law Clerk research suggests that such uncertainty might exist in some instances.

On the other hand, lawyers who never had to demand a jury trial to get one in state court might be surprised to find that they had to make a formal jury demand in federal court.

The Advisory Committee chose the other alternative -- requiring a jury demand in all removed cases by the deadline set in Rule 38. One point raised during the Oct. 10 meeting was that it be made clear that even when a party fails to meet the Rule 38 deadline the court may, under Rule 39(b), order a jury trial despite the belated request.

So the Advisory Committee unanimously voted to propose that the following draft Rule 81(c) amendment and Committee Note be published for public comment:

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

* * *

(3) ***Demand for a Jury Trial.***

(A) ***Before Removal*** ~~***As Affected by State Law***~~**.** A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) ***After Removal.*** If no demand is made before removal, Rule 38(b) governs a demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal. But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.

Suggestion 15-CV-A was submitted by Mark Wray. Rules Law Clerk memos can be found in the October 2024 agenda book starting on page 105 (February 28, 2024) and page 121 (June 26, 2024).

(b) Rule 41(a) -- voluntary dismissal

At its October 2024 meeting, the Advisory Committee unanimously voted in favor of publication of amendments to Rule 41. This subcommittee, chaired by Judge Cathy Bissoon (W.D. Pa.), was formed at the March 2022 Advisory Committee meeting in response to submissions (21-CV-O; 22-CV-J) noting a widespread disagreement among the circuit and district courts regarding the interpretation of the rule. In sum, although the rule is currently entitled "Dismissal of Actions," and describes circumstances in which a plaintiff may dismiss "an action," in most courts parties and judges use the rule to dismiss less than an entire "action." That is, although a minority of courts have concluded that the rule permits voluntary dismissal only of entire cases, most courts deploy the rule to dismiss some but not all claims in the case, leaving others to continue.

After several years' worth of study, outreach, and deliberation, the Advisory Committee has concluded that the rule should be amended to permit dismissal of one or more claims in a case, rather than permitting dismissal of only the entire action. Not only would this change provide nationwide uniformity and conform to most district courts' practice, such an amendment would further the Federal Rules' general policy in favor of narrowing the issues during pretrial proceedings of complex cases. The language referring to "actions" has been unchanged since the rule was promulgated in 1938. Even at the time of the rule's promulgation, one of its drafters indicated that one of several "causes of action" asserted in a complaint could be dismissed under the rule.[1] But since then the prevalence of multiparty, multiclaim litigation has grown exponentially, as has the importance of judicial case management, as reflected in Rule 16. A more flexible rule that permits dismissal of individual claims would therefore further support the goal of simplifying complex cases. Rule 41(d) is also amended to reflect this change, as explained in the Committee Note.

Over the course of the last two years, the subcommittee conducted extensive outreach, meeting with representatives from Lawyers for Civil Justice, the American Association for Justice, and the National Employment Lawyers Association. The subcommittee also sought feedback from federal judges, via a letter to the Federal Judges Association. The consistent message that emerged from this outreach was that most district judges were far more flexible about dismissing individual claims than the text of the rule suggests, and that such activity was helpful in narrowing the issues involved in cases during pretrial proceedings. There was no opposition voiced to making the rule more flexible in this way.

The subcommittee has also reached consensus around another amendment to the rule regarding who must sign a stipulation of dismissal of a claim. Currently, the rule states that "all parties who have appeared" must sign such a stipulation. The Eleventh Circuit, however, recently held that the plain text of the rule demands signatures not only from the parties currently involved in the litigation, but also former parties who no longer are part of the case. The Advisory Committee concluded that such a requirement is unnecessary and that the text of the rule should be clarified to require that only *current* parties to the litigation must sign a stipulation of dismissal of a claim.

[1] Remarks of Edgar B. Tolman, *Proceedings of the Institute on Federal Rules, Cleveland, Ohio, July 21-23, 1938* at 348-50.

The subcommittee considered narrowing this requirement further to require signatures only by the parties to the claim to be dismissed (leaving out other existing parties to the case) but concluded that this would potentially sacrifice notice to all existing parties of the dismissal. In a case in which dismissing a claim may affect other parties, the subcommittee concluded that seeking the signatures of all existing parties served important purposes of notifying both the court and all parties of the potential dismissal. Should one or more parties in the case refuse to sign a stipulation of dismissal, the court may of course still order that dismissal under Rule 41(a)(2).

The draft Rule 41(a) amendment and Committee Note is as follows:

Rule 41. Dismissal of ~~Actions~~ Claims

(a) Voluntary Dismissal.

(1) ***By ~~the~~ a Plaintiff.***

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an action~~ a claim or claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared and remain in the action.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), ~~an action~~ a claim or claims may be dismissed at ~~the~~ a plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ claim or claims may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

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(d) Costs of a Previously Dismissed ~~Action~~ Claim. If a plaintiff who previously dismissed ~~an action~~ a claim in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Committee Note

References to "action" have been replaced with "a claim or claims," in order to clarify that this rule may be used to effect the dismissal of one or more claims in a multi-claim case, whether by a plaintiff prior to an answer or motion for summary judgment, stipulation, or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who are no longer parties. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the existing parties at the time of the stipulation provide both sufficient notice to those involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

II. INFORMATION ITEMS

The following matters are still under review by the Advisory Committee. The Standing Committee has discussed some of them during its past meetings. The Advisory Committee welcomes thoughts from Standing Committee members on these topics.

(a) Rule 45(b) -- manner of service of a subpoena

The Discovery Subcommittee has continued to consider the problems that can result from Rule 45(b)(1)'s directive that service of a subpoena depends on "delivering a copy to the named person." In addition, the subcommittee has focused on the requirement that, when the subpoena requires attendance by the person served the witness fees and mileage be "tendered" to the witness.

Numerous submissions have been made for amending Rule 45(b)(1) over the years, often invoking the provisions of Rule 4 for service of initial process. As the Standing Committee has heard in past meetings, one proposal was to incorporate several provisions of Rule 4 by reference. But the differences between the summons and a subpoena were emphasized. Nonparty witnesses may not be aware of the possibility of litigation in the same way that potential parties are.

Subpoenas can come with a "short fuse" calling for very prompt compliance, while the time to answer may provide more time for reaction.

In addition, some Rule 4 methods that had been considered at first seemed on refection not to work. For example, waiver of service under Rule 4(d) is ineffective unless the recipient waives service, and the time lag before that decision must be made could be too long in many instances. Rule 4(d)(1(F) provides that the defendant must get "at least 30 days after the request was sent" to return the waiver.

Another possibility considered was to invoke state law. Rule 4(e)(1) says that a summons may be served by the method authorized by state law. Perhaps a similar analogy could be to draw on state law for service of subpoenas. But very thorough Rules Law Clerk research showed that there was huge variation among states on that subject. In some states, even a telephone call suffices.

Moreover, one goal of a revision would be to install a clear nationwide rule, making it seem unwise to incorporate widely diverging state law practices. In the same vein, authorizing local rules to adopt local practices seemed out of step with a push toward national uniformity.

There was also some discussion whether service by mail or "commercial carrier" might be desirable options under an amended rule. Courts continue to use U.S. mail, and many important matters are delivered by FedEx, UPS, DHL and the like. But whether "Fast Frank's Delivery Service" should also suffice under a "commercial carrier" rule provision might pose challenges. U.S. mail, meanwhile, may be a very poor way to serve 20-somethings, some of whom may not have much to do with it.

Instead, the focus changed to Rule 4(e)(1) and (2), which adopt what might be time-honored methods of serving a person. Then -- on analogy to Rule 4(f)(3) with regard to service on a person outside the U.S. -- by authorizing the court to approve an alternative method "reasonably calculated to give notice." Rather than trying to prescribe in advance what is per se acceptable in all instances, it seemed preferable to leave the decision what to employ for a given witness in a given case to the presiding judge. At the same time, the notion is that some showing ought to be made to justify substitute means of service -- ordinarily attempting the "traditional" methods or explaining why that would be futile.

A separate question was whether Rule 41(b)(1) should continue to require that "if the subpoena requires that person's attendance, tendering the fees for 1 days attendance and the mileage allowed by law." The witness fee is required by 28 U.S.C. § 1821, not the rule, and the question is whether the rule should make effective service contingent on tendering this fee.

So two possible courses were suggested -- providing that the fee may be tendered at the time of service or at the commencement of the trial, hearing, or deposition the witness was commanded to attend.

Accordingly, two possible approaches continue under study:

Rule 45. Subpoena

* * * * *

(b) Service.

Alternative 1 -- retaining obligation to tender fees but not as a part of service

(1) ***By Whom and How; Notice Period; Tendering Fees.***

(A) Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named [person] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice.[2]

(B) ~~and, I~~if the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], the subpoena must be served at least 14 days before the date on which the person is commanded to attend. In addition, the party serving the subpoena requiring the person to attend must

[2] Ed Cooper has suggested the following alternative to (A):

> **(A)** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person by:
>
> (i) delivering a copy to the [person] {individual} personally;
> (ii) mailing a copy to the person['s last known address];
> (iii) leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion [who resides there]; or
> (iv) another means authorized by the court and reasonably calculated to give notice.

Ed adds the following notes:

(a) "delivering" carries forward the ambiguity that some courts resolve by allowing delivery by mail. "to the person personally" reduces the ambiguity, but seems clunky. One alternative would be "delivering a copy to the person in hand," but that has not found favor.

(b) if we want to include commercial carries [cf. Appellate Rule 25] this might be: "sending a copy to the person['s last known address] by mail or commercial carriers." Commercial carriers may be more reliable than mail.

(c) The bracketed phrases were taken from Rule 5(b)(2)(C) {last known address} and 4(e)(2)(B) {who resides there}. Leaving with a transient guest or worker may be reasonable, at least if the named person is hiding behind whoever answers the door . . . .

tender~~ing~~ the fees for 1 day's attendance and the mileage allowed by law at the time of service, or at the commencement of the trial, hearing, or deposition. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

Alternative 2 -- deleting obligation to tender fees

(1) ***By Whom and How; Notice Period; ~~Tendering Fees~~.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named [person] {individual} personally or leaving a copy at the person's dwelling or usual place of abode with someone of suitable age and discretion. For good cause, the court may by order authorize serving a subpoena in another manner reasonably calculated to give notice. ~~and,~~ I~~i~~f the subpoena requires that the named person~~'s~~ attend~~ance,~~ a trial, hearing, or deposition, unless the court orders otherwise [for good cause], the subpoena must be served at least 14 days before the date on which the person is commanded to attend. ~~tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.~~

Draft Committee Note

Rule 45(b)(1) is amended to clarify what is meant by "delivering" the subpoena. Courts have disagreed about whether the rule requires hand delivery. Though service of a subpoena usually does not present problems -- particularly with regard to deposition subpoenas -- uncertainty about what the rule requires has on occasion caused delays and imposed costs.

The amendment removes that ambiguity by providing that methods authorized under Rule 4(e)(2)(A) and (B) for service of a summons and complaint constitute "delivery" of a subpoena. Though the issues involved with service of a summons are not identical with service of a subpoena, the basic goal is to give notice and the authorized methods should assure notice. In place of the current rule's use of "delivering," these methods of service also are familiar methods that ought easily adapt to the subpoena context.

The amended rule also authorizes a court order permitting an additional method of serving a subpoena so long as that method is reasonably calculated to give notice. A party seeking such an order must establish good cause, which ordinarily would require at least first resort to the authorized methods of service. The application should also demonstrate that the proposed method is calculated to give notice.

The amendment adds a requirement that the person served be given at least 14 days notice if the subpoena commands attendance at a trial, hearing, or deposition. Rule 45(a)(4) requires the party serving the subpoena to give notice to the other parties before serving it, but the rule does

not presently require any advance notice to the person commanded to appear. Compliance may be difficult without reasonable notice. Providing 14-day notice is a method of avoiding possible burdens on the person served. In addition, emergency motions for relief from a subpoena can burden courts. For good cause, the court may shorten the notice period on application by the serving party.

Alternative 1

The amendment also simplifies the task of serving the subpoena by removing the requirement that the witness fee under 28 U.S.C. § 1821 be tendered at the time of service and permitting tender to occur instead at the commencement of the trial, hearing, or deposition. The requirement to tender fees at the time of service has in some cases further complicated the process of serving a subpoena, and this alternative should simplify the task.

Alternative 2

The amendment deletes the requirement that the party serving the subpoena also tender the witness fee for 1 day's attendance and the mileage allowed by law when serving the subpoena. Experience has shown that requiring this tender in addition to service of the subpoena can unduly complicate the service process. The amendment does not affect the obligation imposed by 28 U.S.C. § 1821, but does remove this complication from the process of serving the subpoena.

* * * * *

The Advisory Committee welcomes Standing Committee reactions to its current approach to these problems, in particular regarding (a) whether adding a 14-day (or other) notice period would be wise, and (b) whether removing the tender of the witness fee as a service requirement would cause or avoid problems.

(b) Remote testimony -- Rules 45(c) and 43(a)

The Advisory Committee received a submission urging substantial changes to Rule 43(a) to make use of remote testimony easier to justify. Under a 1996 amendment to Rule 43(a), remote trial testimony can be ordered only when supported not only by good cause, but also by "compelling circumstances," and then only with "appropriate safeguards." The proposed changes to Rule 43(a) sought to relax these constraints considerably.

Meanwhile, at its June 2024 meeting the Standing Committee authorized publication of Bankruptcy Rule amendments that would permit use of remote testimony regarding "contested matters" in bankruptcy court, but not in adversary proceedings. The public comment period for these amendment proposals ends in mid-February 2025.

The Advisory Committee now has a Rule 43/45 Subcommittee that has begun to study these remote testimony issues, but it has not reached a point of formulating a proposal.

Representatives of the subcommittee have met and will be meeting with interested bar groups to consider the appropriate approach to remote testimony.

At present, there is no consensus on amending Rule 43(c) to relax the limits on remote trial testimony. Any views of Standing Committee members on that question would be welcome.

But another issue is of more immediate importance. In 2023, the Ninth Circuit ruled that Rule 45 does not permit a subpoena to command a distant witness to provide remote trial testimony. *See* *In re Kirkland*, 75 F.4th 1030 (9th Cir. 2023). Some district courts have reached the same conclusion.

The *Kirkland* decision did not involve the question whether such remote testimony should be authorized under Rule 43(a). Instead -- though a bankruptcy court had found Rule 43(a) satisfied -- it granted a writ of mandate holding that Rule 45 does not permit a court to require a witness to attend and give remote testimony within 100 miles of the witness's home, but more than 100 miles from the courthouse.

In 2013, Rule 45(c) was revised and reorganized, and the place of compliance provisions were all collected in Rule 45(c). The accompanying Committee Note said that once a Rule 43(a) order for remote testimony was entered a subpoena could be used to command the witness to provide such testimony so long as it did not command the witness to travel more than 100 miles from her place of residence or a place where she transacts business in person.

The subcommittee has concluded that it is important to amend Rule 45(c) to make clear that -- once it determines that remote testimony is justified under the rules -- the court may use its subpoena power to require the distant witness to provide that testimony. That would not involve changing Rule 43(a), but would remove the doubt that the Ninth Circuit's decision introduced. Already that doubt has affected other forms of discovery. *See, e.g.*, *York Holding, Inc. v. Waid*, 345 F.R.D. 626, 629-30 (D. Nev. 2024) (rejecting an argument that *In re Kirkland* precludes a subpoena to produce documents within 100 miles of the witness's place of business though more than 100 miles from the courthouse).

As amended in 2013, Rule 45(b)(2) authorizes the court presiding over the action to issue a subpoena that can be served anywhere in the United States. That authority has no bearing on the determination whether, under Rule 43, the court should authorize remote testimony in a trial or hearing. But an amendment could clarify that -- so long as the court finds such testimony warranted under the rules -- the court is not powerless to compel the witness to travel within the limits imposed by Rule 45(c) to provide that remote testimony.

Since the Advisory Committee's October meeting, the subcommittee has held another meeting and has focused on an amendment to Rule 45(c) to clarify that the court has such power. The Ninth Circuit recognized that a rule change could produce that result. *See In re Kirkland*, 75 F.4th at 1047 ("any changes to Rule 45 [are] 'for the Rules Committee, and not for [a] court.'"). The subcommittee's goal is to propose a change that takes up the Ninth Circuit's invitation.

The current inclination is to provide by rule that when a witness is directed to provide remote trial or hearing testimony the "place of attendance" is the place the witness must go to provide that testimony, not the courtroom in which the remote testimony is broadcast.

The question whether opportunities for such remote testimony should be expanded remains open, but should be separate.

The subcommittee welcomes any reactions from Standing Committee members.

(c) Rule 55(a) and 55(b)(1) clerk "must" enter default and default judgment

Rule 55(a) commands actions by clerks that do not correspond to what happens in many districts. The rule says that if the plaintiff can show that the defendant has failed to plead or otherwise defend, "the clerk must enter the party's default." Rule 55(b)(1) then says that if "the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk * * * must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing."

On the face of the rule, there is room for difficult choices in some cases by the clerk. There may sometimes be questions about whether effective service occurred. Given the possibility of extensions of time to respond, the court's records may not show that the defendant has not pled within the allowed time. Once default is entered, the question whether the suit is for a "sum certain" or one that "can be made certain by computation" may not appear so certain to the clerk.

At the Advisory Committee's request, FJC Research did a thorough study of default practices in the district courts. A link to that study appears at the end of this section of the report. The study did not show that the command in the rule ("must") has itself produced significant difficulties. But it did show that there are wide variations among the district courts in handling applications for entry of default or default judgment. In some districts, all these matters are submitted to the judge. In other districts, the clerk's office enters defaults but only the judges enter default judgments. In some districts there is a district-wide written policy on how to deal with questions about whether a default should be entered.

During the Advisory Committee's October 2024 meeting, there was discussion about whether there is reason to pursue a possible amendment to Rule 55. At least some favor changing "must" to "may." At the Advisory Committee meeting, the Committee had before it a draft of a possible amendment:

Rule 55. Default; Default Judgment

(a) Entering a Default. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk may ~~must~~ enter the party's default [upon finding that the party has failed to plead or otherwise defend].

(b) Entering a Default Judgment.

(1) ***By the Clerk.*** If the clerk determines that the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—may ~~must~~ enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

A change along these lines might protect the clerk against undue pressure to enter defaults or default judgments when there are serious questions about whether they are appropriate.

But that sort of change might not be sufficient. Attorney members of the Advisory Committee emphasized at the meeting the uncertainty about how such matters are handled in different districts.

For the present, the Advisory Committee is endeavoring to determine (a) whether a rule change along the lines sketched above would be useful, and (b) whether a national rule adopting (imposing?) a uniform method of dealing with entry of default and default judgments should be developed. The Advisory Committee welcomes Standing Committee reactions.

The FJC's March 2024 study on Rule 55 can be found in the October 2024 agenda book starting on page 129.

(d) Third Party Litigation Funding

Third party litigation funding first appeared on the Advisory Committee's agenda in mid 2014. The Chamber of Commerce proposed that a new Rule 26(a)(1)(A)(v) be added, requiring disclosure of the fact of funding, the identity of the funder, and production of all agreements between the funder and the adverse party. The initial proposal was for this disclosure to apply in all cases. The proponents likened the disclosure to the disclosure already required by Rule 26(a)(1)(A)(iv) of insurance coverage.

At its Fall 2014 meeting, the Advisory Committee decided that litigation funding seemed to be a fast-moving target and that the pending proposal seemed to apply in a very wide variety of situations. It might be extended to apply to a conventional law firm line of credit, secured by the receivables of the firm. It might extend to support from a family member to pay the rent and buy groceries pending success in the lawsuit after a car crash. So there was considerable uncertainty about when a disclosure requirement should apply and what should be disclosed. For example, if the applicant for funding disclosed core attorney work product to obtain the funding, should that presumptively be available to the litigation opponent without any showing of need?

Since 2014, litigation funding activity has reportedly increased and also evolved. A variety of concerns have been raised about litigation funding. Some of these concerns are addressed in a December 2024 GAO report, Information on Third-Party Funding of Patent Litigation. A link to

this report is included below. Bills have also been introduced in Congress. Most recently, Rep. Issa introduced the H.R. 9922, the Litigation Transparency Act of 2024, on Oct. 4. A link to this bill is provided below.

The new TPLF Subcommittee has had one meeting to plan its examination of this topic. There are at least some models to be examined. A few years ago the District of New Jersey adopted a local rule calling for disclosure, though not as much disclosure as the original 2014 Rule 26(a) proposal submitted by the Chamber of Commerce. The FJC may be able to provide empirical data on how that rule has worked. The Wisconsin Legislature adopted a "tort reform" discovery package some years ago that included funding disclosure as one feature in a broader reform. Some other state legislatures have also considered disclosure measures. Obtaining hard data on how those have actually worked is challenging, however.

The Advisory Committee welcomes reactions from Standing Committee members on how best to approach this topic.

Links to H.R. 9922 regarding transparency and oversight of third-party beneficiaries in civil actions and the GAO Report on Third-Party Funding of Patent Litigation from December 2024.

(e) Cross-border discovery

Judge Michael Baylson (E.D. Pa.) and Prof. Steven Gensler (Univ. of Oklahoma) -- both former members of the Advisory Committee -- urged in a *Judicature* article that there be a study of the handling of cross-border discovery with an eye to possible rule changes to improve that process. *See* Baylson & Gensler, *Should the Federal Rules Be Amended to Address Cross-Border Discovery?*, 107 Judicature 18 (2023). A link to this article is included in this report.

The Cross-Border Discovery Subcommittee has held online meetings, and representatives of the subcommittee have met with bar groups. Further meetings with bar groups are planned, and in March 2025 representatives of the subcommittee are expected to attend the annual meeting of Sedona Conference Working Group 6 in Los Angeles that focus on and discuss cross-border discovery issues. For the present, the subcommittee is focused on discovery from litigants that are parties to U.S. litigation (28 U.S.C. § 1981 and the Hague Convention), rather than domestic discovery in the U.S. to obtain evidence for use in non-U.S. litigation (28 U.S.C. § 1982).

The subcommittee has also received initial reactions from representatives of the Federal Magistrate Judges Association and the Department of Justice. From these responses, it appears that there are differing views on whether to attempt rulemaking in the area.

One idea that has been advanced is that such discovery be added to the topics for the Rule 26(f) discovery conference and the Rule 16(b) scheduling order. Other concerns focus on privacy and confidentiality. For example, Rule 34 document requests may seem to run afoul of foreign privacy regulations, particularly the EU General Data Privacy Regulation. In addition,

there may be suggestions to re-examine the criteria articulated in *Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987).

Arguments have been made about the need for such rulemaking. Thus Sant, *Court-Ordered Law Breaking: U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 Brook. L. Rev. 181 (2015), begins with the following sentence: "Perhaps the strangest legal phenomenon of the past decade is the extraordinary surge of U.S. courts ordering individuals and companies to violate foreign law." On the other hand, arguments have been made that companies sometimes seem to exploit these laws to prevent discovery of needed evidence. *See* Relkin & Breslin, *Hidden Across the Atlantic*, Trial Magazine, June 2012, at 14. This article asserts that -- at least in drug and medical device litigation -- defendants "may attempt to hide behind narrower foreign laws that protect an associated entity to prevent important discovery."

The subcommittee's work is ongoing. The subcommittee welcomes thoughts from Standing Committee members on these topics.

The article by Baylson & Gensler, *Should the Federal Rules be Amended to Address Cross-Border Discovery?*, can be found in the April 2024 agenda book starting on page 303.

(f) Rule 7.1

The Rule 7.1 Subcommittee, chaired by Justice Jane N. Bland (Texas S. Ct.), has continued its work on the disclosures required of nongovernmental corporations. Currently, the rule requires a "nongovernmental corporate party or a nongovernmental corporation that seeks to intervene" to disclose "any parent corporation and any publicly held corporation owning 10% or more of its stock." The goal of the rule is to ensure that district judges can comply with their duty to recuse when they have "a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). Because the statute requires recusal for both legal ownership and indirect equitable ownership, the current rule does not require that parties disclose sufficient information for judges to evaluate their statutory obligation in all cases.

The subcommittee has been considering whether an expanded disclosure requirement would be feasible and beneficial. Its work is informed by recently revised guidance issued by the Codes of Conduct Committee regarding recusal based on a financial interest. This updated guidance focuses on ownership of an interest in an entity that "controls" a party; that is, if the judge has a financial interest in a parent that "controls" a party, that judge has a financial interest requiring recusal. The current rule likely ensures disclosure of most such circumstances, but not all. Therefore, the subcommittee is considering an amendment that would require parties to disclose not only parents and owners of 10% of a party's stock, but also "any publicly held business organization that [directly or indirectly] controls a party." The subcommittee is currently seeking feedback from knowledgeable parties as to whether this requirement is sufficiently clear based on a shared understanding of the basic legal meaning of the word "control." Ultimately, the subcommittee's goal is to develop language to better ensure that judges can comply with the revised guidance issued by the Codes of Conduct Committee. The subcommittee is making

substantial progress and hopes to present rule and committee note language for the Advisory Committee's consideration at the April 2025 meeting.

(g) Use of the term "master" in Rule 53 and other rules

Rule 53 (entitled "Masters") uses the word "master" repeatedly. In January 2024, the American Bar Association (ABA) submitted 24-CV-A proposing that the word be removed from Rule 53 and from any other place where it appears in the Civil Rules. A link to this submission is provided below in this report. Later in 2024, the Academy of Court-Appointed Neutrals (formerly the Academy of Court-Appointed Masters) submitted 24-CV-J supporting the thrust of the ABA proposal. After that, the American Association for Justice submitted 24-CV-S endorsing the removal of the word "master" but not endorsing a substitute term.

Use of "master" in rules and statutes

The term "master" has been used for centuries in Anglo-American jurisprudence. Supreme Court Rule 37(3) uses the term "Special Master." Besides Rule 53, it appears in at least the following Civil Rules: 16(c)(2)(H); 23(h)(4); 52(a)(4); 54(a); 54(d)(2)(D); and 71.1(h)(2)(D). In addition, it is used in Rule 16.1(b)(3)(F), which was approved by the Standing Committee at its June 2024 meeting and is presently pending before the Supreme Court. This new rule may go into effect on Dec. 1, 2025.

The previous Rules Law Clerk identified a number of places in Titles 18 and 28 in which the word appears. He did not have time to try to identify other statutory provisions that use the word, but that could be undertaken in the future if helpful. Here is a list of the uses of the word identified by the Rules Law Clerk in those titles of the United States Code:

18 U.S.C. § 1836(b)(2)(D)(iv) -- "The court may appoint special . . . master to locate and isolate all misappropriated trade secret information . . ."

18 U.S.C. § 2248 -- the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 2259 -- the court may "refer any issue arising . . . connection with a proposed order of restitution to a magistrate or special master for proposed findings . . ."

18 U.S.C. § 3507 -- special master at foreign deposition.

18 U.S.C. § 3524(d)(3) -- appointment of special master for protection of witnesses.

18 U.S.C. § 3664(d)(6) -- appointment of special master to make proposed findings of fact and recommendations in regard to enforcement of an order for restitution.

28 U.S.C. §636(b)(2) -- A judge may appoint a magistrate judge to act as a special master without regard to the provisions of Rule 53.

28 U.S.C. § 957 -- The clerk may not appoint "a commissioner, master, referee or receiver in any case, unless there are special reasons requiring such appointment which are recited in the order of appointment."

28 U.S.C. § 1605A(e) -- In terrorism cases, the courts of the United States may appoint special masters to hear damage claims brought under this section.

28 U.S.C. § 2284 -- In matters required to be heard by a three-judge court, when there is an application for a preliminary injunction a single judge "shall not appoint a master."

A change to the Civil Rules will not change those statutory references. And it might be noted that somewhat frequently courts appoint people to the position of "master" without necessarily doing so under the auspices of Rule 53; there may be inherent authority to make such appointments.

At the Standing Committee's June 2024 meeting, these issues were introduced at pp. 526-27 of the agenda book for that meeting. A link to that agenda book is included below in this report.

The Advisory Committee discussed these issues during its October 10 meeting. Discussion included whether a change is needed, and if so what new term should be substituted. Ultimately the resolution was for the matter to remain on the Advisory Committee's agenda for purposes of monitoring, but not to undertake immediate preparation of amendments to all the affected rules.

Suggestion 24-CV-A was submitted by the ABA. Link to the Standing Committee's June 2024 agenda book.

(h) Random case assignment

The Advisory Committee has received several proposals suggesting amendment of the Civil Rules to require random assignment of district judges in certain types of cases. The Advisory Committee previously noted that the Judicial Conference had issued guidance to all districts earlier this year recommending that they take this action as a matter of local rules and policy. At its April 2024 meeting, the Advisory Committee decided to defer immediate action to observe the districts' response to this guidance. The Reporters are closely following uptake of the guidance in the district courts, which is still in its early stages. This ongoing research reveals that some districts have already decided to follow the JCUS guidance, while others have not yet decided whether they will; things are changing rapidly. This issue is important and will remain on the Advisory Committee's agenda as it monitors the evolving landscape.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 41. Dismissal of ~~Actions~~ Claims

(a) Voluntary Dismissal.

(1) *By ~~the~~ a Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, ~~the~~ a plaintiff may dismiss ~~an action~~ a claim or claims without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

[1] New material is underlined in red; matter to be omitted is lined through.

(ii) a stipulation of dismissal signed by all parties who have appeared and remain in the action.

(2) ***By Court Order; Effect.*** Except as provided in Rule 41(a)(1), ~~an action~~ a claim or claims may be dismissed at ~~the~~ a plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the ~~action~~ claim or claims may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * * * *

(d) Costs of a Previously Dismissed ~~Action~~ Claim. If a plaintiff who previously dismissed ~~an action~~ a claim in any court files an action based on or including the same claim against the same defendant, the court:

(1) may order the plaintiff to pay all or part of the costs of that previous action; and

(2) may stay the proceedings until the plaintiff has complied.

Committee Note

References to "action" have been replaced with "a claim or claims," in order to clarify that this rule may be used to effect the dismissal of one or more claims in a multi-claim case, whether by a plaintiff prior to an answer or motion for summary judgment, stipulation, or court order. Some courts interpreted the previous language to mean that only an entire case, *i.e.* all claims against all defendants, or only all claims against one or more defendants, could be dismissed under this rule. The language suggesting that voluntary dismissal could only be of an entire case has remained unchanged since the 1938 promulgation of the rule. In the intervening years, multi-claim and multi-party cases have become more typical, and courts are now encouraged to both simplify and facilitate settlement of cases. The amended rule is therefore more consistent with widespread practice and the general policy of narrowing the issues during pretrial proceedings. Rule 41(d) is amended to reflect the change to 41(a) but is not intended to suggest that costs should be imposed as a

matter of course when a previously dismissed claim is refiled. If a court believes an award of costs is appropriate, the award should ordinarily be limited to costs associated with only the voluntarily dismissed claim or claims.

Second, Rule 41(a)(1)(A)(ii) is amended to clarify that a stipulation of dismissal need be signed only by all parties who have appeared and remain in the action. Some courts had interpreted the prior language to require all parties who had ever appeared in a case to sign a stipulation of dismissal, including those who are no longer parties. Such a requirement in most cases is overly burdensome and an unnecessary obstacle to narrowing the scope of a case; signatures of the existing parties at the time of the stipulation provide both sufficient notice to those involved in the case and better facilitate formulating and simplifying the issues and eliminating claims that the parties agree to resolve.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 81. Applicability of the Rules in General; Removed Actions

* * * * *

(c) Removed Actions.

(1) ***Applicability.*** These rules apply to a civil action after it is removed from a state court.

* * * * *

(3) ***Demand for a Jury Trial.***

(A) ***Before Removal*** ~~***As Affected by State Law.***~~ A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal.

(B) ***After Removal.*** If no demand is made before removal, Rule 38(b) governs a

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demand for a jury trial. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38(b) must be given one if the party serves a demand within 14 days after:

~~If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.~~

~~**(B)** ***Under Rule 38.*** If all necessary pleadings have been served at the~~

~~time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:~~

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

Committee Note

Rule 81(c) is amended to remove uncertainty about when and whether a party to a removed action must demand a jury trial. Prior to 2007, the rule said no demand was necessary if the state court "does" not require a jury demand to obtain a jury trial. State practice on jury demands varies, and it appears that in at least some state courts no demand need be made, although it is uncertain whether those states actually guarantee a jury trial unless the parties affirmatively waive jury trial. In other state courts, a jury demand is required, but only later in the case than the deadline in Rule 38 for demanding a jury trial. A number of states have rules similar to Rule 38, but time limits for making a jury demand differ from the time limit in Rule 38.

This amendment is designed to remove uncertainty about whether and when a jury demand must be made after removal. It explicitly preserves the right to jury trial of a party that expressly demanded a jury trial before removal.

But otherwise it makes clear that Rule 38 applies to removed cases. If all pleadings have been served at the time of removal, the demand must be made by the removing party within 14 days of the date on which it filed its notice of removal, and by any other party within 14 days of the date on which it was served with a notice of removal. If further pleadings are required, Rule 38(b)(1) applies to the removed case.

When no demand has been made either before removal or in compliance with Rule 38(b), the court has discretion under Rule 39(b), on motion, to order a jury trial on any issue for which a jury trial might have been demanded.

The amendment removes the prior exemption from the jury demand requirement in cases removed from state courts in which an express demand for a jury trial is not required. Courts no longer have to order parties to cases removed from such state courts to make a jury demand; the rule so requires.