ADVISORY COMMITTEE
ON
CIVIL RULES

April 1, 2020

AGENDA
Meeting of the Advisory Committee on Civil Rules
April 1, 2020

1. Opening Business

A. Report on the January Meeting of the Committee on Rules of Practice and Procedure

- Draft Minutes of the January 28, 2020 Meeting of the Committee on Rules of Practice and Procedure 15

B. Report on the March 2020 Session of the Judicial Conference of the United States

- March 2020 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States.....37

C. Status of Proposed Amendments to the Federal Rules

- Chart Tracking Proposed Rules Amendments.....55

2. ACTION: Review and Approval of Minutes

- Draft Minutes of the October 29, 2019 Meeting of the Advisory Committee on Civil Rules.....61

3. Information: Legislative Update

- Pending Legislation that Would Directly or Effectively Amend the Federal Rules (116th Congress) 103

4. ACTION: Social Security Disability Review Subcommittee

- Subcommittee Report.....109
  - Draft Supplemental Rules.....110
  - Appendix: Subcommittee Conference Calls
    - Notes of November 22, 2019 Conference Call.....121
    - Notes of December 19, 2019 Conference Call 127
    - Notes of February 6, 2020 Conference Call 133

ADVISORY COMMITTEE ON CIVIL RULES

Chair	Reporter
Honorable John D. Bates United States District Court E. Barrett Prettyman U.S. Courthouse 333 Constitution Avenue, N.W. Washington, DC 20001	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215

Associate Reporter

Professor Richard L. Marcus
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

Members

Honorable Jennifer C. Boal
United States District Court
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Room 6400
Boston, MA 02210-3002

Honorable Robert M. Dow, Jr.
United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn Street, Room 1978
Chicago, IL 60604

Honorable Joan N. Ericksen
United States District Court
300 South Fourth Street, Room 12W
Minneapolis, MN 55415

Honorable Joseph H. Hunt*
Assistant Attorney General (ex officio)
United States Department of Justice
950 Pennsylvania Ave., N.W., Suite 3601
Washington, DC 20530

* Alternate Representative:
Joshua E. Gardner, Esq.
United States Department of Justice
1100 L Street, N.W., Suite 11502
Washington, DC 20005

Honorable Kent A. Jordan
United States Court of Appeals
J. Caleb Boggs Federal Building
844 North King Street, Room 5100
Wilmington, DE 19801-3519

Honorable Thomas R. Lee
Associate Chief Justice
Utah Supreme Court
450 South State, PO Box 140210
Salt Lake City, UT 84114-0210

Members (continued)

Honorable Sara Lioi
United States District Court
John F. Seiberling Federal Building
and U.S. Courthouse
Two South Main Street, Room 526
Akron, OH 44308

Honorable Brian Morris
United States District Court
Missouri River Courthouse
125 Central Avenue West, Suite 301
Great Falls, MT 59404

Honorable Robin L. Rosenberg
United States District Court
Paul G. Rogers Federal Building
701 Clematis Street, Room 453
West Palm Beach, FL 33401

Virginia A. Seitz, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington DC 20005

Joseph M. Sellers, Esq.
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue N.W., Fifth Floor
Washington, DC 20005

Professor A. Benjamin Spencer
University of Virginia Law School
580 Massie Road, Room WB173E
Charlottesville, VA 22903

Ariana J. Tadler, Esq.
Tadler Law LLP
One Pennsylvania Plaza
New York, NY 10119

Helen E. Witt, Esq.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Liaisons

Honorable A. Benjamin Goldgar
(*Bankruptcy*)
United States Bankruptcy Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn Street, Room 638
Chicago, IL 60604

Peter D. Keisler, Esq.
(*Standing*)
Sidley Austin, LLP
1501 K Street, N.W.
Washington, DC 20005

Secretary, Standing Committee and Rules Committee Chief Counsel

Rebecca A. Womeldorf
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	District of Columbia	Chair: 2015	2020
Jennifer C. Boal	M	Massachusetts	2018	2021
Robert M. Dow, Jr.	D	Illinois (Northern)	2013	2020
Joan N. Ericksen	D	Minnesota	2015	2021
Joseph H. Hunt*	DOJ	Washington, DC	----	Open
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

Principal Staff: Rebecca Womeldorf 202-502-1820
Julie Wilson 202-502-1820

* Ex-officio - Assistant Attorney General, Civil Division

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	Hon. Frank M. Hull *(Standing)* Hon. Bernice B. Donald *(Bankruptcy)*
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)*

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff

Rebecca A. Womeldorf, Esq.
Chief Counsel
Administrative Office of the U.S. Courts
Office of General Counsel – Rules Committee Staff
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544
Main: 202-502-1820

Bridget M. Healy, Esq.
Counsel *(Appellate, Bankruptcy, Evidence)*

S. Scott Myers, Esq.
Counsel *(Bankruptcy, Standing)*

Julie M. Wilson, Esq.
Counsel *(Civil, Criminal, Standing)*

Brittany Bunting
Administrative Analyst

Shelly Cox
Management Analyst

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 6-100
Washington, DC 20544

Laural L. Hooper, Esq.
Senior Research Associate *(Criminal)*

Molly T. Johnson, Esq.
Senior Research Associate *(Bankruptcy)*

Timothy T. Lau, Esq.
Research Associate *(Evidence)*

Marie Leary, Esq.
Senior Research Associate *(Appellate)*

Dr. Emery G. Lee
Senior Research Associate *(Civil)*

Tim Reagan, Esq.
Senior Research Associate *(Standing)*

TAB 1

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TAB 1A

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 28, 2020 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met in Phoenix, Arizona, on January 28, 2020. 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 Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Judge Srikanth Srinivasan
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division represented the Department of Justice (DOJ) on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair (by telephone)
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 Liesa L. Richter, Consultant

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter (by telephone); Professor Daniel R. Coquillette (by telephone), Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary (by telephone); Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; 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).

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. This meeting is the last for Judge Srikanth Srinivasan, who in a few weeks will become the Chief Judge of the U.S. Court of Appeals for the District of Columbia. Judge Campbell thanked Judge Srinivasan for his contributions as a member of the Committee and wished him well in this new assignment. Judge Campbell welcomed three new members of the Standing Committee: Judge Gene Pratter, Kosta Stojilkovic, and Judge Jennifer Zipps. Judge Campbell also welcomed Judge Raymond Kethledge, who began his tenure as Chair of the Criminal Rules Advisory Committee last October. Judge Campbell noted the addition of a new member of the Rules Committee Staff, Brittany Bunting. Judge Campbell also recognized Julie Wilson, Rules Committee Staff Counsel, for reaching the milestone of 15 years of service with the federal government.

Scott Myers reviewed the status of proposed rules amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2019. The chart also shows the interim Bankruptcy Rules that have been recommended for adoption as local rules with an effective date of February 19, 2020. Also included are the rules approved by the Judicial Conference in September 2019 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2020, provided the Supreme Court approves them and Congress takes no action to the contrary.

Judge Campbell asked the judge members of the Committee if they had occasion in their courts to address new Criminal Rule 16.1, which went into effect on December 1, 2019. No judge member had yet addressed Criminal Rule 16.1. Judge Campbell observed that it would be good to raise awareness about the new Rule. He noted that he had occasion in a recent trial to apply the amended version of Evidence Rule 807, which also took effect last December, and found it much easier to apply than its predecessor. Judge Campbell also noted that the pending amendment to Evidence Rule 404(b) would have been helpful in a recent case, if it had been in effect.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 25, 2019 meeting.**

REPORT ON MULTI-COMMITTEE ITEMS

Judge Chagares, Chair of the Appellate Rules Advisory Committee, reported on the E-Filing Deadline Joint Subcommittee which was formed to analyze whether e-filing deadlines should be earlier than midnight. One key question under study is whether the midnight deadline negatively affects quality of life, particularly for young associates and staff. The subcommittee's consideration of e-filing deadlines is in part inspired by filing rules in Delaware. The rules in Delaware state court were amended effective September 2018 to provide for a 5:00 p.m. (ET) electronic-filing deadline. This accorded with similar local provisions in the District of Delaware that provide for a 6:00 p.m. (ET) electronic-filing deadline. The subcommittee has solicited

comments from the American Bar Association, paralegal and legal assistant associations, and law schools. The first public suggestion on this e-filing proposal voicing support for the proposal was received at 1:48 a.m. on the morning of the Appellate Rules Advisory Committee's fall meeting.

Professor Cooper, Reporter to the Civil Rules Advisory Committee, reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee. The subcommittee was formed to consider the implications of the Supreme Court's holding in *Hall v. Hall*, 138 S. Ct. 1118 (2018), that consolidation under Civil Rule 42(a) of originally-separate lawsuits does not merge those lawsuits for purposes of 28 U.S.C. § 1291's final-judgment rule. The *Hall v. Hall* Court suggested that, if this holding created any problems, the Rules Enabling Act process would be the right way to address them. Dr. Emery Lee of the Federal Judicial Center is undertaking a deep review of cases filed in 2015-2017. Those cases were filed, but may or may not have gone to final disposition, before the Court's decision in *Hall v. Hall*; it may be necessary to expand the period of study to include cases filed in three subsequent years.

Judge Chagares reported on a proposal, concerning the computation of deadlines, that was considered by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules at their respective fall 2019 meetings. The proposal came from Sai, who has submitted helpful rules suggestions over the years. Sai proposed a rule that would require courts to calculate all deadlines and tell the parties the dates of those deadlines. The committees recognized that such a practice would be helpful to litigants, particularly to pro se litigants, but concluded that it would be impracticable, and unduly burdensome, to task the courts with such a duty. Accordingly, the advisory committees have removed this proposal from their agendas.

Professor Hartnett, Reporter to the Appellate Rules Advisory Committee, described the advisory committees' consideration of another suggestion submitted by Sai. The standards for *in forma pauperis* (i.f.p.) status currently vary across districts, and Sai proposes replacing those varying standards with a nationally uniform one. Sai also raised concern about the Administrative Office forms that courts use to gather information bearing on i.f.p. status; Sai argues that some questions on these forms are ambiguous and/or unduly intrusive. After the advisory committees considered this proposal at their fall 2019 meetings, the Civil Rules Committee removed the proposal from its agenda, but the Appellate Rules Committee retained the proposal on its agenda, and the Criminal Rules Committee expressed the intention to follow the other committees' lead on the matter. The Appellate Rules Committee's interest in this item, Professor Hartnett explained, stemmed partly from the fact that – unlike the other sets of national Rules – the Appellate Rules have an official Form (Form 4) dealing with requests to proceed i.f.p. in the courts of appeals. Further, Supreme Court Rule 39 directs that litigants use Form 4 when seeking i.f.p. status in the Supreme Court. A participant asked why the Civil Rules Advisory Committee had removed the item from its agenda. Judge Bates, the Chair of that committee, explained that although the committee recognized the potential problems with the variation in standards for i.f.p. status, it could not see how to establish a workable single standard for 94 districts given the variety of financial circumstances across the districts. But, he noted, the Civil Rules Advisory Committee referred the forms questions raised by Sai to the Administrative Office, the entity that maintains certain district-court forms (including Forms AO 239 and 240 concerning requests for i.f.p. status). Professor Cooper, Reporter to the Civil Rules Advisory Committee, noted that that committee did not have occasion to reach questions relating to the scope limitation set by the Rules Enabling Act

– i.e., whether rulemaking on eligibility for i.f.p. status would alter substantive rights. Professor Cooper further questioned the feasibility of establishing a nationally uniform i.f.p. standard in light of regional variations in the cost of living.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Campbell prefaced the report by the Bankruptcy Rules Advisory Committee by thanking that committee for its admirably quick action in preparing interim rules and forms to implement the Small Business Reorganization Act of 2019 (SBRA). Judge Dow in turn commended Professor Gibson and Scott Myers, who took the lead in that project; he noted that the courts have already expressed appreciation for the interim rules and forms. Judge Dow and Professors Gibson and Bartell then delivered the report of the committee, which last met on September 26, 2019, in Washington, DC. The Advisory Committee presented one action item and two information items.

Action Item

Official Form Amendments Made to Implement the HAVEN Act. The Honoring American Veterans in Extreme Need Act (HAVEN Act) of 2019 became effective on August 23, 2019. The HAVEN Act was designed to exclude certain benefits paid to veterans or servicemembers (or their family members) from the Bankruptcy Code's definition of "current monthly income." A debtor's "current monthly income" is used in means testing computations to determine the debtor's eligibility for bankruptcy relief. Professor Bartell explained that the HAVEN Act does not affect the Bankruptcy Rules; however, its provisions require changes to three official forms: Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). The Advisory Committee approved the amended forms and recommends that the Standing Committee retroactively approve (and provide notice to the Judicial Conference concerning) the amendments to the three official forms.

Professor Struve, Reporter to the Standing Committee, commended Professor Bartell and Scott Myers for their work on these forms.

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 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Information Items

Interim Rules and Official Forms to Implement the SBRA. The SBRA will go into effect on February 19, 2020. It creates a new subchapter V of chapter 11 of the Bankruptcy Code and provides an alternative to the current reorganization path for small businesses. Professor Gibson explained that the SBRA requires amendments to a number of Bankruptcy Rules and Forms. Because the SBRA will go into effect before the rules amendments could make it through the full Rules Enabling Act process, the Advisory Committee voted to have the amendments issued as

interim rules for adoption as local rules or by standing orders in each of the districts. The Advisory Committee modeled its approach on an expedited process followed in 2005 when interim rules were needed to respond to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At its fall 2019 meeting, the Advisory Committee discussed the proposed draft interim rules and forms and voted to seek approval for their publication for public comment. (There were some post-meeting revisions to the package, and the Advisory Committee approved those revisions by email vote in October 2019.) The resulting eight proposed interim rules and nine official forms were, in turn, approved for publication by the Standing Committee (by email vote). The package was published for four weeks during October and November 2019. The Advisory Committee received seven relevant comments, which provided helpful suggestions. In response, the Advisory Committee made some revisions to the published package and also approved a few interim changes that had not been published – namely, revisions to four additional rules and the issuance of a new rule. By an email vote that concluded in December 2019, the Advisory Committee unanimously decided to recommend the issuance of thirteen interim rules. It also approved nine new or amended official forms. The Advisory Committee approved the official forms pursuant to its delegated authority from the Judicial Conference to issue conforming or technical official form amendments subject to later approval by the Standing Committee and notice to the Judicial Conference. By email vote in December 2019, the Standing Committee unanimously approved the issuance of the rules as interim rules and approved the promulgation of the forms. Judges Campbell and Dow subsequently requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize distribution of the interim rules to the districts for adoption as local rules. The Executive Committee unanimously approved the request. Judges Campbell and Dow sent a memorandum to all chief judges of district courts and bankruptcy courts requesting local adoption of the interim rules to implement the SBRA until rulemaking under the Rules Enabling Act can take place. At its spring 2020 meeting, the Advisory Committee will begin the process for the issuance of permanent rules. Professor Gibson indicated that the Advisory Committee expects to bring to the Standing Committee's June 2020 meeting a request for approval for publication of permanent rules and forms.

Judge Dow commended the efforts of all involved in finalizing interim Bankruptcy Rules to be adopted by the districts as local rules in response to the SBRA.

Bankruptcy Rules Restyling. Professor Bartell remarked that the restyling process is going well. The style consultants have provided drafts of Parts I and II of the Bankruptcy Rules. The Restyling Subcommittee, reporters, and style consultants have exchanged different views on some changes to Part I. Professor Bartell noted that they are close to the point of finalizing Part I. The subcommittee has three meetings scheduled in the next six weeks to discuss the draft of Part II. The subcommittee expects to present final drafts of Parts I and II to the Advisory Committee at its spring 2020 meeting and, if approved, to request permission to publish from the Standing Committee at its mid-year meeting. Professor Bartell commended the style consultants for their wonderful work on these rules. The subcommittee is thrilled with what it is receiving from the style consultants and thinks that everyone involved in bankruptcy practice will be pleased with the restyled rules.

Judge Campbell noted that the restyling endeavor will be a multiyear effort and has gone very well over the past year. He commended Judge Krieger for her work chairing the subcommittee. Judge Dow thanked the style consultants, Professor Bartell, and Judge Krieger for their work throughout this process. In response to a question about the anticipated publication process, Judge Dow explained that the Advisory Committee intends to seek publication in stages but will hold all restyled rules for final approval and adoption at one time. Judge Dow expects that Parts I and II will be ready to present to the Standing Committee at the Standing Committee's June meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on October 30, 2019, in Washington, DC. The Advisory Committee presented several information items.

Rule 3 (Appeal as of Right — How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Proposed amendments to Appellate Rules 3 and 6 and Forms 1 and 2 are out for public comment. The Advisory Committee has received few comments thus far. The Advisory Committee has been considering this project since fall 2017, and its work finds new support in the Supreme Court's recent decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), in which the Court stated that the filing of a notice of appeal should be a simple, non-substantive act. After identifying inconsistencies among different jurisdictions in how notices of appeal are treated, the Advisory Committee proposed rule amendments to reduce inadvertent loss of appellate rights by the unwary. The Advisory Committee expects to seek final approval of the amended rules and forms from the Standing Committee at its mid-year meeting.

Professor Hartnett explained that some litigants have mistakenly believed that they must designate every order they wish to challenge on appeal. The proposed amendment to Appellate Rule 3 would alert readers to the merger principle without trying to codify it. It would also add a provision stating that a notice of appeal encompasses the final judgment as long as it designates "an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties" or an order described in Appellate Rule 4(a)(4)(A) — i.e., an order disposing of the last remaining motion of a type that restarts the time to take a civil appeal. The rule leaves open the ability for litigants to deliberately and expressly limit the scope of the notice of appeal. "Without such an express statement, specific designations do not limit the scope of the notice of appeal." The proposed amendment to Appellate Rule 6 is simply a conforming amendment. The forms amendments reflect, among other things, the distinction between appeals from final judgments and appeals from other appealable orders. Professor Hartnett noted that courts continue to issue decisions that underscore the importance of these amendments. He described a recent decision in which a litigant filed a notice of appeal designating both a specific summary judgment ruling and the final judgment, "as well as any and all rulings by the court." The court concluded that because there had been a specific designation, the notice of appeal did not encompass orders that it did not list.

Professor Hartnett also noted that the Advisory Committee had received two public comments on the proposed amendments — one supportive and one critical. The main critique of

the proposed amendments stems from the language in proposed Appellate Rule 3(c)(5)(A), which refers to an order that adjudicates "all **remaining** claims and the rights and liabilities of all remaining parties." In contrast, Civil Rule 54(b) omits the word "remaining" and refers to "a judgment adjudicating all the claims and all the parties' rights and liabilities." In the commenter's view, there is not a final judgment until some document is entered that recites the disposition of all claims, not just the remaining claims. The premise of the proposed amendment is contrary to that: once the last remaining claim is resolved, there is a final judgment. The Advisory Committee unanimously supported this approach, which is in accord with leading treatises on federal practice and procedure.

One member inquired as to the purpose behind proposed Rule 3(c)(6), which would allow a litigant to designate a specific part of a judgment or appealable order and expressly exclude others from the scope of the notice of appeal. Professor Hartnett explained that it may sometimes be beneficial for a litigant to limit the scope of their notice of appeal. For example, a litigant may want to appeal an adverse ruling as to one party, without wishing to appeal the court's determinations as to other parties.

Another member asked if the language in subparagraph (5)(A) — "the rights and liabilities of all remaining parties" — creates tension with Civil Rule 58(e), which sets a default rule that an outstanding request for costs and/or fees does not prevent a judgment from becoming final for appeal purposes. The member suggested deleting "the rights and liabilities of all remaining parties" if it is not necessary to the proposed rule. Professor Struve responded that she understood this phrase to be a reference to the language in Civil Rule 54(b) — "the rights and liabilities of fewer than all the parties." Professor Cooper suggested that adding the "remaining" language in Appellate Rule 3(c)(5)(A) has the advantage of making clear that a final judgment need not indicate all claims that may have been previously disposed of. Judge Campbell inquired whether the language "all remaining claims" — without referencing rights and liabilities — would suffice. Professor Hartnett explained that the impetus behind including "rights and liabilities" in the new language was to integrate Appellate Rule 3(c) with Civil Rule 54(b). Professor Cooper noted that "claim" is a word with multiple meanings. He observed that the language in Rule 54(b) has existed for a very long time. It would be better, he suggested, for Rule 3(c) not to emphasize the word "claim" standing alone.

A member raised a related question regarding attorney's fee applications and whether this proposed rule might alter current law under which, as noted, Civil Rule 58(e) sets a default rule that a pending fee application does not prevent a judgment from becoming final for appeal purposes. It was suggested, though, that the same tension currently exists between Civil Rule 58(e) and Civil Rule 54(b). A member noted that Civil Rule 54(b) uses "claims *or* the rights and liabilities" while the proposed language of Appellate Rule 3(c)(5)(A) uses "claims *and* the rights and liabilities." This member suggested that the disjunctive / conjunctive distinction may be significant. Judge Chagares and Professor Hartnett indicated that the Advisory Committee will continue to consider these issues.

Rule 42 (Voluntary Dismissal). Proposed amendments to Rule 42 are out for public comment. Judge Chagares explained that during the restyling of the Appellate Rules, the phrase "may dismiss" replaced the phrase "shall … dismiss[]" in Rule 42(b)'s language addressing the

dismissal of an appeal on agreement of the parties. The concern addressed by the proposed amendment stems from the apparent discretion the current rule would give to the courts of appeal not to dismiss an appeal despite the parties' agreement that it should be dismissed. The amendment would change the relevant "may dismiss" to "must dismiss" in what would become the Rule's subdivision (b)(1). In addition, the Advisory Committee restructured Rule 42(b) for overall clarity and added a subdivision (c) to clarify that the rule does not alter the legal requirements governing court approval of settlements. The Advisory Committee has received no comments on this proposed rule change and expects to seek final approval from the Standing Committee at its mid-year meeting.

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares explained that the Advisory Committee has engaged in a comprehensive review of these two rules. Amendments to Rule 35 and 40 that set length limits for responses to petitions for rehearing are on track to take effect on December 1, 2020, if the Supreme Court approves them and Congress takes no contrary action. Apart from those pending amendments, Judge Chagares noted that while the Advisory Committee has not received any complaints about the rules, small changes to harmonize the two rules may be beneficial if unintended consequences can be avoided. Professor Hartnett noted that the benefits of a rewrite of these rules must be balanced against the risk of disrupting current practice. The Advisory Committee's consideration of further potential amendments has thus narrowed and is presently focused on two items. First, the Advisory Committee seeks to underscore the difference between the standards for en banc and panel rehearing. Second, it is reassessing the interaction between petitions for panel rehearing and petitions for *en banc* rehearing, particularly given that the procedures are governed by two separate rules. A review of local rules and internal operating procedures of various circuits revealed a widespread practice of treating an *en banc* petition as including a request for panel rehearing. The Advisory Committee is also considering ways to ensure that a panel cannot block litigants from seeking rehearing en banc (the concern focuses on instances when a panel makes changes to its decision and states that no further petitions for rehearing en banc will be permitted). A related question concerns whether post-panel-rehearing *en banc* petitions should be limited to instances when the panel changes the substance of its initial decision.

One member expressed a view that a qualifier based on "changes to substance" should not be included in any potential amendments to Rules 35 and 40. Even changes that may seem small and stylistic, he argued, can have big effects. The member emphasized that timely-filed petitions for panel rehearing or rehearing *en banc* affect the time for filing petitions for a writ of certiorari. That makes it especially important for the rules governing rehearing petitions to operate mechanically, so that litigants will be able to forecast reliably whether a rehearing petition will suspend the deadline to petition for certiorari. The same member observed that one proposed addition — the statement in proposed new Rule 35(b)(4) that if the Rule 35(b)(1) criteria for rehearing en banc are not present, "panel rehearing pursuant to Rule 40 may be available" — would be more appropriate in a committee note rather than in rule text. Another member asked if subdivision (b)(5) of the proposal should explicitly limit a second petition for rehearing *en banc* to those petitions that are directed toward the changes made by the panel after the initial petition for rehearing. Professor Hartnett suggested, though, that in a petition after the panel changes its decision, a party might also want to address changes that were requested but not made. For

instance, a panel's revised decision might cite a supervening Supreme Court precedent without sufficiently addressing the import of that new precedent.

Rule 25 (Filing and Service) and Privacy in Railroad Retirement Act Benefit Cases. In response to a suggestion from the Railroad Retirement Board's General Counsel, the Advisory Committee has been considering whether privacy protections afforded Social Security benefits cases under Civil Rule 5.2(c) and Appellate Rule 25(a)(5) should be extended to Railroad Retirement Act benefits cases. Judge Chagares noted the similarity between Social Security and Railroad Retirement Act benefits programs. Unlike Social Security cases, however, Railroad Retirement Act benefits cases go directly to the courts of appeal on petition for review. The Advisory Committee is considering whether other types of benefits cases likewise go directly to the courts of appeals for review and implicate similar privacy concerns. Professor Hartnett added that the Judicial Conference Committee on Court Administration and Case Management (CACM) has not objected to the Advisory Committee pursuing a possible rules amendment in this context.

A member suggested that this may become a slippery slope; he noted that ERISA and disability claims cases often involve the same kind of private personal information. Judge Campbell responded that the current proposal arose because the Railroad Retirement Board brought the suggestion to the advisory committee's attention. And the likelihood that the Appellate Rules would need to address many similar instances is low, given that the goal here is to address instances where an agency decision in a benefits case goes directly to the court of appeals. (In proceedings where agency review is initiated in the district court, Professor Hartnett observed, the Appellate Rules piggyback on the Civil Rules' privacy approach.)

Another member asked whether the draft language "of a benefits decision of the Railroad Retirement Board" is needed – why not just say "a petition for review under the Railroad Retirement Act"? Civil Rule 5.2(c) applies to "action[s] for benefits under the Social Security Act," but the rule language does not specify "a benefits decision by the Social Security Administration." Professor Hartnett responded that there may be other types of Railroad Retirement Board decisions that are subject to review under the Railroad Retirement Act; he promised to check with the Board's General Counsel.

Another member wondered what systems exist for protecting private information in review proceedings under the Longshore and Harbor Workers' Compensation Act and the Black Lung Act and whether those same systems should also suffice to protect privacy in review proceedings under the Railroad Retirement Act. Professor Hartnett explained that the ordinary mechanism available in any case would be a motion to seal. Railroad Retirement Act benefits cases are distinctive because they are essentially Social Security benefits cases for railroad workers; it would be very hard to address privacy concerns in such cases through standard redaction procedures. Judge Chagares added that the committee had not found any other types of proceedings that are as similar (as Railroad Retirement Act benefits cases are) to Social Security benefits cases.

Professor Bartell expressed concern about adding "privacy" to the draft amendment of Appellate Rule 25(a)(5). She noted that if the rule extended only the "privacy provisions" of Civil Rule 5.2(c)(1) and (2) to Railroad Retirement Act cases, it would raise questions about which parts of Civil Rule 5.2(c) are being incorporated.

Suggestion Regarding Decision on Grounds Not Argued. The Advisory Committee is considering a suggestion submitted by the American Academy of Appellate Lawyers. This suggestion would require a court of appeals, if contemplating a decision based on grounds not argued, to provide notice and an opportunity to brief that ground. Judge Chagares formed a subcommittee to consider this issue. The threshold question whether this suggestion is appropriate for rulemaking, or more appropriate as a subject of best practices. A member commented that, in addition to the difficulty of defining "grounds not argued," the suggested rule amendment may not accomplish anything that litigants could not already achieve through petitions for rehearing.

Suggestion Regarding "Good Cause" Definition for an Extension of Time to File a Brief. The Advisory Committee received a suggestion to specify criteria for finding "good cause" for an extension of time to file a brief. Judge Chagares noted that the term "good cause" appears multiple times in the Appellate Rules and Civil Rules. The Advisory Committee agreed that a good-cause determination depends on many factors and that no bright-line definition would be desirable. The Advisory Committee removed this item from its agenda.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Civil Rules Advisory Committee, which last met on October 29, 2019, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Social Security Disability Review and Multidistrict Litigation (MDL) subcommittees.

Information Items

Social Security Review Subcommittee. Judge Bates explained that the subcommittee was formed in response to a suggestion submitted by the Administrative Conference of the United States (ACUS). ACUS proposed the adoption of national rules governing district-court review of Social Security Administration decisions, in order to provide greater uniformity and to recognize the appellate nature of such review. The subcommittee has prepared drafts that illustrate possible alternative approaches that a national rule could take. One approach would create a new rule within the Civil Rules; the other would create a new set of supplemental rules. Each of the draft alternatives is more modest than the original suggestion.

Judge Bates explained that the subcommittee and Advisory Committee have again returned to the initial question: whether to embark on this project, notwithstanding the usual preference for keeping the Rules trans-substantive. Beyond trans-substantivity, there are other competing concerns. Some reasons to create special rules for Social Security cases include the support from ACUS and the Social Security Administration, the modesty of the proposal, a preference for uniformity in procedure across districts, and the volume and uniqueness of Social Security cases. Countervailing considerations (in addition to the concerns about substance-specific rulemaking) include the opposition by plaintiffs' organizations and the DOJ, the likelihood that a national rule would not displace all the variations created by local rules, and a question as to the appropriateness of adopting rule amendments in order to address problems that may relate more closely to the insufficiency of agency funding. Judge Bates also emphasized the trans-substantivity concerns.

Uniformity in federal procedures is a laudable goal of the Rules Enabling Act. Judge Bates recognized the concern about carving out categories of cases for specific rules and the risk of favoritism that poses. He noted that the subcommittee considered whether rules should be created that focus more broadly on cases that — like Social Security cases — are based on an administrative record. Such a broad undertaking would be difficult to achieve, given the variety of agencies and matters that come to the district court for review.

Professor Coquillette remarked that the Rules Committees have received numerous requests to carve out special rules over the years, and Congress has at times seemed inclined to carve out particular categories like patent cases and class actions for special rules. If the Advisory Committee moves forward with a proposal, Professor Coquillette suggested that it should create a supplemental set of Social Security rules, rather than a new Civil Rule.

A member expressed the view that the Rules Committees picking specific areas and carving out special rules could be problematic; that might be a task to which Congress is better suited. A different member suggested that this issue ties in with broader issues about specialized courts.

Several judge members expressed support for the proposal. There is a gap in the rules with regard to these types of actions, and the proposal would provide a practical solution. Regarding trans-substantivity concerns, one noted that the federal courts already use local rules to create substance-specific rules for special types of cases. Professor Cooper observed that district judges plainly have authority to establish practices that go beyond the Rules Enabling Act's scope in the course of deciding cases. The question of the appropriate scope of local rules is more difficult. 28 U.S.C. § 2071(a) says only that local rules "shall be consistent with" any national rules promulgated under the Rules Enabling Act. Does the fact that varying local rules now address a topic justify the adoption of national rules on that topic?

Judge Campbell observed that this is a unique situation in which a government agency has asked the Rules Committees to address a problem. The subcommittee has done a great job and has identified some possible rules that could address inefficiencies in the current system. This stands as a compelling argument in favor of rulemaking. While trans-substantivity is a countervailing concern, the Rules Committees have already crossed that bridge with respect to, for example, admiralty cases and habeas proceedings. Social security cases constitute a large part of the courts' dockets, and the matter is important to a government agency, and these considerations may outweigh the concerns about substance-specific rulemaking. Judge Campbell also expressed his view that the proposal is even-handed and would simplify procedures for all parties. The main question at present is whether to publish a proposal. Judge Campbell added that he favored publication for comment.

A member echoed Judge Campbell's comments, noting that the presumption against substance-specific rules can be overcome. The opposition by the claimants' bar and DOJ, this member suggested, should not be dispositive here because their reasons for opposition do not go to the heart of the problem. The claimants' side argues that a uniform rule will displease judges. If that is the case, it is unclear how that would disadvantage only claimants. The DOJ cites trans-substantivity concerns. The Rules Committees can decide the trans-substantivity question on their

own. In this member's view, the proposal would be beneficial and streamline the process through modest improvements without favoring either side. Another member agreed.

A different member asked about the feasibility of a pilot project with this proposal. Professor Cooper explained that the DOJ has crafted a model rule and offered it to district courts as a suggested local rule (though this is not a formal pilot project). Further, the subcommittee has sought input from magistrate and district judges on how the rules work in Social Security cases. The general feedback is that the Civil Rules do not fit Social Security cases and that the proposed national rule reflects what judges are already doing and would be helpful. Judge Campbell agreed that the proposal parallels what many districts are already doing.

A judge member voiced support for publishing the proposal for public comment. The same member asked if the subcommittee had considered drafting a best-practices guide instead of a rule amendment. This member also noted that, in her district, magistrate judges are tasked with handling Social Security review proceedings. Judge Bates responded that the subcommittee continues to consider a best-practices approach but that it currently views a rule amendment as preferable. He also observed that the proposed rule would not affect how districts structure the handling of Social Security disability review cases.

Professor Coquillette agreed that the proposal should be published for comment and reiterated his support for the supplemental set of rules instead of a new Civil Rule.

A judge member observed that he shared the general concern over trans-substantivity. Based on the proliferation of local rules related to Social Security cases, however, trans-substantivity does not seem to be as much of a concern. The question then is whether to pursue uniformity by means of a national rule.

Subcommittee on Multidistrict Litigation. Judge Bates stated that the subcommittee has focused primarily on four areas: third-party litigation funding (TPLF); early vetting of claims through the use of plaintiff fact sheets (PFS) and defendant fact sheets (DFS); interlocutory review in MDL cases; and judicial involvement in the settlement process and review.

The Advisory Committee decided to remove TPLF from the subcommittee's agenda (as this phenomenon is not unique to or especially prevalent in MDL cases) and has returned it to the Advisory Committee for monitoring.

The subcommittee continues to study "early vetting" as a tool to winnow unsupportable claims and jump start discovery. The subcommittee has concluded that plaintiff fact sheets — and defense fact sheets, secondarily — are used in virtually all "mega" tort MDLs and in most other large MDL proceedings, particularly personal injury MDLs. Because plaintiff fact sheets take a lot of time to develop, a simpler practice called "census of claims" has emerged. All groups involved think this is a worthwhile approach to examine. While it gathers less information, the census of claims practice seems to serve very valuable purposes. Several transferee judges are using this approach in current MDL proceedings.

The issue of interlocutory review in MDL proceedings is under active assessment. The subcommittee is considering whether existing procedural mechanisms, chiefly 28 U.S.C. § 1292(b), provide adequate interlocutory appellate review of certain MDL orders. Judge Bates highlighted the subcommittee's study of Judge Furman's order in *In Re: General Motors LLC Ignition Switch Litigation*, No. 14-MD-2543 (SDNY 2019), which granted a party's request for certification of an interlocutory appeal under § 1292(b). Judge Bates explained the difficulty of drafting a rule amendment that would expand options for interlocutory review only to certain kinds of MDLs, or to specific subject matters such as preemption or *Daubert* rulings. The subcommittee continues to consider these questions in the context of possible rule amendments.

The subcommittee also continues to consider the issue of judicial supervision in the MDL settlement process and settlement review. Judge Bates explained that the subcommittee is considering whether this issue is appropriate for rulemaking and whether any such rule should be limited to a certain subset of MDLs. While the academic community has expressed support for greater judicial involvement in MDL settlements, neither the bar nor transferee judges share that position. Judge Bates noted that this is an ongoing effort, and the subcommittee is in the early stages. One member, citing his MDL experience in which courts have been heavily involved, inquired whether there is a need for more judicial involvement in the settlement process. Judge Bates clarified that the subcommittee is looking at non-class-action MDLs where the rules do not offer the same mechanism for judicial involvement as under Civil Rule 23.

A judge member expressed the view that rulemaking may not always be appropriate in the MDL context. It would be difficult to carve out a category of MDL cases to which certain rules should apply. Flexibility in MDLs is preferable to a one-size-fits-all approach. Rather than rulemaking, this member suggested, it would be better to promote best practices through guidance from, for example, the Judicial Panel on Multidistrict Litigation (JPML) and the Manual for Complex Litigation. Of the topics under study, this member suggested, the best candidate for rulemaking would be interlocutory appeals; Section 1292(b) is not a good fit for MDLs.

Another member suggested that this is an area where some rulemaking would be helpful because procedural decisions can have huge substantive implications in MDL proceedings. In this member's experience, large MDLs usually result in settlement. Judicial management and decisions regarding interlocutory appeal have a massive impact on the outcome. As to addressing judicial involvement in the settlement process, however, this member suggested a need for caution.

A different member emphasized that in the mass tort MDL context, Civil Rule 23 brings with it a lot of jurisprudence that gives some backbone as to the roles of lead attorneys. The American Law Institute's project on aggregate litigation provides guidance on what ethical obligations lead attorneys have regarding settlement when representing large groups of clients. This member agreed with the earlier comment that some of these issues go beyond the role of procedure and may not be appropriate for rulemaking. In addition, creating a rule for interlocutory review in MDL proceedings may prolong these cases even further. This would cause practical concerns for clients.

A member noted that, in his experience in the Second Circuit, requests for interlocutory review under § 1292(b) are rarely granted. He asked how different courts are treating these

requests. Professor Marcus explained that the difficulty is finding all the cases in which these requests are made but denied. Judge Bates added that the subcommittee hears anecdotally that certain circuits never grant § 1292(b) requests, but clear data are not readily available to support or contradict these comments. A judge member noted that his research revealed little as far as cases dealing with when it is appropriate to grant § 1292(b) requests in MDL cases.

Another judge member commented that the JPML makes available a very fine body of resources for case management. She asked whether the JPML has a view regarding the need for rulemaking. Regarding interlocutory appeals, this member noted that added delay presents a real concern from a case management perspective.

Rule 4(c)(3) – Service by the U.S. Marshals Service. Professor Cooper explained that present language in Civil Rule 4(c)(3) creates an ambiguity by stating both "the court may order" service by a marshal at the plaintiff's request and "[t]he court must so order if the plaintiff" has i.f.p. status. One plausible interpretation is that if a plaintiff is granted i.f.p. status, then the court must order service by a marshal. A second interpretation is that the court's obligation to order service by a marshal is contingent on the plaintiff making a motion. If the rule were amended to remove the ambiguity, the amended rule could adopt either of these approaches, or it could instead adopt a different approach that would direct service by a marshal on behalf of any i.f.p. litigant even when the court does not order the marshals to effect service. The Advisory Committee is in discussions with the U.S. Marshals Service and the Administrative Office regarding possible solutions.

Judge Campbell stated that the staff attorneys in his court confirmed that 100% of prisoner pro se complaints that survive initial screening by the court under 28 U.S.C. § 1915A are served by a marshal, and about 50% of non-prisoner pro se cases are served by a marshal. In the other 50% of non-prisoner pro se cases, Judge Campbell noted that the plaintiffs effect service by other means. This suggests that there is a significant portion of cases where the marshals are not needed.

Rule 12(a) – Filing Times and Statutes. Judge Bates explained that the Advisory Committee has begun looking at Civil Rule 12(a), which sets the time to serve a responsive pleading. The general provision under paragraph (1) — setting the presumptive time at 21 days — includes the qualifying statement: "Unless another time is specified by this rule or a federal statute[.]" The Advisory Committee is considering whether the same qualifier should be added to paragraphs (2) and (3), which apply to the United States and its officers or employees. Judge Bates noted that the Freedom of Information Act sets a 30-day response time, which may apply to cases otherwise governed by Rule 12(a)(2). The Advisory Committee will discuss this issue more in-depth at its spring meeting.

Matters Removed from the Agenda. Judge Bates identified items that the Advisory Committee removed from its agenda after consideration. These items relate to expert witness fees in discovery, proportionality under Rule 26, clear offers under Rule 68, and a proposal that Rule 4(d) be amended to address the practice of "snap removal."

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Richter provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee presented three information items.

Rule 702 – Admission of Expert Testimony. The Advisory Committee has been examining Evidence Rule 702, following a 2016 report which raised concerns about methods used nationwide for forensic feature-comparison evidence. The report by the President's Council of Advisors on Science and Technology (PCAST) recommended the preparation of a committee note to Rule 702 that would guide judges as to the admissibility of forensic feature-comparison expert testimony. The Advisory Committee convened a symposium in October 2017 to discuss the PCAST report and related *Daubert* issues. It has continued to discuss potential rule amendments at subsequent Advisory Committee meetings. At its fall 2019 meeting, the Advisory Committee concluded that creating a free-standing rule governing forensic evidence would be inadvisable because such a rule would overlap problematically with Rule 702. Judge Livingston noted that the Advisory Committee is exploring judicial and legal education options on this issue and the Committee's Reporter is working with the FJC and Duke and Fordham Law Schools to organize judicial-education programming.

The Advisory Committee is continuing to consider a possible amendment that would add an element to Rule 702 to address the problem of experts overstating opinions. Prior to its fall meeting, the Advisory Committee convened a group of judges from around the country for a mini-conference at Vanderbilt University. The panel provided helpful comments about *Daubert* best practices and potential Rule 702 amendments on overstatement in expert opinions. At its spring 2020 meeting, the Advisory Committee will decide whether to move forward with proposed amendments or to put further consideration of Rule 702 on hold. The DOJ has suggested that the Advisory Committee take the position of "watchful waiting" and permit the DOJ to continue its work in this area and to allow its internal changes to percolate through the courts. Judge Livingston noted that the Evidence Rules Committee is working in tandem with the Criminal Rules Committee (which has been developing amendments to Criminal Rule 16 concerning expert disclosures).

Rule 106 – Rule of Completeness. The Advisory Committee received a proposal to amend Rule 106 to provide that a completing statement is admissible over a hearsay objection and to provide that the rule covers oral statements as well as written or recorded statements. Judge Livingston noted that most courts already permit completing oral statements, but under Rule 611 rather than Rule 106. Judge Livingston observed that the original committee note to Rule 106 stated that the rule was limited to writings and recorded statements only "for practical reasons." Those "practical reasons" might concern situations where completing oral statements are made by different declarants. Another practical concern is disrupting the order of proof in a case.

Judge Livingston explained that the hearsay issue presents the strongest reason for a rule amendment. The Sixth Circuit has a published opinion holding that in order to complete a statement under Rule 106, the completing portion of the statement must also be admissible under the hearsay rules. The Advisory Committee is considering whether and how the Evidence Rules

should allow these completing oral statements to come in as evidence. Some Advisory Committee members have taken the position that a rule amendment should, in effect, create a new hearsay exception, such that the completing portion of a statement comes in for its truth. Others took the position that a completing oral statement should come in for completeness, but not its truth unless it satisfies one of the hearsay exceptions. The Advisory Committee will continue to consider this matter at its next meeting.

Rule 615 – Excluding Witnesses. The Advisory Committee is considering a potential amendment to Evidence Rule 615, which provides that a judge may *sua sponte* — or must, upon request — exclude witnesses from a trial or hearing. Professor Richter noted that sequestration orders under Rule 615 tend to be short, and the brevity of these orders, as reflected in transcripts, creates uncertainty about their scope. For example, such orders may be interpreted as only requiring witnesses to physically leave the courtroom. On the other hand, they may extend beyond physical sequestration and regulate behavior and communications by witnesses outside the courtroom. The Advisory Committee identified a conflict in federal case law regarding these interpretations. Some courts say that for a Rule 615 order's scope to extend beyond physical sequestration, a judge's order must explicitly state that external communications are to be limited. Most courts, however, say that it is implicit in the Rule — and thus covered in vague orders — that sequestration extends beyond physical presence in the courtroom. Without specificity in a Rule 615 order, the Advisory Committee is concerned that witnesses will not have notice that the court intends to bar external communications.

The Advisory Committee has identified possible alternative rule amendments to address the issue of the scope of Rule 615 orders. At this point, the Advisory Committee is still considering whether any amendment is appropriate; it will continue to explore these possibilities at its spring meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Criminal Rules Advisory Committee, which met on September 24, 2019, in Philadelphia, Pennsylvania. The Advisory Committee presented three information items.

Rule 16 – Discovery Concerning Expert Reports and Testimony. The Advisory Committee's draft amendments to Criminal Rule 16 seek to improve the specificity and timeliness of expert disclosures. The Advisory Committee undertook this project following public suggestions that Rule 16 be amended to track more closely the Civil Rule 26 approach to expert disclosures. The Advisory Committee has held two informational sessions in the past two years. Following these sessions, the Advisory Committee identified the main problems with Criminal Rule 16: timing of the disclosure, and disclosures that are too cursory and vague to allow the parties to adequately prepare for trial. The reporters and Rule 16 Subcommittee developed a proposal to address these problems. At its fall 2019 meeting, the Advisory Committee discussed and refined the draft amendments, and unanimously approved them and a proposed committee note.

Judge Kethledge summarized the Advisory Committee's main points of discussion and debate. First, the Advisory Committee debated whether a numerical or functional deadline for

disclosure would be preferable. The Advisory Committee decided a functional standard — "sufficiently before trial to provide a fair opportunity for" each party to meet the opponent's evidence — was appropriate because a one-size-fits-all approach does not work well in this context. The rule requires the district court to specify a deadline using this standard. Second, the Advisory Committee considered whether to term the disclosed document something other than a "summary" (as the current Rule calls it). The Advisory Committee elected to eschew the terms "summary" and "report" and instead to focus on the verb "disclose" – thus allowing the amended provisions to speak for themselves regarding required content of the disclosure. The proposed amendments would add to the list of required contents "a complete statement of all opinions" that the party will elicit in its case-in-chief.

While the proposal would not require the witness to prepare the document to be disclosed under Rule 16, it would require that the witness review and sign the document. Judge Kethledge explained that this provision serves an impeachment function. Judge Kethledge noted some of the concerns expressed by the DOJ about the proposal. For the signing requirement, the Department indicated that it does not always have control over the expert witness and may face difficulty getting the witness to sign; the draft includes an option for the disclosing party to "state[] in the disclosure why it could not obtain the witness's signature through reasonable efforts."

Judge Kethledge emphasized the deliberative process undertaken by the Rule 16 Subcommittee and the full Advisory Committee in developing this proposal. He commended those involved for contributing constructively and in good faith. The Advisory Committee's proposal is a product of a fairly delicate compromise. He explained that the Advisory Committee is confident that this proposed amendment would improve practice in criminal cases and allow expert testimony to be more effectively tested than it is at present.

Professor Beale added that the proposal will bring Criminal Rule 16 closer to Civil Rule 26 but she emphasized that criminal practice is different. Professor Beale explained the differences in pre-trial disclosures and discovery between civil and criminal practice. The goal of the proposed amendment is to allow the parties adequate time and opportunity to prepare for trial, and the proposal provides the necessary flexibility for that in the criminal context. Thus, the Advisory Committee drew on certain aspects of Civil Rule 26 but tailored the proposal for criminal practice. Professor King noted that the proposal limits the required disclosure to the expert opinions that will be elicited in the party's case-in-chief. This reflects special constitutional concerns in criminal cases.

The DOJ representative commented on the Advisory Committee's excellent process that took into account the Department's concerns and input and reached a consensus proposal agreeable to everyone.

A judge member inquired whether the "reasonable efforts" standard for obtaining the expert witness's signature could be clarified. Professor Beale responded that the committee note, which will be considered again at the Advisory Committee's spring meeting, could address this issue.

Professor Marcus commented that the proposal's duty to supplement the disclosure may cause problems, based on experience with a similar provision under the Civil Rules. Professor King responded that Criminal Rule 16(c) contains a continuing duty to disclose.

Judge Campbell asked what the defendant's "case-in-chief" refers to under the proposed Rule 16(b)(1)(C)(i). Professor Beale explained that "case-in-chief," as it applies to the defense, is when the defense puts on its own witnesses after the government rests. The current rule uses "case-in-chief" in several places – with respect to discovery obligations of both the government and the defense – but not with respect to the defense's expert witness disclosure obligations. Instead, under current subsection (b)(1)(C), the defense must disclose expert witnesses it intends to use as evidence at trial. The Advisory Committee was concerned that the absence of the restricting language "case-in-chief" in subsection (b)(1)(C) might inadvertently require the defendant to disclose *more* than the government. Professor Beale emphasized that it was the Advisory Committee's goal to make the party's obligations both parallel and reciprocal.

Judge Campbell expressed concern about adding the "case-in-chief" language to the defense's expert disclosure obligations. In his view, neither the current rule nor the proposed amendment make the disclosure obligations equal. He pointed out that adding the "case-in-chief" language to the defendant's disclosure obligations could be interpreted as expanding the disclosure obligation to all expert witnesses the defense intends to use, including any rebuttal experts. In contrast, it is not clear that the government would be obligated to disclose rebuttal expert witnesses.

Professor Beale explained that the issue of unequal disclosure standards has not been coming up in practice. She suggested that the language is worth looking at again but added that there may be concern about opening up the disclosure requirements to encompass more than "case-in-chief." Judge Kethledge noted that it is hard to find the right phrase; one possibility might be "disclose every witness you will use." Judge Campbell responded that this is what the rule already requires of the defendant, but not of the government; the Rule, he stressed, should be even-handed.

A member raised the question about the risk of one party trying to game the system under this proposal by under-disclosing and later supplementing. This member highlighted the door-shutting aspect of the Civil Rule 26 approach. The reporters responded that this potential issue had not been raised in any discussions and would be beneficial to address with the Advisory Committee.

A judge member commented that the defendant's "case-in-chief" language already existed in subdivision (b) and that there are practical reasons to use that term. Because a defendant has no obligation to preview his or her defense before trial, the government may not know what expert witnesses it needs for rebuttal. The same situation can arise where a defendant needs to call an expert witness in sur rebuttal. This member suggested that this is a reason to use parallel language and refer to "case-in-chief." Professor King explained that even though the proposal is reciprocal, it is situated within the larger context of various defense rights, including the protection against self-incrimination.

Another member remarked that the duty to supplement expert disclosures under Civil Rule 26 is critical to prevent trial by ambush. The member observed that this concern may not carry over to criminal practice to the same degree.

Professor King asked the Standing Committee members whether it makes sense to close the door on a criminal defendant's ability to supplement when the defendant identifies an additional expert witness during and because of an issue that arises at trial. She noted as a backdrop that the defendant has no duty to put on a defense at all.

Judge Campbell emphasized the tension present in criminal practice: there is an interest in avoiding sandbagging, but the system also must preserve the defendant's rights.

Professor Beale acknowledged these concerns. She reiterated that practitioners have not been reporting problems with delayed supplementation or parties gaming the system. Unlike with new Criminal Rule 16.1, there was no push to add an explicit good-faith element to the duty to supplement in this proposal. Judge Kethledge added that the Advisory Committee developed this proposal with the approach of limiting its efforts to actual, existing problems and building a consensus around them, rather than focusing on speculative problems.

Task Force on Protecting Cooperators. Judge Kethledge noted that the Task Force, chaired by Judge Lewis Kaplan, has made its recommendations, which related primarily to changes in the CM/ECF system and changes to Bureau of Prisons operations and policies. Some of the recommendations are proving challenging and expensive to implement.

In Forma Pauperis Status Suggestion. Judge Kethledge explained that the Advisory Committee chose not to pursue the suggestion regarding i.f.p. status because eligibility under the Criminal Justice Act involves different standards. The Advisory Committee would be interested in being involved with this multi-committee item, if it continues, as far as i.f.p. status relates to habeas cases.

OTHER COMMITTEE BUSINESS

Legislative Report. Julie Wilson delivered the legislative report and directed the Committee to the tracking chart in the agenda book. The chief legislative development concerning the rules committees is the SBRA, which was discussed previously. Along with CACM and the Office of Legislative Affairs, the Rules Committee Staff provided support to Judge Audrey Fleissig and Judge Richard Story last fall when they testified before the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet. The hearing and their testimony primarily focused on sealing of court records, cameras in federal courts, and access to the Public Access to Court Electronic Records (PACER) database. Representative Nadler recently introduced H.R. 5645, the "Eyes on the Courts Act of 2020." The bill would provide for media coverage of all federal appellate proceedings, including Supreme Court proceedings. A Sunshine in Litigation Act bill will likely be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

Judiciary Strategic Planning. Ms. Wilson reported on the *Strategic Plan for the Federal Judiciary*, which sets out the core values of the federal judiciary and strategies for realizing those values. The *Plan* is updated every five years, and 2020 is an update year. Ms. Wilson directed the members to the agenda book containing an update from Judge Campbell on the *Plan* and the Rules Committees' work. Discussion was invited; Judge Campbell will continue to communicate with the Judiciary's Planning Officer regarding updates to the *Plan.*

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 in Washington, DC. on June 23, 2020.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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Agenda E-19 (Summary)
Rules
March 2020

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

This report is submitted for the record and includes information on the following for 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 on January 28, 2020. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair (by telephone), and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. 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; and Judge Debra Ann Livingston, Chair, Advisory Committee on Evidence Rules.

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

Evidence Rules; 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, 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 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, and discussed an action item regarding judiciary strategic planning.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

The Advisory Committee met on October 30, 2019. Discussion items included: the rules and forms published for public comment in August 2019; potential amendments to Rules 25, 35, and 40; a suggestion that parties be given notice and an opportunity to respond if a decision will rest on grounds not argued; and the standard for in forma pauperis participation in appellate cases.

Rule 25

The Advisory Committee continued its discussion of potential amendments to Rule 25(a)(5) to ensure privacy protections in Railroad Retirement Act cases. A proposed rule amendment will be considered at the spring meeting.

Rules 35 and 40

Amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Hearing) imposing length limits on responses to a petition for rehearing have been approved by

the Conference and submitted to the Supreme Court for its consideration, with a potential effective date of December 1, 2020. Beyond these specific pending amendments, the Advisory Committee continued to consider a suggestion that Rules 35 and 40 be revised comprehensively to make the two rules dealing with rehearing petitions more consistent, but has been dissuaded from doing so given the absence of a demonstrated problem calling for such a comprehensive solution, as well as potential unintended consequences and the general disruption of significant rules amendments. The Advisory Committee will continue to discuss more limited amendments to Rule 35 that would clarify the relationship between petitions for panel rehearing and rehearing en banc.

Finally, the Advisory Committee determined to retain on its agenda a suggestion that parties be given notice and an opportunity to respond if a decision may be based on grounds not argued. The Advisory Committee will also continue to consider in forma pauperis standards in appellate cases.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented no action items.

Information Items

The Advisory Committee met on September 26, 2019. The bulk of the agenda concerned responses to two recently enacted laws and an update on the restyling of the Bankruptcy Rules.

Response to Enactment of the Honoring American Veterans in Extreme Need Act of 2019: Notice of Amendments to Official Forms 122A-1, 122B, and 122C-1

In response to the Honoring American Veterans in Extreme Need Act of 2019 (HAVEN Act, Pub. L. No. 116-52, 133 Stat, 1076), which became effective on August 23, 2019, the Advisory Committee approved amendments to Official Forms 122A-1 (Chapter 7 Statement of Your Current Monthly Income), 122B (Chapter 11 Statement of Your Current Monthly Income), and 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of

Commitment Period). It submitted the amendments for retroactive approval by the Standing Committee, and for notice to the Judicial Conference.[1]

The HAVEN Act amends the definition of "current monthly income" in Title 11, U.S. Code, § 101(10A) to exclude:

> any monthly compensation, pension, pay, annuity, or allowance paid under title 10, 37, or 38 in connection with a disability, combat-related injury or disability, or death of a member of the uniformed services, except that any retired pay excluded under this subclause shall include retired pay paid under chapter 61 of title 10 only to the extent that such retired pay exceeds the amount of retired pay to which the debtor would otherwise be entitled if retired under any provision of title 10 other than chapter 61 of that title.

The exclusions set forth in the HAVEN Act's amended definition of "current monthly income" supplement the current income exclusions for social security benefits, payments to victims of war crimes or crimes against humanity, and payments to victims of terrorism. The HAVEN Act also limits the inclusion of certain pension and retirement income.

To address the statutory change, at its September 26, 2019 meeting, the Advisory Committee approved conforming changes to lines 9 and 10 of Official Forms 122A-1, 122B, and 122C-1. The revised forms were posted on the judiciary's website on October 1, 2019. The Standing Committee approved the changes and now provides notice to the Judicial Conference. The revised forms are set forth in Appendix A.

Response to the Enactment of the Small Business Reorganization Act of 2019: Distribution of Interim Bankruptcy Rules; Notice of Amendments to Official Forms 101, 201, 309E1, 309E2 (new), 309F1, 309F2 (new), 314, 315, and 425A

The Small Business Reorganization Act of 2019 (SBRA, Pub. L. No. 116-54, 133 Stat. 1079) creates a new subchapter V of chapter 11 for the reorganization of small business debtors, which will become effective February 19, 2020. The enactment of the SBRA requires

[1] Because the HAVEN Act went into effect immediately upon enactment, the Advisory Committee voted to change the relevant forms pursuant to the authority granted by the Judicial Conference to the Advisory Committee to enact changes to Official Forms subject to subsequent approval by the Standing Committee and notice to the Judicial Conference (JCUS-MAR 16, p. 24).

amendments to several bankruptcy rules and forms. Because the SBRA will take effect long before the rulemaking process can run its course, the Advisory Committee voted to issue needed rule amendments as interim rules for adoption by each judicial district. In addition, the Advisory Committee recommended amended and new forms pursuant to the authority delegated to make conforming and technical amendments to Official Forms (JCUS-MAR 16, p. 24).

The Advisory Committee's proposed interim rules and form changes were published for comment for four weeks starting in mid-October 2019. As a result of the comments received, a subcommittee of the Advisory Committee recommended changes to several of the published rules and forms, changes to four rules that were not published for public comment, and promulgation of a new rule.

By email vote concluding on December 4, 2019, the Advisory Committee voted unanimously to seek the issuance of 13 interim rules, and it approved nine new or amended forms as Official Forms pursuant to the Advisory Committee's delegated authority from the Judicial Conference (JCUS-MAR 16, p. 24). By email vote concluding on December 13, 2019, the Standing Committee unanimously approved the Advisory Committee's proposed interim rules and Official Form changes required to respond to SBRA. This report constitutes notice to the Judicial Conference of amendments to Official Forms 101 (Voluntary Petition for Non-Individuals Filing for Bankruptcy), 201 (Voluntary Petition for Individuals Filing for Bankruptcy), 309E1 (For Individuals or Joint Debtors), 309E2 (For Individuals or Joint Debtors under Subchapter V) (new), 309F1 (For Corporations or Partnerships), 309F2 (For Corporations or Partnerships under Subchapter V) (new), 314 (Class [ ] Ballot for Accepting or Rejecting Plan of Reorganization), 315 (Order Confirming Plan), and 425A (Plan of Reorganization for Small Business Under Chapter 11). The revised forms are set forth in Appendix B.

Following the Standing Committee's approval, the chairs of the Standing Committee and the Advisory Committee requested the Executive Committee of the Judicial Conference to act on an expedited basis on behalf of the Judicial Conference to authorize 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 that they can be adopted locally to facilitate uniformity in practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. On December 16, 2019, the Executive Committee approved the requests as submitted.

The chairs of the Standing Committee and the Advisory Committee sent an explanatory memorandum to all chief judges of the district and bankruptcy courts on December 19, 2019. The memorandum included a copy of the interim rules and requested that they be adopted locally to implement the SBRA until rulemaking under the Rules Enabling Act can take place.

A copy of the December 19 memorandum and the Advisory Committee's December 5 Report to the Standing Committee are included in Appendix B. The interim rules and amended forms are also posted on the judiciary's website.

At its spring 2020 meeting, the Advisory Committee will consider the issuance of permanent rules to comply with the SBRA and anticipates seeking the Standing Committee's approval at its June 2020 meeting to publish the rules and forms for public comment in August 2020.[2]

Bankruptcy Rules Restyling

The Advisory Committee also reported on the progress of the work of its Restyling Subcommittee in restyling the Bankruptcy Rules. The Advisory Committee anticipates that

[2] Although the Official Forms have been officially promulgated pursuant to the Advisory Committee's delegated authority from the Judicial Conference to issue conforming Official Form amendments, the Advisory Committee intends to publish them again under the regular procedure to ensure full opportunity for public comment.

restyled versions of the 1000 and 2000 series of rules will be ready for publication for public comment this summer, subject to the Standing Committee's approval at its June 2020 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on October 29, 2019. In addition to its regular business, the Advisory Committee heard testimony from one witness regarding the proposed amendment to Rule 7.1 addressing disclosure statements, which was published for public comment in August 2019. The proposed amendment to Rule 7.1 remains out for public comment, and the Advisory Committee plans to consider the draft rule and anticipates seeking final approval from the Standing Committee at its June 2020 meeting. The Committee discussed a suggestion regarding service by the U.S. Marshals Service for in forma pauperis cases. In addition, the Committee received updates on the work of a joint Civil-Appellate subcommittee and two subcommittees tasked with long-term projects involving possible rules for social security disability cases and multidistrict litigation (MDL) cases.

Service by U.S. Marshals for In Forma Pauperis Cases

At the January 2019 Standing Committee meeting, a member raised an ambiguity in the meaning of Rule 4(c)(3), the rule addressing service by the U.S. Marshals Service for in forma pauperis cases. The rule states that "[a]t the plaintiff's request, the court *may* order that service be made" by a marshal and that the court "*must* so order" if the plaintiff is proceeding *in forma pauperis* (emphasis added). The ambiguity lies in the word "must" – when is it that the court "must" order service? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require marshal service even if the plaintiff does not make a request. The

ambiguity appears to be an unintended result of changes made as part of the 2007 restyling of the Civil Rules.

According to the U.S. Marshals Service, service practices for in forma pauperis cases vary across districts. Greater uniformity would be welcome, as would reducing service burdens on the Marshals Service. While it is not clear that a rule change would accomplish either goal, the Advisory Committee is exploring amendment options that would resolve the identified ambiguity. The Advisory Committee will continue to gather information on current practices and possible improvements in consultation with the U.S. Marshals Service.

Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee

As previously reported, a joint subcommittee of the Advisory Committees on Civil and Appellate Rules is considering whether either or both rule sets should be amended to address the effect of consolidating initially separate cases on the "final judgment rule". The impetus for this project is *Hall v. Hall*, 138 S. Ct. 1118 (2018). In *Hall*, the petitioner argued that two individual cases consolidated under Civil Rule 42(a) should be regarded as one case, with the result that a judgment in one case would not be considered "final" until all of the consolidated cases are resolved. *Id.* at 1124. The Court disagreed, holding that individual cases consolidated under Civil Rule 42(a) for some or all purposes at the trial level retain their separate identities for purposes of final judgment appeals. *Id.* at 1131. The Court concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." *Id.*

Given the invitation from the Court, the subcommittee was formed to gather information as to whether any "practical problems" have arisen post-*Hall*. As a first step, the subcommittee is working with the FJC to gather data about consolidation practices. The FJC's study will

initially include actions filed in 2015-2017 and may eventually include post-2017 actions. The subcommittee will not consider any rule amendments until the research is concluded.

Social Security Disability Review Subcommittee

The Social Security Disability Review Subcommittee continues its work considering a suggestion by the Administrative Conference of the United States (ACUS) that the Judicial Conference develop uniform procedural rules for cases 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).

The subcommittee continues to work on a preliminary draft Rule 71.2 for discussion purposes. The subcommittee made the initial decision to include the rule within the existing Civil Rules framework with the goal of obtaining a uniform national procedure. Some members at the Advisory Committee's October 2019 meeting expressed concern that including subject-specific rules within the Civil Rules conflicts with the principle that the Civil Rules are intended to be rules of general applicability, i.e., "transubstantive." The DOJ has expressed concern about the precedent of adopting specific rules for one special category of administrative cases. The subcommittee has drafted a standalone set of supplemental rules to be considered as an alternative to including a rule within the existing Civil Rules.

The subcommittee will continue to gather feedback on the draft Rule 71.2, the supplemental rules and, of course, the broader question of whether rulemaking would resolve the issues identified in the initial ACUS suggestion. The subcommittee plans to decide whether pursuit of a rule is advisable and to recommend an approach at the Advisory Committee's April 2020 meeting.

MDL Subcommittee

The MDL Subcommittee was formed in November 2017 to consider several suggestions from the bar that specific rules be developed for MDL proceedings. Since its inception, 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 continue to gather information and feedback by participating in conferences hosted by different constituencies, including MDL transferee judges.

The MDL Subcommittee has considered a long list of topics and narrowed that list over time. At the October 2019 meeting, the subcommittee reported its conclusion that third-party litigation financing (TPLF) issues did not seem particular to multidistrict litigation and in fact appear more pronounced in other types of litigation. For that reason, the subcommittee recommended removing TPLF issues from the list of topics on which to focus. Given the growing and evolving importance of TPLF, the Advisory Committee agreed with the subcommittee's recommendation that the Advisory Committee continue to monitor developments in TPLF. The MDL Subcommittee's continued work now focuses on three areas:

a. Use of plaintiff fact sheets and defendant fact sheets to organize large personal injury MDL proceedings and to "jump start" discovery;

b. Interlocutory appellate review of some district court orders in MDL proceedings; and

c. Settlement review, attorney's fees, and common benefit funds.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Item

The Advisory Committee met on September 24, 2019. The meeting focused on a proposed draft amendment to Rule 16 that would expand the scope of expert discovery. The scope of discovery in criminal cases has been a recurrent topic on the Advisory Committee's

agenda for decades. Most recently, the Rule 16 Subcommittee was formed to consider suggestions from two district judges to expand pretrial disclosure of expert testimony in criminal cases under Rule 16 to more closely parallel the expert disclosure requirements in Civil Rule 26. At the Advisory Committee's October 2018 meeting, the DOJ updated the Advisory Committee on its development and implementation of policies governing disclosure of forensic and non-forensic evidence. The Rule 16 Subcommittee subsequently convened a miniconference in May 2019 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. Participants were asked to identify any concerns or problems with the current Rule 16 and to provide suggestions for improving the rule.

While the DOJ representatives reported no problems with the current rule, the defense attorneys identified two problems: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors. Participants discussed ways to improve the current rule to address these identified concerns.

Based on the feedback, the Rule 16 Subcommittee drafted a proposed amendment that addressed the timing and contents of expert disclosures while leaving unchanged the reciprocal structure of the current rule. First, the proposed amendment provides that the court "must" set a time for the government and defendant to make their disclosures of expert testimony to the opposing party. That time must be "sufficiently before trial to provide a fair opportunity for each party to meet" the other side's expert evidence. Second, the proposed amendment lists what must be disclosed in place of the now-deleted phrase "written summary."

After thorough discussion at the October 2019 meeting, the Advisory Committee unanimously approved the draft amendment in concept. The Rule 16 Subcommittee continues to refine the draft rule and accompanying committee note and will present the final draft to the

Advisory Committee at the May 5, 2020 meeting. The Advisory Committee plans to seek approval to publish the proposed amendment in August 2020.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 25, 2019. That morning, the Advisory Committee held a miniconference on best practices for judicial management of *Daubert* issues. The afternoon meeting agenda included a debrief of the miniconference, as well as discussion of ongoing projects involving possible amendments to Rules 106, 615, and 702.

Miniconference on Best Practices in Managing *Daubert* Issues

The miniconference involved an exchange of ideas among Advisory Committee members and an invited panel regarding *Daubert* motions and hearings, including the questions about the interplay between *Daubert* and Rule 702. The panel included five federal judges who have authored important *Daubert* opinions and who have extensive experience in managing *Daubert* proceedings, as well as a law professor who has written extensively in this area.

Rule 702

Following the miniconference, the Advisory Committee continued the discussion, noting that its consideration of these issues began with the Advisory Committee's symposium on forensics and *Daubert* held in October 2017. The Advisory Committee formed a Rule 702 Subcommittee to consider possible treatment of forensics, as well as the weight/admissibility question described below.

The Advisory Committee has heard extensively from the DOJ about its current efforts to regulate the testimony of its forensic experts. The Advisory Committee continues to consider a possible amendment addressing overstatement of expert opinions, especially directed toward

forensic experts. The current draft being considered by the Advisory Committee provides that "if the expert's principles and methods produce quantifiable results, the expert does not claim a degree of confidence unsupported by the results." At its next meeting on May 8, 2020, the Advisory Committee plans to consider whether to seek approval to publish for public comment a proposed amendment to Rule 702.

Rule 106

The Advisory Committee continues its consideration of various alternatives for an amendment to Rule 106, which provides that when a party presents a writing or recorded statement, the opposing party may insist on introduction of all or part of a writing or recorded statement that ought in fairness to be considered as well. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded oral statements to be admissible for completion, or rather to leave it to parties to seek admission of such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence. The Advisory Committee plans to consider at its May 8, 2020 meeting whether to recommend a proposed amendment to Rule 106 for public comment.

Rule 615

Finally, the Advisory Committee continues to consider a rule amendment to address problems identified in the case law and reported to the Advisory Committee regarding the scope of a Rule 615 order, regarding excluding witnesses. The Advisory Committee plans to consider

whether to recommend a proposed amendment to Rule 615 for public comment at its May 8, 2020 meeting.

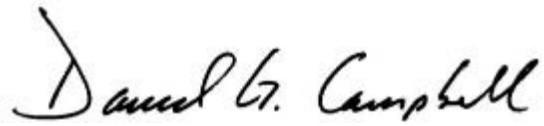
OTHER ITEMS

The Standing Committee's agenda included two additional information items and one action item. First, the Committee heard the report of the E-filing Deadline Joint Subcommittee, the subcommittee formed to consider a suggestion that the electronic filing deadlines in the federal rules be rolled back from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone. The subcommittee's membership includes members of each of the rules committees as well as a representative from the DOJ. The subcommittee's work is in the early stage and it will report its progress at the June 2020 meeting.

Second, the Committee was briefed on the status of legislation introduced in the 116th Congress that would directly or effectively amend a federal rule of procedure.

Third, at the request of Judge Carl E. Stewart, Judiciary Planning Coordinator, the Committee discussed whether there were any changes it believed should be considered for inclusion in the 2020-2025 *Strategic Plan for the Federal Judiciary* (*Strategic Plan*). It is the Committee's view that, while committed to supporting the *Strategic Plan*, its work is very specific – evaluating and improving the already-existing rules and procedures for federal courts – and often does not involve the broader issues that concern the Judicial Conference and the strategic planning process. With this reality in mind, the Committee did not identify any specific additional rules-related suggestions but authorized the Chair to convey to Judge Stewart ongoing rules initiatives that should support the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

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

Appendix A – Official Bankruptcy Forms (form changes made to implement the HAVEN Act)
Appendix B – Memoranda, Interim Bankruptcy Rules, and Official Bankruptcy Forms regarding implementation of the SBRA

TAB 1C

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Effective December 1, 2019 REA History: no contrary action by Congress; adopted by the 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.	

Revised March 2020

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.	

Revised March 2020

Effective (no earlier than) December 1, 2020 Current Step in REA Process: transmitted to Supreme Court (Oct 2019) REA History: approved by Judicial Conference (Sept 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 qualifiies 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."	

Revised March 2020

Effective (no earlier than) December 1, 2021 Current Step in REA Process: published for public comment (Aug 2019-Feb 2020) REA History: unless otherwise noted, approved for publication (June 2019)		
Rule	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 3	The proposed amendments to Rule 3 address the relationship between the contents of the notice of appeal and the scope of the appeal. The proposed amendments change the structure of the rule and provide greater clarity, expressly rejecting the *expressio unius* approach, and adding a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Conforming amendments to the proposed amendments to Rule 3.	AP 3, Forms 1 and 2
AP 42	The proposed amendment to Rule 42 clarifies the distinction between situations where dismissal is mandated by stipulation of the parties and other situations. The proposed amendment would subdivide Rule 42(b), add appropriate subheadings, and change the word "may" to "must" in new Rule 42(b)(1) for stipulated dismissals. Also, the phrase "no mandate or other process may issue without a court order" is replaced in new (b)(3). A new subsection (C) was added to the rule to clarify that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration.	
AP Forms 1 and 2	Conforming amendments to the proposed amendments 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.	CV 7.1
BK 9036	The proposed amendment would require high-volumne paper notice recipients (intially 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.	
CV 7.1	Proposed amendment would: (1) conform Civil Rule 7.1 with pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012; and (2) require disclosure of the name and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.	AP 26.1, BK 8012

Revised March 2020

TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
OCTOBER 29, 2019

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on October 1 29, 2019. 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; Ariana J. Tadler, Esq.; 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; Professor 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. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Allison A. Bruff, Esq., represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included John Beisner, Esq.; Fred Buck, Esq. (American College of Trial Lawyers); Andrew Cohen (Burford Capital); Alexander Dahl, Esq., and Andrea Looney, Esq. (Lawyers for Civil Justice); David Foster, Esq., and David Mervis, Esq. (SSA); Joseph Garrison, Esq. (NELA); William T. Hangley, Esq. (ABA Litigation Section liaison); Max Heerman, Esq. (Medtronic); Robert Levy, Esq. (Exxon Mobil); Jonathan Redgrave, Esq.; Benjamin Robinson, Esq. (Federal Bar Assn.); John Rosenthal, Esq.; Jerome Scanlan, Esq. (EEOC); and Susan H. Steinman, Esq. (AAJ).

Judge Bates announced that Laura Briggs, who has served for many years as the Clerk of Court Representative, is retiring from the judiciary and from her work with the Committee. She has been an essential member, offering conceptual and practical insights on the working of the Civil Rules and providing countless examples of how she has addressed and resolved issues in implementing the rules that influence the shape of new rules. The Committee acknowledged her work with warm applause.

Judge Bates reported that the Standing Committee and the Judicial Conference had approved and recommended for adoption the proposed amendments of Rule 30(b)(6). The rule is in the Supreme Court, on track to take effect on December 1, 2020.

Hearing, Rule 7.1 amendments

Judge Bates noted that the proposed amendment of Rule 7.1 was published for comment last August. Only one person asked to testify at the October hearing. The hearing will begin today's meeting.

GianCarlo Canaparo began by stating that the proposal to amend Rule 7.1 is good. It is important to identify the parties' citizenships early in every action. Early identification avoids the waste occasioned by tardy discovery of a diversity-destroying citizenship. But the amendment should be expanded to reach beyond attributed citizenships to include disclosure of the parties' own citizenships. Imagine a simple action in which three co-owners, each a citizen of a different state, sue a single trespasser who might be a cocitizen of one plaintiff. This should be found out early in the action.

Mr. Canaparo noted that other comments have expressed concerns about the working of the proposed amendment when an action is removed from state court, but suggested that the proposed language reaches removed cases. At the same time, he suggested that Rule 7.1(b) should be revised to require that the disclosure be filed within 21 days after service of the first filing.

Mr. Canaparo answered a question by saying that the need to disclose the parties' citizenships arises from the prospect that the complaint may not comply with the Rule 8(a)(1) requirement to state the grounds for the court's jurisdiction.

April 2019 Minutes

The draft Minutes for the April 2-3, 2019 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf presented the legislative report.

The Rules Committee Staff is tracking several bills that would amend the Civil Rules. None of them has yet gained traction.

There was a hearing on transparency in the courts, addressing PACER fees, cameras in the courtroom, and sealed court filings. The Administrative Office helped to arrange for testimony by judges. There is not yet anything further to report.

Social Security Review

Judge Bates introduced the report of the Social Security Review Subcommittee by noting that it has been at work for more than two years. It has received repeated input from many sources including the Administrative Conference, the Social Security Administration, the National Organization of Social Security Claimants Representatives, the American Association for Justice, district and magistrate judges, academics, and still others. Its work has been very productive. Successive drafts have advanced to a point that makes it appropriate to confront the next step: is it appropriate to adopt an Enabling Act rule that is this far substance-specific, either as a Civil Rule or as a Supplemental Rule?

Judge Lioi, Chair of the Subcommittee, began the presentation by a brief outline of the most recent draft Rule 71.2. It addresses only § 405(g) review actions that present only an individual claim. Successive subdivisions provide for simplified pleading by a brief complaint and an answer that need be no more than the administrative record and any affirmative defenses; for the court to transmit a Notice of Electronic Filing to SSA and the local United States Attorney that displaces any need to serve summons and complaint under Rule 4; timing requirements for answer and motions; and presentation of the case for decision by briefs. This procedure is calculated to reflect the character of these cases as appeals, quite unlike actions that involve initial litigation and original decision by a district court.

The draft rule has been continually revised in response to comments by the many organizations and people that have contributed to Subcommittee deliberations. The Subcommittee brings to the Committee three questions about alternatives for the next steps: The Subcommittee might continue to seek further assistance from others with the goal of further refining the draft. Or it might rely on the extensive work already done to move toward preparing a proposal for publication with the help of the Committee and the Standing Committee. Or it might conclude, with the advice of the Committee and Standing Committee, that however good a proposed rule might be, it is unwise to adopt an Enabling Act rule that is limited to a single area of substantive law. If the project is to continue, the Subcommittee will welcome Committee contributions to further refine the proposal.

Several reasons can be found for carrying the work forward. The project was brought to the Judicial Conference as a proposal by the Administrative Conference of the United States, based on a deep study of widely divergent practices across different district courts. SSA strongly supports the proposal, even though it has been pared back from the much more elaborate draft that SSA provided at

the outset. SSA is in a good position to evaluate the effects of local rules — and there are many and quite different local rules — and less formal local practices.

Every effort has been made to ensure that Rule 71.2 is neutral as between claimants and SSA. It reflects what some courts are doing by explicit local practices, and what some others are doing at least de facto.

NOSSCR representatives have expressed concerns that it is important to keep judges happy by submitting these review actions through the familiar procedures they have shaped and to which they have become accustomed. That concern, however, has been significantly reduced by the reactions of magistrate judges and district judges that have reviewed Rule 71.2 drafts. Some now use procedures closely similar to draft Rule 71.2. Others attempt to use general Civil Rules procedures, such as summary judgment, but report that they do not work well. The Subcommittee may seek reactions from a greater number of judges. Judge Boal added that the magistrate judges who met with the Subcommittee on October 3 generally accepted the rule draft, and did not object to it. Indeed, those who now use Rule 56 work around it, and welcomed the Rule 71.2 approach.

The Department of Justice has created a model local rule that closely resembles the Rule 71.2 draft, and has recommended adoption by district courts.

A central reason for the Rule 71.2 approach is that the § 405(g) cases it reaches are appeals on an administrative record. They are quite unlike original actions in the district courts. As one example, there is no need for discovery in the vast majority of § 405(g) actions, and the rare action that may entail discovery is taken outside Rule 71.2 and governed by the full sweep of the Civil Rules.

Every year brings some 17,000 to 18,000 § 405(g) actions to the district courts. Many districts adopt local rules, or less formal local practices, because they have found that the general Civil Rules do not work for these actions. Draft Rule 71.2 brings them into an appeal process that reflects the actual character of the proceedings.

Finally, concerns about transsubstantivity may be deflected by recognizing that many local rules have been adopted specifically for § 405(g) actions. If local rules can do it, why not a national rule?

Judge Lioi turned to the argument that the transsubstantivity principle must defeat any attempt to craft a rule specifically

limited to social security review actions.

One concern is that, because the Subcommittee wished to ensure that it crafted a rule that was neutral, the draft rule is modest. And even if the rule in fact is neutral, some parties to § 405(g) review actions — even all parties — may perceive that the rule favors their adversaries.

Another concern is the familiar "slippery slope" problem. Once even a single rule sets a precedent, interest groups will begin to agitate for other substance-specific rules, arguing that this rule shows there is no principle that requires transsubstantivity.

The first reaction to this presentation was that the modest character of the draft rule will encourage supplemental local rules. One obvious example is provided by the deliberate choice to avoid setting page limits for briefs in a national rule. Local rules will set limits, and in the process may supplement the national rule in ways that impair its operation. More generally, the existing body of local rules have an inertia that will carry beyond adoption of a national rule.

Discussion continued with a set of reflections on these themes expressed in parallel terms.

Draft Rule 71.2 seeks to establish an appeal framework that adapts the Civil Rules to § 405(g) review actions. The introduction that sets the scope of the rule is critically important. It seeks to limit the rule to the vast majority of actions that require review and decision on the administrative record. The appellate character of the proceedings is not altered by the practice of remanding for further administrative proceedings. The underlying study by Professors Gelbach and Marcus shows that the rates of remand for further administrative proceedings range from a low of about 20% in some districts to a high of about 70%. But when the action is ready for decision in the district court, it acts on the administrative record and award. It does not make an independent determination, but reviews only for substantial evidence. These are appeals.

A very few § 405(g) actions do call for discovery in a district court. One example is provided by claims of ex parte contacts with the administrative law judge. An even more rare example is a claim of illegality not reflected in the administrative record. Whatever the reasons may be, such actions are taken outside draft Rule 71.2 and are governed by all of the Civil Rules.

Section 405(g) itself requires that district courts provide review in the framework of the Civil Rules or supplements to them.

It provides for review by a civil action. It includes some provisions to govern the civil-action proceeding, including three distinct provisions for remand to SSA. Filling out an appropriate appeal procedure by a Civil Rule seems an appropriate accommodation of the Rules Enabling Act to the Social Security Act.

The origins of the transsubstantivity concern are reflected in the earlier discussion. Section 2072(a) authorizes "general rules of practice and procedure," and § 2072(b) exacts that they "shall not abridge, enlarge or modify any substantive right." Honoring those limits calls for more than ingenious speculations about the meanings of words or attempts to be sure about what the framers of the Enabling Act would have intended for circumstances difficult to foresee when the statutory words were crafted. A rule that applies to a defined set of § 405(g) actions across all districts can be seen as a general rule. The goal of adapting the procedures of courts that ordinarily exercise original jurisdiction to the needs of an appeal jurisdiction mandated by statute need not of itself abridge, enlarge, or modify the substantive rights governed by the statute.

The modest character of the Rule 71.2 draft may bear on the transsubstantivity concern. A plaintiff need plead only enough to identify the SSA decision and invoke § 405(g) review jurisdiction. That is enough to satisfy Rule 8(a)(1), (2), and (3) in an appeal setting. At the same time, the plaintiff is left free to plead more, an opportunity that may be seized to educate SSA lawyers about the nature of the claims and the opportunities to meet them. SSA can answer with nothing more than the administrative record and any affirmative defenses; the Rule 8(b) obligation to respond to each allegation in the complaint is excused. Notification by the court's transmitting a Notice of Electronic filing has worked well in the districts that do this now, and has been accepted on all sides. The provisions that integrate motions practice with pleading deadlines are simple. And the heart of the rule provides for presentation of what is in fact an appeal by the briefing procedure used for appeals. These are procedures designed to advance the interests of both parties and the court. The facts and the law are focused through the governing standard of review in a way that does not favor any party or alter underlying substantive rights.

The Subcommittee considered the alternative of proposing a rule that would govern all "administrative review" proceedings in the district courts. Such a rule would unarguably be transsubstantive. But it soon became apparent that drafting any such rule would be enormously difficult. A wide range of actions by quite distinctive executive offices and more nearly independent regulatory agencies may become the subject of civil actions in the district courts. Some are familiar, such as actions under the Freedom of Information Act. Many invoke the Administrative

Procedure Act. The elements that resemble appellate review are mixed in quite different proportions with elements that clearly involve original decision and action by the district court. Many years of effort would be required to produce a workable rule, if the task could be managed at all. The clearly appellate character of the § 405(g) proceedings brought within draft Rule 71.2 is much different. And, as compared to the full range of administrative "review" actions in the district courts, § 405(g) actions present a clearly identified opportunity to establish a good and uniform national rule.

General discussion began with a theme that emerged in earlier Committee meetings. There are several examples of Rules Enabling Act rules that are substance-specific. Looking only to the Civil Rules, Rule 5.2© establishes distinctive limits on remote access to court dockets in social security and immigration actions. Rule 71.1 provides distinctive procedures for condemnation actions. The Supplemental Rules for Admiralty and Maritime Claims were focused on that particular substantive area until they were expanded to include Asset Forfeiture Actions. The separate sets of Supplemental Rules for § 2254 and § 2255 cases invoke the Civil Rules for many matters. These very examples, however, pose the question whether any § 405(g) rule or rules should be lodged in the body of the general Civil Rules or should instead be framed as another set of supplemental rules.

Experience suggests that various groups are eager to get special sets of procedures for their own special interests. A recent example focused on legislation that would require adoption of specific rules to address "patent troll" litigation. Powerful arguments are made that one or another substantive area requires special procedures. Adhering to the model of supplemental rules may make it easier to resist these pressures. And the supplemental rules model may facilitate drafting more detailed provisions that might be more difficult to frame as part of new provisions inserted into the general body of the Civil Rules. More detailed supplemental rules also might prove more effective in discouraging local rules that deflect uniform national practices. This "is not academic, but political reality."

This reference to focused substantive interests prompted the observation that this project had its origins in SSA concerns about the workload imposed by § 405(g) actions on its understaffed legal resources. The work springs from what may be seen as specific interests.

Another early observation was that the Appellate Rules include several provisions that do not seem transsubstantive. The circumstances of appeal procedure may be better suited to such rules, but then proposed Rule 71.2 provides an appeal procedure

lodged in the Civil Rules to honor the mandate of § 405(g) that these appeals come to the district courts.

Department of Justice views were sought by observing that SSA favors the proposed rule, even though the proposal does not include everything initially suggested by SSA, and that claimants groups seem neutral or opposed. Department representatives responded that "the executive branch is not unanimous." The Department is worried that one specialized set of rules will lead to pressure for other sets of specialized rules. A § 405(g) review rule does not seem necessary. Although the draft rule is neutral between claimants and SSA, the concern about pressure for other specialized rules remains. The Department has generated a model local rule to guide districts that may want a local rule, but guidance is not a mandate and is not likely to lead to uniform adoption across all districts. The Department is not now prepared to support a new national rule.

This observation spurred a comment that a similar choice may confront the MDL Subcommittee, asking whether to draft model local rules or instead to propose new national rules.

The concern that a § 405(g) rule might become the thin edge of the wedge that pries open a path for other specialized rules was addressed by suggesting that § 405(g) review presents a distinctive circumstance. The sheer volume of actions outstrips any other set of administrative review actions in the district courts, and quite possibly all other administrative review actions taken together. And the cases present uniform procedural issues. These strong differences can thwart efforts to claim that other specialized settings present equally strong claims for distinctive rules.

The number of habeas corpus cases governed by supplemental rules was offered as a comparison. Without knowing exact numbers, it may be that the number of actions is similar to the number of § 405(g) proceedings. They too are governed by specialized statutes. But the comparison to § 405(g) actions remains uncertain.

Comparisons continued. Section 405(g) cases are a "different subset" of the civil docket. "Appellate cases in the district courts do not fit the rules for trial cases." It might be said that the current Civil Rules are not truly transsubstantive, since they do not include separate provisions for appeal-like actions. A set of rules to govern all administrative-review actions in the district courts would be truly transsubstantive.

A judge suggested that following the general Civil Rules in social security cases imposes delay on claimants. And that is a bad thing. Any rule that increases efficiency would be desirable.

Another judge observed that the sheer number of social-security review cases is important. It will be important to figure out what is going on. Many district courts have pro se law clerks to help pro se parties. Section 405(g) records are lengthy, and often are not clear. More work is lavished on an individual case in the district court than the case got in SSA proceedings. "Something has to be done." The problem is inefficiency and delay. Any new rule, however, should focus on the administrative record, without much energy devoted to pleading.

A lawyer member said that uniformity has great value. Present circumstances show a great deal of disuniformity.

Freedom of Information Act cases were offered as a distinctive subset of administrative review actions. They could easily become a source of pressure to adopt distinctive rules.

Transsubstantivity returned with a suggestion that § 405(g) review actions should be addressed by a supplemental rule or rules, not placed within the Civil Rules. One potential advantage would be that supplemental rules could provide greater particularity. But do we want that much particularity, or is the simplicity of the present draft better? Whichever form, however, the project is worth pursuing.

A different twist on the choice between supplemental rules and a general civil rule was provided with the observation that "different courts handle these cases differently." Some rely on magistrate judges to enter judgment. Others rely on magistrate judges to make a report and recommendation, leading to review and judgment by a district judge. Still others act only through a district judge. If the supplemental rule approach is adopted, should it address these variations?

A related question asked whether supplemental rules might be written in a form that pro se litigants can understand more readily than the conventional drafting of the Civil Rules? That approach might even lend itself more readily to creating a separate pamphlet explaining the rules to pro se plaintiffs.

A different question asked whether adopting supplemental rules for § 405(g) cases would prompt more or less pressure to adopt rules for other administrative-review actions in the district courts. A judge answered that whatever form is chosen for § 405(g) rules, it is answer enough that these cases account for something like 8% of the civil docket and present uniform procedural issues. Section 405(g) cases are different from other administrative-review actions, but not from each other. But "pitching it toward a large audience in a way that only supplemental rules can do may be worth exploring."

Another member thought the idea of a general administrative-review rule "is interesting." These cases appear frequently. Further discussion suggested that some districts may have local rules for them. But they are different from § 405(g) cases, and from each other. ERISA cases, for example may have discovery.

Following these lines, a participant suggested that it would be difficult to define the scope of a rule for "administrative review." Actions framed by specific statutory provisions, like § 405(g), are one thing, at least if they relate to the work of an independently defined agency. But the range and variety of government entities that are not part of Article I or Article II is great. And the variety of appropriate procedures may be equally great. Discovery is often required. Indeed there is a growing and active body of law about discovery in ERISA and FOIA actions. Summary judgment may be useful.

The core of the supplemental rules discussion returned with the observation that in some ways we have already started down the slippery slope. The Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions is an undeniable beginning, authorized by the Rules Enabling Act and joined to the Civil Rules. But transsubstantivity "is a presumption, no more." Non-transsubstantive rules can be adopted for weighty reasons. The presumption would hold if litigants on all sides of a given subject area see no need for substance-specific rules. But the objections here seem less weighty. The Department of Justice fears that future committees will give way to pressure. Claimants' representatives fear to discomfort judges accustomed to present ways. But the draft rule is a modest, incremental improvement that should work well for cases that share unique but uniform procedural characteristics. There are a significant number of these cases. Although a general administrative-review rule would be nice, "it's a thicket."

A Department of Justice representative responded that "if we look to the Committee's ability to weigh these considerations, we will be adding to the precedent for the next" set of substance-specific rules. "We have seen incredible, increasing discovery in APA cases." This discovery "changes the nature of practice," and is a big problem for the executive branch. Matters are further complicated by joining other claims to APA claims "as a hook into discovery."

The central question was repeated: What advice should the Committee give to the Subcommittee? There seems to be enough support to continue to study the possibility of recommending a new rule or rules, while reconsidering the question whether any new rules should be adopted directly into the Civil Rules or instead should be framed as supplemental rules integrated with the Civil Rules.

One question is whether adopting the supplemental rules format would encourage recommendation of more detailed provisions. Some expansion might be considered. Examples of matters considered in earlier drafts and abandoned include uniform page limits for briefs, provisions recognizing the various occasions for remanding to SSA, and explicit procedures for awarding attorney fees for work done on review in the district court. These drafts were abandoned on their own merits, but it may be that they would seem more attractive as part of a more elaborate set of supplemental rules. Adopting just a single supplemental rule might seem rather odd.

The case for doing nothing was advanced. The October 3 conversation with some magistrate judges seemed to at least one participant to provoke an underwhelmed response. They seemed to say that the proposed rule would make little difference in what they are doing now. "There will be local practices." Claimants are opposed. SSA will not get all it wants. "This proposal is not reason enough to venture into the transsubstantivity debates." A more general administrative review rule might make sense, but not a limited § 405(g) review rule. The work that has been done could be put to good use by framing a model local rule. A model rule could include very detailed provisions, at a level that would not be attempted even in supplemental rules. "It is good to let local courts do their own thing."

One response was to ask whether a model local rule could provide for relying on a Notice of Electronic Filing to displace formal Rule 4 service of summons and complaint on SSA and the local United States Attorney. That practice has been enthusiastically received on all sides, but would be hard to square as a local rule consistent with Rule 4. It might be adopted as a new provision in Rule 4.

Another response asked whether it is necessary to keep open the possibility of discovery. Discovery is used now in rare circumstances, and indeed may be useful, as noted in the earlier discussion.

The Committee concluded that the Subcommittee should continue its work, keeping in mind the views of those who doubt that any rule should ultimately be proposed. The work should include consideration of the supplemental rules alternative.

Discussion turned for a moment to what the Committee might say to direct further Subcommittee work on the details of rule provisions. Is it time for comments on details of the draft rule?

Some specific questions were raised.

The first addressed the provision in draft Rule 71.2(a)(2)(B) that calls for the "last four digits of the social security number of the person on whose wage record benefits are claimed." SSA says that this information is important to enable it to identify the correct administrative proceeding and record.

Draft Rule 71.2(c)(1)(A) says that the answer "must include" a certified copy of the administrative record. Perhaps this should be "may be limited to" the record and any affirmative defenses, the better to reflect the proposition that Rule 8(b) does not apply, freeing SSA from the obligation to respond to allegations in the complaint.

Draft subdivision (c)(2)(B) begins "Unless the court sets a different time * * *." Is this needed, given the general Rule 6(b) authority to extend time limits for good cause?

The subdivision (c)(2)(B) time provisions also tie back to (c)(1)(B). This part of (c)(2)(B) suggests that a motion under Rule 71.2(c)(2)(A) may be made and decided in less than 60 days after notice of the action is served on SSA and the United States Attorney. Is that prospect so plausible as to warrant a separate rule provision? Perhaps so, as a matter of foreseeing what is possible, even if not particularly likely.

Draft subdivision (d)(1) sets the time for the claimant's brief at 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 71.2(c)(1)(A), "whichever is later." Is it likely that the answer will be filed before all motions are disposed of? Serving the motion defers the time to answer as provided by Rule 12(a)(4). The time for making a motion is set at the same 60-day period as the time for serving the answer, which includes the administrative record. But the administrative record may prove useful to support a Rule 12(b) motion, for example by showing the date of the event that starts the time allowed to file the action.

Draft subdivision (d)(1) also directs that the plaintiff file a motion for the relief requested along with the plaintiff's brief. What does the motion add to the request for relief that is made in the brief? The judge who asked this question noted that his clerk's office reports that a motion is not needed to track the case for case-management purposes. Another judge noted that in her district the time for 6-month reports is triggered by filing the administrative record, and some judges fear that adding a motion requirement to (d)(1) may confuse matters. Clerk Briggs suggested that "the motion easily could serve no purpose." The judge who first raised the question added that if a motion is required, symmetry might seem to suggest that a cross-motion should be required, and that "makes even less sense."

January 30 draft

Discussion concluded with the observation that the Subcommittee had been provided some guidance, even if the guidance "is not always clear."

MDL Subcommittee

Judge Bates introduced the MDL Subcommittee report by noting that the Subcommittee has gathered a great deal of information. The issues on its agenda are evolving. Some of the questions they are finding may be difficult to address by court rules. The Judicial Panel on Multidistrict Litigation has been actively engaged in the Subcommittee's inquiries, as have some MDL judges and some academics.

Judge Dow delivered the report, framing it as a "high-level summary." The Subcommittee has whittled its recent list of six subjects down to four, and will propose that the Committee approve deferral of one of the four. Three will remain for continuing active study.

Third-Party Litigation Funding: The Subcommittee has done extensive work on third-party funding, including attendance at a one-day conference arranged by George Washington University Law School last November. Third-party funding is extensive, and seems to be still growing. Financing is used for a wide variety of litigation, and in forms that tie more or less directly to particular litigation. Individual arrangements can be complicated, and there are many varieties of arrangements. Plaintiffs as well as defendants arrange financing. As a potential Civil Rules matter, the focus has been on disclosure. Some district local rules and some circuit local rules are written in terms that at times explicitly look to disclosure of third-party financing, but that more often seem to reach third-party financing by requiring disclosure of anyone who has a financial interest in the litigation.

While third-party financing is thriving and seems to be expanding, there are no signs that it is peculiarly involved in MDL proceedings. MDL judges, at least, commonly report that they are not aware of third-party financing in the proceedings they have managed. But there have been prominent signs of interest, including an order for in camera disclosure of any third-party financing arrangements in the pending opioid MDL.

It has been suggested that third-party funding could be useful to expand the universe of lawyers who can participate in leadership roles in MDL proceedings. Participation can require costly investments that will be repaid only after protracted proceedings. Not all lawyers or firms have the required resources.

Professor Marcus added that the Committee first received proposals calling for disclosure of third-party funding some five years ago. Those proposals were general, not focused on MDL proceedings alone. "We've learned a lot. It is not an MDL-specific issue."

The Subcommittee will continue to monitor third-party funding developments, but does not plan to work toward possible rules proposals. A judge asked what does "monitoring" mean? Possibilities include further "mail box" suggestions from outside observers; attention to JPML annual survey answers to the question whether MDL judges are aware of third-party funding in their proceedings; attention to developments in local court rules; keeping informed about any action in Congress (S. 471 in Congress now addresses disclosure in MDLs and class actions); and sending a few Subcommittee members to programs arranged by others. The Subcommittee Chair and Reporter, consulting with the Committee Chair, will determine how best to survey local rules.

Early "Vetting" and Initial Census: Efforts have long been made to get behind or beyond individual complaints in the individual actions consolidated in an MDL. The purpose can be to advance management by finding out more about the topics the cases present. It can be to advance discovery, and with that to weed out unfounded claims. There is an apparent consensus that there are problems with unfounded claims in the truly large-scale, "mega" MDLs. The common problems involve plaintiffs who were not even exposed to the challenged product, or have no evidence that exposure caused any injury.

Plaintiff fact sheets have been used to gather information from individual plaintiffs, and have come to be used in almost all of the largest MDL proceedings. Defendant fact sheets also are common in those cases. They are a subject of discussion at the JPML program for MDL judges being held today. Wide use might suggest that there is little need to consider a rule regulating the practice.

But wide use of plaintiff fact sheets has shown some dissatisfaction. They are tailored to the circumstances of each particular MDL, and months may be needed to develop the form. This delay can impede the next steps in managing the proceeding. And there have been at least some complaints that fact sheets impose an undue burden.

A recent development in efforts to gather information about individual cases in an MDL without imposing undue delay or effort has been called an "initial census." This approach is on track to be used soon in two pending MDLs. The information may be used not only to guide ongoing management, but also to determine whether it

is feasible to certify a class action, a class action with subclasses, or perhaps more than one class action.

This is an important subject. There is general agreement that some efforts to gather information about individual actions in an MDL is a good thing. Rather than indicate that no rule is needed, agreement might suggest the value of a rule to ensure that the effort is made in all appropriate MDLs, and is made in the best form.

Discussion began with an echo of the initial observations: fact sheets, initial censuses, or something of the sort meet broad acceptance. But it is not so clear that a new rule is appropriate.

Another observation was that agreement on the value of these approaches is often accompanied by disagreement about the time needed to develop plaintiff fact sheets. An initial census might be simpler.

Another Committee member observed that MDLs come in all kinds of shapes, leaving the question whether an "initial census" should be used in all cases.

Professor Marcus suggested that a rule would have to say when the rule applies. Is it for all MDLs? Only "mega" MDLs? Only personal-injury MDLs, and if so what counts as personal injury? And something is likely to depend on the purpose, whether it is to screen out unfounded claims or to get a jump-start on managing the MDL. Apart from that, there are forms of mass litigation outside the MDL world: should a rule apply to them?

Further discussion noted the view of one prominent MDL judge that it takes too long to finish the plaintiff fact sheet process to gain much help in managing an MDL. An initial census might be faster in generating a sense whether there are categories of dubious claims, which might then be explored by plaintiff fact sheets. H.R. 985 in the last Congress took an approach to initial plaintiff statements that was extremely demanding as to content, time to complete the fact sheet, and time for judicial consideration of each fact sheet. The initial census may prove effective, and at much lower cost.

A judge described an MDL that grew to 8,500 cases. A plaintiff was required to file a fact sheet within 60 days of filing a complaint, providing under oath such information as when the plaintiff got the implant and what the injuries were. Defendants were allowed to challenge the sufficiency of individual fact sheets, and if not satisfied by the plaintiff's response could take the question to the judge. No defendant took any fact sheet to the judge. Then settlement came on. At that point the defendants

brought up 120 cases in which they never got a fact sheet, an event suggesting that the defendants had not thought it important to get the information early in the proceedings.

The Subcommittee will continue to consider these topics, paying close attention to the proceedings that will use the initial census approach. Much may be learned from them. The Subcommittee may develop a rule proposal. Or it may conclude that the best approach is to leave these practices for continuing evolution in the overall MDL world.

The Committee was comfortable with this approach.

Settlement Review: Judge Dow suggested that the MDL judge's role in the settlement process is perhaps the toughest question the Subcommittee faces. Rule 23 provides protection for class members through the judge. Some MDL proceedings approach dimensions that look much like class actions in the sense that individual plaintiffs who are represented by attorneys not included in the MDL leadership are not effectively represented by the lead attorneys. Attorneys who represent plaintiffs and those who represent defendants join in asking that settlement not become a subject for rules. The pressure for judicial involvement comes mostly from academics.

That sets the question: Should there be a rule addressing settlement of MDL proceedings, perhaps one designed to ensure that the lawyers who lead and control an MDL proceeding are responsible for representing all plaintiffs in the MDL, particularly for settlement? One illustration is the certification of a settlement negotiating class in the opioid MDL. Another illustration is an MDL in which the defendants retained a separate team of lawyers charged with negotiating settlements with individual-case plaintiffs.

Judges commonly agree that they have no role to play with respect to individual settlements. If a plaintiff and defendant settle and seek to dismiss, the judge cannot intrude.

Many MDL judges, on the other hand, view global settlement as their primary responsibility. And there is no rule structure for this.

The Subcommittee is exploring questions as to present sources of a judge's authority with respect to MDL settlements. Is there inherent power, drawing not only from the nature of judicial office but from the very structure and purpose of MDL consolidation? Can authority be found in the duty to police the professional responsibility of the lawyers who appear in an MDL and act in ways that reach beyond their own clients? Would it help judges to provide a clear basis of authority in a rule? And would the clear

authority protect individual plaintiffs? The Subcommittee realizes that proposing a rule on settlement would be "swimming against the tide," but will continue to explore the waters.

Professor Marcus offered a perspective on the issues that trouble academic commentators on this question. On most issues of MDL procedures, such as interlocutory appeals, clear and opposing positions can be found for plaintiffs and defendants. That they join in agreeing that rules should not be developed for settlement is one of the things that worries academic observers. They worry that individually represented plaintiffs are confronted with backroom deals negotiated by lead lawyers who do not represent them. This concern may explain why judges often become involved. Rule 23 protections are provided if class certification becomes the means of implementing settlement. Many observers believe that judges become involved in large-scale MDL settlements in ways that parallel their role in class-action settlements. "It is difficult to say who is being injured." Any effort to frame a rule must confront the "perimeter" question that defines the circumstances that authorize judicial involvement.

These questions were approached from a somewhat different slant by the observation that it may be possible to frame a rule around the common tendency in the Civil Rules to rely on case-specific exercises of discretion by the judge. MDL proceedings, as constantly emphasized, come in myriad sizes and shapes. They may involve as few as four, or perhaps even fewer, individual actions. They span the entire range of subject matters. The individual plaintiffs may be unsophisticated real persons, or highly sophisticated persons and businesses. There may not be any officially recognized lead lawyer or leadership structure. There may be an elaborate structure of lead counsel, executive committee, steering committee, discovery committee, liaison counsel or committee for actions outside the MDL, and settlement committee. Lawyers who are not members of any of the leadership committees may have significant influence on them, or little or no voice. The question is very much an MDL-specific question of identifying the point at which the proceedings inflect away from effective individual representation of all plaintiffs toward de facto representation by the leadership. Attempting to define that point by formula would indeed be difficult. Leaving it to judicial discretion could provide ample authority for judicial involvement without requiring involvement in most proceedings.

A participant elaborated on this subject. One possible approach would be to turn the judge's role in settlement on the judge's responsibility for recognizing a formal lead-counsel structure. Some MDLs will enjoy coordinated work by plaintiffs' counsel without any need for court direction or formal recognition. But when the court undertakes to define leadership roles and

responsibilities, it can address many topics that surround the defined roles. Rule 23 provides a ready model, all the more fit because the concern in MDL proceedings is often expressed by judges by referring to a quasi-class action. Not only is lead counsel recognized, but attorney fees are addressed. In MDL proceedings, common-benefit funds to compensate lead counsel are typical and important. The role of lead counsel in settlement is equally important. The MDL structure, moreover, may provide reason for judicial involvement in the fees charged by counsel who are not appointed to the leadership structure — they may seem more engaged in the proceeding when they settle through it than are lawyers who may represent class members who are not class representatives.

A judge observed that many judges believe they have ample inherent authority, and also feel responsible to protect the interests of plaintiffs represented by individually retained lawyers. At least one judge who has issued opinions justifying inherent authority, however, has said that it would be helpful and reassuring to have a solid foundation in a court rule.

Subcommittee work will continue.

Interlocutory Appeals: Judge Dow said that "interlocutory appeals are the hottest topic for the Subcommittee."

The Subcommittee report provides a summary of several research projects that have been undertaken by plaintiffs' groups, defense groups, and for the Committee. The research shows there are not many § 1292(b) appeals in MDL proceedings. The low reversal rate on the appeals that are taken seems to parallel the rate for all § 1292(b) appeals or appeals generally. There may be indications that courts of appeals take a practical approach — leave to appeal is somewhat more likely to be granted in an MDL that includes many individual actions than in smaller-scale MDLs. There may be some issues with the statutory criteria for § 1292(b) appeals, particularly with the requirement that there be a controlling question of law as to which there is substantial ground for difference of opinion. A case may involve a vitally important application of well-settled law to the specific circumstances of the MDL, and deserve interlocutory review accordingly. Defendants, moreover, frequently say that getting important questions settled is almost as important as getting them settled the right way. Continuing proceedings will go more smoothly, particularly toward settlement, when uncertainty is removed.

The research, however, also shows that the median time to decision of a § 1292(b) appeal is nearly two years. Some circuits are considerably faster, while others are considerably slower. Plaintiffs assert that any increased opportunity for interlocutory appeals will tempt defendants to seek appeals for the purpose of

delay. Whatever the purpose, the MDL court may be left in a quandary over continuing management even though the appeal does not of itself stay proceedings. The Subcommittee believes that the problem of delay will persist, and is not likely to be controlled by proposing an appeal rule that mandates disposition by the court of appeals within a defined time limit.

The model being considered at the moment relies on discretion in the court of appeals to decide whether to grant permission to appeal. The MDL judge could not veto the appeal, as can be done by simply refusing to make the findings that enable application to the court of appeals for permission to appeal under § 1292(b). But the MDL judge would be responsible for stating reasons why an interlocutory appeal might, or might not, best serve the interests of the MDL proceeding.

The possibility of an interlocutory appeal rule has been discussed at several conferences organized by outside groups. The evolution of the defense proposals has been remarkable. Proposals to establish appeals as a matter of right from some more or less loosely described categories of orders have been abandoned. The question instead has become whether to adopt a rule that eliminates any MDL-judge veto and relies on criteria that look to advancing the purposes of the MDL proceeding.

Initial discussion asked whether a rule would be confined to some category of MDL proceedings — for example those that include more than a threshold number of individual actions — or would reach all? A rule available in every MDL proceeding would generate far more opportunities for interlocutory appeals. Judge Dow responded that discussion at the October 1 meeting sponsored by Emory Law School suggested that it would be difficult to draft a rule that excludes some MDLs. The standard might look to something borrowed from 28 U.S.C. § 158(d) for bypass appeals in bankruptcy: "may materially advance the progress of the case or proceeding in which the appeal is taken."

The suggestion that a rule might apply to all MDLs prompted a further question: why, then, not adopt a similar rule for class actions, which may involve similar opportunities for useful interlocutory appeals? Or, extending it, for other large aggregations of cases that are in the same district?

One response suggested that setting a number-of-cases threshold might prove tricky when the number of cases in the MDL continues to grow with tag-along transfers and original filings.

A Committee member suggested that "this seems to be working into a broader scope than we have data for." It is important to recognize the problem of delay in getting an appellate decision. We

need more information to support consideration of a rule that would apply to all MDL proceedings, much less to class actions as well.

Another member suggested that the first question is whether the criteria of § 1292(b) in fact constrain district judges who believe that an interlocutory appeal is desirable. Research for the Committee failed to find any case in which a judge said that an appeal would be desirable, but § 1292(b) does not authorize it. On the other hand, some defense counsel say that they get signals from the judge that they should not ask for certification. "There is some concern about denial of access to appellate review."

A related defense concern is that there is asymmetric access to review under the final judgment rule, as is true in all civil cases. If a plaintiff loses a ruling that disposes of even a single case in the MDL, the plaintiff can appeal. If a defendant loses a ruling that allows many cases to continue, the defendant cannot appeal.

Another member remarked again on the evolution of the proposals. The initial proposal by defense interests was for appeal as of right, with no input from the MDL judge and a mandatory stay of proceedings. "Protections have been added," with contractions as well as expansions.

Yet another member agreed that the kinds of issues and rulings being offered as reasons for interlocutory appeal may not meet § 1292(b) criteria. And there may be judicial signaling that deters requests for certification. But certifications do happen in MDLs, and may be followed by the appellate court's denial of permission to appeal.

The problem of delay recurred. A judge described an MDL that reached a ruling on a preemption issue just a few months before the schedule to hold Daubert hearings and to begin bellwether trials. If an appeal were certified and accepted, a decision could not be had from the court of appeals before the MDL would otherwise have been resolved. So an appeal was not certified. If a rule is to be recommended, it should in some way address the problem of delay.

The problem of delay was further addressed by a reminder that a single MDL might involve a series of orders that seem likely subjects for interlocutory appeal. Successive delays could be a truly serious problem.

One approach to delay was suggested: a rule that calls for the MDL judge's views on the value and risks of an interlocutory appeal could recognize advice that an appeal would be useful if it can be resolved within a stated period, but not otherwise. Different circuits seem to vary in their ability to produce prompt decisions,

but a circuit court that grants permission to appeal with this advice from the MDL judge might respond by moving faster than its general § 1292(b) pace.

The last question raised asked whether any rule should be located in the Civil Rules. There was no response.

Judge Bates thanked the Subcommittee for its continuing work.

Final Judgment Appeals after Rule 42(a) Consolidation

Judge Rosenberg delivered the report of the joint Appellate-Civil Rules Subcommittee appointed to study the effects of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018). She reminded the Committee of the basic ruling: no matter how complete the Rule 42(a) consolidation of cases that were initially filed as separate actions, an order that disposes of all claims among all parties to any component that began life as a separate action is a final judgment. Appeal may be taken under § 1291. Failure to take a timely appeal forfeits the right to appeal when the remaining components of the consolidated proceeding are later resolved by a final judgment. This rule had been anticipated by some circuits, but a majority of the circuits took one of three other approaches — the disposition is never final, or it is sometimes final depending on the circumstances, or it is presumed not final but may be final in special circumstances. She also noted that the Court suggested that if this rule has untoward consequences, the cure should be found in the Rules Enabling Act process.

The Subcommittee has met by two conference calls. Some of its members have had additional exchanges with Emery Lee to help design Federal Judicial Center research. Dr. Lee has begun a docket search of all cases filed in 2015, 2016, and 2017 in twelve districts. The work will continue, and may be concluded as to those years by next spring. It may be useful, however, to expand the project to include cases filed in 2018, 2019, and 2020.

The reason for pursuing this work is the prospect that allowing and forcing immediate appeals in consolidated proceedings may not be efficient. If new rules provisions are proposed, the likely starting points will be Rule 42(a) and Rule 54(b).

Dr. Lee described his work. The first task is to determine how many consolidations occur, and how many cases are included in the consolidations. The 12 districts examined so far have been selected to represent circuits that include each of the four different approaches identified before *Hall v. Hall*. It appears that between 1% and 2% of all cases on the docket are consolidated. The meaning of that number depends in part on what is selected as the denominator. If actions of types not likely to be consolidated

could be identified and taken out of the count, the fraction would be higher. But it appears that consolidations "show up in a lot of places." There are a lot of prisoner cases, bankruptcy appeals, even administrative review cases. FOIA cases often show up in the District of Columbia District. Cases involving complex subject matter also show up.

Another step is to determine the purposes of consolidation, particularly whether it is intended to be "for all purposes." This will be a tricky inquiry, because judges do not always describe the nature of the consolidation, and often will justifiably not be thinking ahead to the many possible paths to decision that might lead to complete disposition of one originally separate action before others are decided. And it may be difficult to "code" docket entries, which often may not say "this is a final judgment."

Work so far suggests that more than 5,000 cases are consolidated annually. If that number holds, it will be necessary to proceed by sampling the cases.

E-Filing Deadline

Judge Bates reported that the Appellate, Bankruptcy, Civil, and Criminal Rules Committees are represented on a joint committee to study a suggestion by Judge Chagares that the deadline for electronic filing be changed from midnight in the court's time zone to "when the clerk's office is scheduled to close." The relevant rule for this Committee is Civil Rule 6(a)(4)(A). Civil Rules Committee members Ericksen and Seitz are working on the subcommittee. Member Seitz observed that the proposal was prompted by a similar local rule in the District of Delaware setting the time at 6:00 p.m., and a later rule by the Supreme Court of Delaware that set the time at 5:00 p.m.

The Subcommittee has launched elaborate studies of practices around the country, not only as to other local rules that may change the deadline but also as to actual filing patterns — when are filings actually made; can differences be identified by type of action, firm size, or like factors; what times do clerk's offices actually close, and are means provided to file paper copies on the same day after closing; and what percentage of cases have at least one pro se filing. Work will be taken up as information is developed.

Rule 4(c)(3): Marshals Service in In Forma Pauperis Actions

Section 1915(d) of the Judicial Code directs that when a plaintiff is authorized to proceed in forma pauperis "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases."

The statute is reflected in Rule 4(c)(3), but at least some observers believe the rule is ambiguous. The first sentence provides that, at the plaintiff's request, the court may order service by a marshal. The second sentence reads: "The court *must so order* if the plaintiff is authorized to proceed in forma pauperis * * * or as seaman * * *." Does "so order" mean always must order service by the marshal in i.f.p. or seaman cases? Or does it mean that the court must make the order only if the plaintiff requests it? This subject was launched by a suggestion of Judge Furman at the January 2019 Standing Committee meeting. Opinions in the Second Circuit have divided on the question whether the court must order marshal service only if the plaintiff requests it.

Those who find the text ambiguous might resort to the pre-style version, which might more easily be read to mandate an order for marshal service whether or not the plaintiff requests the order.

One possible approach is to do nothing. Rules amendments are not proposed every time an ambiguity appears, nor every time some court somewhere seems to get an issue wrong, nor every time conflicting interpretations appear.

Three basic alternatives can be evaluated if something is to be done. One is to resolve the ambiguity by requiring an order for marshal service in every case that recognizes i.f.p. status or involves a seaman. That might seem to fit better with the broad command of § 1915(d).

The second approach would be to confirm that the court must order marshal service only if an i.f.p. plaintiff makes a request.

A third approach, perhaps closer still to the spirit of the statute, would dispense with the need for a court order: the marshal would automatically be required to make service in every i.f.p. action.

The choice among competing approaches should be informed by information from the Marshals Service. The Marshals Service has reached out to the districts for advice but got only a low response rate. Responses were mixed. One district automatically issues service orders. There is a general belief that clarity would be helpful, but it is not certain whether there is a real need.

Clerk Briggs observed that "marshals despise making service." The Bureau of Prisons "gives us a waiver."

A judge noted that service is a big burden on marshals, especially when it must be made in remote areas. "If the plaintiff doesn't ask, don't jump."

January 30 draft

Another judge said that his district routinely appoints marshals. But it is a "huge imposition." When lawyers are appointed, the lawyers agree to make service, in part because they will do it faster than the marshals can do it. Pro se litigants have difficulties, but sometimes they make service and then fail to note service on the docket.

Two other possibilities were noted. One is that service by marshals might be a good place to begin experimenting with electronic service of the summons and complaint. The marshals could set up a reliable system and provide good information on the likely advantages of efficiency and any likely difficulties and disadvantages. Another is that marshals might be encouraged to appoint persons not marshals to make service for the marshals. That might well satisfy both § 1915(d) and Rule 4(c)(3).

Other possible questions about marshals service were noted in the agenda materials but not discussed.

Discussion concluded by suggesting that it may be useful to find some means of providing further advice to the Reporter.

Rules 4, 5: 19-CV-N

These suggestions for Rules 4 and 5 come from Dennis R. Brock, a prisoner plaintiff who encountered some uncertainties in pursuing a pro se action. He paid the filing fee, and he says that in some unspecified way he requested service by a marshal. (The docket does not reflect the request.) The clerk notified him that he should make service, and mailed him copies of the summons and complaint. He made service by mail. He suggests that "the applicable statutes" should be included in Rule 4.

A second suggestion for Rule 4 arises from a local practice that defers the time to answer until after an Initial Phone Status Conference. Apparently relying on the times specified in Rule 12, Mr. Brock believed the defendant had not timely answered and was preparing to write a motion for default that he did not file because a fellow inmate told him the motion would make the judge mad. He suggests that notice of the local practice should be included in the Civil Rules.

The Rule 5 suggestion arises from the amendments that address electronic filing. Mr. Brock did not use e-filing, and suggests that the court should have sent him a copy of his own filings with the CM/ECF header added by the court. He believes that not having the number will cause confusion when another party refers to a document only by number.

Discussion focused on the high and perhaps growing number of actions that include at least one pro se party. It was noted that in forma pauperis plaintiffs usually appear pro se. Official statistics on the numbers of pro se parties were thought to be skewed. As an extreme example, there may be a single pro se party in a large-scale MDL proceeding.

Discussion concluded by a vote to remove these suggestions from the agenda.

Rule 12(a)(2): Statute Times

Judge Bates led the discussion of 19-CV-O, which proposes that Rule 12(a)(2) should be amended to include an exception for times set by statute to parallel the exception in Rule 12(a)(1).

Rule 12(a) sets the times for responsive pleadings. Rule 12(a) is the general rule. It begins:

> (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: * * *

There is no similar exception for statute-set times in Rule 12(a)(2), which sets a 60-day time to respond in actions against the United States or a United States agency or officer or employee sued in an official capacity. The suggestion made by Daniel T. Hartnett, however, notes that the Freedom of Information Act sets a 30-day period to respond in some actions. He further notes that in a recent action the clerk's office initially refused to issue a summons with the 30-day deadline, relying on the 60-day time set by Rule 12(a)(2) and a computer programmed to set either 21- or 60-day response times. The clerk's office was cooperative, however, and was persuaded to issue a summons with the 30-day period.

Rule 12(a)(3) sets a 60-day response time in an action against 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. Like Rule 12(a)(2), it says nothing of another time specified by a federal statute. No statute specifying a different time has been identified.

There is a strong case for recognizing the exception for statutory times in Rule 12(a)(2), now that specific statutory provisions have been identified. The question whether to amend Rule 12(a)(3) in parallel is more difficult. If the exception occurs in both subdivisions (a)(1) and (a)(2), difficulties will arise if there is — or in the future will be — a statute that sets a different time for an action covered by (a)(3). The lack of parallelism might be taken to imply a deliberate choice. The

outcome, however, would likely turn on the "latest-in-time" rule: a statute enacted after (a)(3) would supersede the rule, while a statute enacted before (a)(3) would be superseded by the rule. There is no reason to wish to supersede an earlier statute by rule without even knowing of the statute, nor reason to court the difficulty of possible future statutes.

Still, it may seem awkward to imply the existence of statutory time periods in an amended Rule 12(a)(3) when no such period is known.

General discussion began with the observation that the Department of Justice complies with the 30-day periods set by FOIA. When an action combines a FOIA claim governed by the 30-day period with claims under other statutes, the Department asks for an extension of time to provide a single answer under the general 60-day period of Rule 12(a)(2). This does not seem to be a problem. The Department has not encountered a statute setting a different period than Rule 12(a)(3).

A question about the interpretation of current Rule 12(a) was raised. Rule 12(a)(1), quoted above, recognizes "another time specified by this rule or a federal statute." It would be possible to interpret that as a provision that recognizes statutory time periods and reaches subdivisions (a)(2) and (a)(3). But the more apparent meaning may be that Rule 12(a)(2) is "another time specified by this rule" without an exception for different statutory periods. Clearly enough 12(a)(2) substitutes a 60-day period for the 21-day period set by Rule 12(a)(1). So for Rule 12(a)(3). It is not clear that the (a)(1) reference to a time specified by a federal statute extends beyond the 21-day periods set by (a)(1), or the 60- and 90-day periods set after waiver of service.

The pre-Style Rule 12(a) was noted. Former 12(a)(1) did not refer to a different time provided by Rule 12(a). It said only: "Unless a different time is prescribed in a statute of the United States * * *." Subdivisions (a)(2) and (3) did not say anything about statutes, or for that matter other rules. It is not clear how this history bears on the possible ambiguity in the present rule — perhaps it was intended to extend the statutory exception to (a)(2) and (3), or perhaps referring to times set in this rule meant only to clarify the role of (a)(2) and (a)(3) as exceptions to (a)(1).

Discussion finished by concluding that language should be drafted by make Rule 12(a)(2) parallel to Rule 12(a)(1). It may be unnecessary, possibly even dangerous, to do the same for Rule 12(a)(3).

January 30 draft

In Forma Pauperis Practices: 19-CV-Q

Sai, who participated actively and constructively in the consideration of amendments to the electronic-filing rules, has made two sets of suggestions that point to serious questions. The first, addressed to the Appellate Rules and Criminal Rules as well as the Civil Rules, relates to in forma pauperis practices.

The first issue goes to the standards used to qualify a litigant for i.f.p. status. The argument that quite different standards are used by different courts, even by different judges on the same court, finds support in a recent law review article that thoroughly researched current practices. The governing statute, 28 U.S.C. § 1915(a), offers no real guidance. Rather than attempt to incorporate specific standards into Rule text, Sai suggests adoption of Legal Service Corporation regulations. Apparently the LSC regulations delegate many determinations to local organizations, a feature that could undercut uniformity. In addition, Sai suggests reliance on government benefit programs — any litigant who receives SSI, SNAP, TNAF, or Medicaid would automatically qualify for i.f.p. status. These proposals would incorporate standards developed for other purposes, and administered in different ways. Even rules to qualify for LSC services serve different purposes than determining i.f.p. status. Additional difficulties appear. Giving specific content by way of income and asset ceilings for i.f.p. status comes close to the line of substantive rules. And wherever that line is drawn, the proposals delegate the actual standards to nonjudicial actors. Delegation may be convenient, but it may not be wise or authorized by the Rules Enabling Act.

The second suggestion is for clear rules on the responsibility to update information about financial status as circumstances change.

The third set of suggestions addresses a host of ambiguities found in the Administrative Office forms for requesting i.f.p. status. Many of the concepts are found inherently ambiguous: What is “income”? What are “assets”? Who counts as a “spouse”? Even, what is “cash” — a blockchain “currency”? Here too, the suggestion is to incorporate standards developed for other purposes. The Internal Revenue Code and Regulations could be incorporated. Here too, the problems of substantive meaning and delegation appear.

The fourth set of suggestions argues that much of the information requested by the current Administrative Office forms is irrelevant, intrusive, and at times so intrusive as to violate the Constitution. An applicant, for example, cannot constitutionally be directed to provide financial information about a nonparty, such as a spouse.

January 30 draft

Discussion began by noting that the Northern District of Illinois i.f.p. forms have been twice revised in the last two years. One reason was that staff attorneys were "aggressive" in dealing with prisoner plaintiffs who got donations to their commissary accounts from family and friends. Sai is right that there are real problems. But it may be better to struggle with the problems on a local level. As one example, it is important to know what the Illinois prison system does.

A judge noted that many factors enter a determination whether to recognize i.f.p. status. Income, assets, number of dependents, financial obligations, ability to earn, and other circumstances may combine in myriad ways. Attempting to capture the calculation in a formula is not likely to be wise. Nor are alternative approaches to increasing uniformity among courts likely to work. As an easy example, a given level of income and assets may be barely adequate for survival in one part of the country, but provide some margin of discretionary expenditure in another part.

The difficulty with uniform standards was approached from a different angle. Courts of appeals may see the question differently than a district court sees it. The problems "touch on the thoughtful discretion of judges all over the country. They might not welcome constraints."

A judge noted that similar problems arise in Criminal Justice Act cases, but that does not provide a foundation for considering a civil rule that sets i.f.p. standards.

Other participants agreed that these are big problems. But the rules committees are constrained in their ability to address them. Are there other groups that might provide some relief?

The Department of Justice will inquire into the possibility that some groups might be found to address some of these questions.

The Court Administration and Case Management Committee is another likely place for considering these questions. They have received Sai's proposal, and appear interested in working on it. Given this information, the Committee concluded that the proposal should be removed from the Civil Rules agenda. It can be left for such consideration as the Court Administration and Case Management Committee chooses to give it.

Calculating Filing Deadlines: 19-VC-R

Sai observes that parties frequently run into difficulties with filing deadlines. The difficulties may arise from inattention, miscalculation, lack of clarity in the rules or events that trigger deadlines, or even misinformation by the court clerk. These

problems may be particularly pronounced for pro se litigants, but attorneys encounter them as well. Much time and no little agony are devoted to calculating and recalculating deadlines. Mistakes still happen. Sai's proposal is addressed to the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Sai's proposal rests on twin propositions: courts know what the deadlines are, and have authority to calculate them conclusively. Court clerks regularly have to calculate deadlines. So Sai proposes that courts be directed by rule to perform time calculations for all possible responses to every court or party action, and to give notice by order to all parties that have appeared. The rule would provide that all filers may rely on the court's calculation. And it is "deliberately cumulative": "The most recent calculation order should be the full calendar of a case listing all available, pending, or issued events, and their respective deadlines."

Missed deadlines can lead to forfeiture of important rights. Assistance for all parties, and particularly for pro se parties, is welcome. Court clerks frequently offer advice now.

But time deadlines are necessary to achieve the Rule 1 goal that every action and proceeding be determined, and be determined with some measure of speed. All of the deadlines in all sets of court rules were examined and many were amended ten years ago. One of the goals was to simplify the rules, reducing the risks of inadvertence and miscalculation. If a particular deadline proves undesirable in practice, it can be considered and modified. There may not be sufficient reason to undertake a sweeping review now, particularly in response to a proposal that does not aim at any particular time period in any particular rule.

The premise that courts know what the times are is not compelling. Some deadlines run from events the court does not learn of. Discovery responses under Rules 33, 34, and 36, for example, are due 30 days after the party is served, but the requests are not filed with the court until they are used in the proceeding or the court orders filing. Some time periods are set before an event. A written motion and notice of hearing, for example, must be served at least 14 days before the time specified for the hearing.

Directing courts to continually calculate specific end-of-deadline days for every event in an action, in short, would impose a heavy burden. Mistakes would be made. And as the law stands now, a rule cannot protect a party who relies on a mistaken court calculation if the relevant time period is not only mandatory, but "jurisdictional" as well.

One alternative to alleviate forfeitures would be to relax the provision of Rule 6(b) that allows a court to extend the time to act "for good cause." One model of generosity is provided by Rule 15(a)(2), which directs a court to "freely give leave" to amend a pleading "when justice so requires." But the good cause standard was adopted for good reason. Relaxing it could discourage the impulse to honor deadlines, and create added work for courts.

Discussion began with the observation that the Bankruptcy Rules Committee quickly rejected this proposal. It is a "nice idea, but thoroughly impracticable." There are too many deadlines. Clerks' offices spend too much time advising on deadlines even now. And it is hard to be confident the court knows the deadlines.

It was reported that the Criminal Rules Committee also had rejected the proposal. It did ask whether the CM/ECF system automatically calculates some deadlines, but found real problems with the prospect of sharing even those calculations with litigants.

Discussion turned to the possibility of relaxing Rule 6(b). The good cause standard might be relaxed, at least for pro se litigants, even borrowing the "freely grant" approach of Rule 15(a). A judge observed that pro se status is part of the good-cause assessment under Rule 6(b). Three other judges agreed, with the note that the Seventh Circuit strongly encourages this practice. Another judge noted that Bankruptcy Rule 9006(b) is not the same as Civil Rule 6(b); if Rule 6(b) is to be taken up, the Bankruptcy Rules Committee will need to consider Rule 9006(b).

The conclusion was that the practice of considering pro se status in administering Rule 6(b) provides good reason to bypass any consideration of Rule 6(b). The problems with the proposal to require courts to provide notice of all deadlines are too great to justify pursuing the proposal further. It will be removed from the agenda.

Rule 68 Offers of Judgment: 19-CV-S

Retired Judge Mark W. Bennett submitted as a recommendation a twelve year old article by Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. 865-937 (2007).

Professor Shelton's article accepts Rule 68 pretty much as it has been interpreted in the courts. Her proposal focuses on increasing the clarity of Rule 68 offers. Clear offers will better enable the plaintiff to determine whether to accept the offer, and provide a better basis for comparing a rejected offer to a judgment. The offeror is better protected against unintended

interpretations that add court awards of costs and perhaps fees to an offer that has been accepted. The plaintiff is better protected against a ruling that a judgment that seems to exceed a rejected offer actually falls below it after including the costs and perhaps fees the court would have added if the offer had been accepted.

The proposal would permit only two types of Rule 68 offers for money judgments. One is a "damage only" offer. The offer does not include any costs or fees, matters left to the court. Both parties know this is what the offer means, and the court knows when it comes time to compare offer and judgment. The other permitted offer is a "lump sum" offer that must be made in exact language provided by an amended Rule 68. The offer includes any prejudgment interest, costs, and attorney fees accrued at the time of the offer.

The concept is clear enough, although inevitable drafting issues would arise in undertaking to frame a rule that as far as possible reduces uncertainties about the impact of a Rule 68 offer.

The Committee's history with Rule 68 raises the question whether this relatively modest proposal could be taken up without going further into Rule 68. Rule 68 has been the subject of perhaps more spontaneously generated proposals than any subject other than discovery. Most of the proposals seek to "put teeth" into the rule by increasing the consequences for failing to win a judgment better than a rejected offer. The most common element would be to add attorney fees incurred by the offeror after the time of the offer.

More complex proposals for expanding Rule 68 often include provisions that enable a claimant to make offers, not only a party defending against a claim. Because a plaintiff who wins a judgment better than an offer rejected by the defendant will almost always recover costs, the proposals contemplate an award of post-offer attorney fees to the plaintiff, a substantial incentive in cases that do not include a statutory fee award. A variation on this theme would reduce the Rule 68 award by the "benefit of the judgment." As a simple illustration, a defendant rejects a $50,000 offer, the plaintiff incurs post-offer fees of $20,000, and wins a judgment for $60,000. The $10,000 part of the judgment that exceeds the rejected offer is deducted from the $20,000 fees, leaving a fee award of $10,000. The plaintiff would then be in as good a position as if the offer had been accepted.

A fundamental question asks whether a Rule 68 award should be made even when it was reasonable to reject the offer. Precise calculations of relief are often difficult, if not impossible, in many settings of factual or legal uncertainty. There may be excellent reasons to reject an offer, even when the final judgment is not more favorable. State offer-of-judgment rules often allow a margin of error. Perhaps Rule 68 should recognize some similar margin.

January 30 draft

Many other issues have demanded attention in addressing Rule 68. One involves offers for specific relief: what tests should be used to compare an injunction against the terms of an injunction included in a Rule 68 offer? Is it possible or desirable to measure the overall value of a judgment that includes both damages and an injunction against an offer that included a different measure of damages and injunction terms?

Another set of questions arises from uses of Rule 68 offers in class actions. Attempts to use Rule 68 offers to moot class actions have been addressed by many recent decisions, and these issues may be coming under control. And there may be no practical problem with attempts to use Rule 68 offers to bind a class when the class judgment fails to provide greater relief than the offer. But if Rule 68 is taken up, it might be appropriate to exclude aggregate party representative actions from its scope.

Two questions arise from two Supreme Court decisions that rely on the "plain meaning" of Rule 68 text. One ruled that failure to win a judgment better than a rejected offer cuts off a statutory right to post-offer attorney fees under any statute that provides for recovery of fees as "costs," but not under a statute that provides for recovery of fees without characterizing them as "costs." Some proposals suggest that the happenstance of legislative language should not have this effect. And many proposals, siding with the dissent, urge that Rule 68 should not operate to cut off attorney fees for plaintiffs that have been the subject of special legislative solicitude and protection. Occasional suggestions have been made that cutting off statutory fee rights by rule forfeiture digs too deep into substantive rights.

The other decision is that a judgment for the defendant defeats any Rule 68 cost award because the award is available only "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer." The plaintiff does not "obtain" a "judgment" when the judgment is for the defendant. A judgment for the defendant, however, may seem to show that the plaintiff's failure to accept was all the less reasonable, and the defendant's post-offer costs all the more an appropriate subject for reimbursement.

Uncertainty also surrounds the debate whether Rule 68 is valuable because it promotes settlement. A common response is that so many cases in federal court settle that actual trials are near the vanishing point. The reply is that Rule 68 offers can encourage cases to settle earlier than they would settle otherwise. And the retort is that it may not be desirable to pressure plaintiffs to settle before the opportunity for discovery that will provide better information about the value of the claim.

A still more fundamental objection asks why there should be a duty to accept an offer to settle. Why impose any forfeiture, even as modest as post-offer costs are likely to be, when a claimant seeks to recover, and may urgently need to recover, the full value of a claim? Even an award for less money than the offer may provide invaluable vindication.

The Committee has repeatedly struggled with Rule 68. Proposals to amend Rule 68 were published in 1982, then in much revised form in 1983, and eventually abandoned. Extensive work was done 25 years ago, this time to be abandoned without publishing any proposal. The subject has been explored repeatedly since then, at times in depth and more frequently with reminders of earlier work, in response to suggestions from the bar and bar groups.

This history suggests that it would be difficult to take up any part of Rule 68 without facing strong pressures, both from without and from within Committee deliberations, to repeat the fundamental reexaminations of the past.

Discussion began with a suggestion that indeed taking up Professor Shelton's article as a proposal would generate strong pressures to explore "far greater" potential revisions.

A Committee member asked how often Rule 68 is used. Careful studies have been done in the past, but nothing recent has come to committee attention. The general assumption is that Rule 68 is not much used. One explanation is that defeating an award of post-offer costs does not provide much of an incentive. Cases that involve statutory fee shifting as costs are commonly thought to provide strong motives to make offers, and there are many such cases. But there too practice is uneven. Some institutional defendants have a routine practice of making Rule 68 offers, for example in police conduct cases. There is some sign of concern, however, that a routine practice may encourage ill-founded claims brought solely for the purpose of accepting the routine offer.

General discussion recognized that Rule 68 presents a complicated set of questions. Rule 68 offers often are ambiguous. But it would be difficult to confine any project to attempts to encourage clear offers, and even those attempts would require appointment of a subcommittee.

The Committee concluded that the time has not yet come to embark on a Rule 68 study.

Rule 26(b)(4)(E)(I): 19-CV-T

Judge Bennett submitted another article by Professor Shelton as a subject for Committee study. This article is Shelton,

Discovery of Expert Witnesses: Amending Rule 26(b)(4)(E) to Limit Expert Fee Shifting and Reduce Litigation Abuses, 49 Seton Hall L. Rev. 475 (2019).

Rule 26(b)(4)(E)(I) says that the court must require that a party seeking discovery must pay an expert witness a reasonable fee for the time spent in responding to discovery under Rule 26(b)(4)(A). Rule 26(b)(4)(A) establishes a right to depose any person who has been identified as an expert whose opinions may be presented at trial. Professor Shelton identifies a large number of discrete questions that have divided courts that undertake to determine what is a reasonable fee.

Judge Bates introduced the topic by asking whether judges on the Committee have seen these problems.

Professor Marcus developed the topic by noting that the Committee heard nothing of these issues when it undertook the thorough study that led to Rule 26(b)(4) amendments ten years ago. He also noted that calculating "a reasonable fee for time spent in responding to discovery" raises questions similar to questions raised in calculating attorney fees. Experience shows that many details need to be addressed on a case-by-case basis.

The proposal does not address Rule 26(b)(4)(E)(ii), which provides that a party seeking discovery from an expert employed only for trial preparation must pay "a fair portion of the fees and expenses" incurred in obtaining the expert's facts and opinion.

One possible complication can be put aside at the outset. This proposal does not open up more general questions whether a party requesting discovery should pay the expenses incurred in responding. The expert's opinions will be described either in a detailed report under Rule 26(a)(2)(B) or in a Rule 26(a)(2)© disclosure that identifies the subject matter on which the expert will provide evidence and provides a summary of the facts and opinions to which the expert is expected to testify. Early hopes were that the Rule 26(a) disclosures would dispense with the need to depose experts. That does not seem to have happened in any general way. But the deposition is primarily for the purpose of preparing to examine the expert at trial. It is for the benefit of the deposing party. The expert's proponent has paid for developing the opinion — why should the proponent also have to pay the expert's fees and expenses for the deposition?

A partial list of the issues that may arise includes these:

How should preparation time be measured? Can preparation for the deposition be separated from preparation for trial, or should an attempt be made to determine what parts of time preparing for

the deposition may reduce time to prepare for trial? What about time spent conferring with counsel? And how can a court decide how much time is reasonable in preparing for a deposition? Can an hourly rate be increased for time in deposition, as it may be for time in trial, as compared to time to undertake the initial study and prepare a report? Can an expert charge a daily fee, even for a deposition that lasts only a few hours or even less than an hour? What about fees to prepare for a canceled deposition?

Expenses also stir debate. What should be expected for travel — spartan, luxurious, or simply comfortable means? Who should be responsible for travel time if the deposition is not taken where the expert works?

When should bills be submitted, when paid? Should interest be awarded after some period of delay? (An order in CVLO MDL 875 Proceeding offered as an example of various award provisions includes interest "at a rate of 3.5% per month for the length of time the invoice remains unpaid.")

All these questions and others are likely to be approached differently if the expert witness was not required to provide a written report under Rule 26(a)(2)(B). The most common examples are treating physicians.

These and many other questions would be subject to flat answers in the draft rule proposed by Professor Shelton. For example the draft provides that "'Time spent responding to discovery' includes only (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript, or time otherwise relating to being deposed."

Discussion began with a lawyer's observation that "I've always worked this out with the other parties." We should leave it there.

Another lawyer fully agreed. "We always work this out. We never have to litigate" these issues.

Yet another lawyer agreed that "it is always worked out." Two more lawyers joined in.

A judge said that she had never seen these issues.

The Committee removed this proposal from the agenda.

January 30 draft

19-CV-V: ESI Production, Cost-Shifting

These two related proposals were made by Judge Michael Baylson, a former Committee member. They relate to the 2015 proportionality amendments of the discovery rules.

The first proposal would authorize the court to require a party to "disclose details of its application of these Rules to its production of electronically stored information." It does not seem to venture into the contentious issues that arise when a party relies on computer searches or computer-aided intelligence to respond to discovery requests. A requesting party, for example, may wish to know how the producing party taught its system to identify relevant and responsive information. Privilege, work-product, and confidentiality issues all arise. Instead, the proposal seems to aim more at the level of research undertaken by a responding party as affected by the responding party's views of proportionality. A responding party may limit its search short of surveying all possible sources, concluding that proportionality justifies a more targeted search. The proposal seems aimed at allowing discovery of how the proportionality principle was implemented.

Professor Marcus observed that this proposal relates to issues that were thoroughly explored in proposing the 2015 amendments. The Rule 26 Committee Note explains that it is not feasible to assign a burden on proportionality, either to require the inquiring party to show that its requests are proportional to the needs of the action or to require the responding party to show that the requests are not proportional or that its efforts to respond are proportional. Instead, the requesting party is in the best position to explain why requested information is relevant, while the responding party is in the best position to explain the burdens that would be imposed by searching for it.

A judge suggested that it will be important to have another four or five years of experience with the 2015 amendments before attempting to deal with this proposal. Experience may show that courts find authority to resolve these issues, including disclosure of the burdens involved in producing electronically stored information. This proposal will be removed from the agenda.

The second proposal is to authorize the court to shift the cost of discovery from one party to another to ensure proportionality. This topic was addressed by the 2015 amendment of Rule 26(c)(1)(B), which allows entry of a protective order specifying terms for the allocation of discovery expenses. The Committee Note cautions that cost-shifting should not become a common practice.

The Committee agreed that explicit recognition of cost-shifting authority in Rule 26(c)(1)(B) suffices for the present. Time may show a need for more frequent or extensive exercise of this authority, but here too it seems better to await the lessons of time. This proposal will be removed from the agenda.

Rule 4(d): "Snap Removal": 19-CV-W

This proposal addresses dissatisfaction with a removal practice that many courts allow under the wording of 28 U.S.C. § 1441(b)(2). The statute allows removal of an action that rests only on diversity jurisdiction, but not "if any of the parties in interest properly *joined and served* as defendants is a citizen of the State in which such action is brought."

The proposal decries decisions ruling that the language of the statute clearly allows removal by non-local defendants if they act before the local defendant is served. It asserts that some defendants that are frequently sued in state courts have adopted a practice of searching court dockets to identify new actions and to remove before the local defendant, indeed before any defendant, is served. This is said to defeat the statutory purpose to defeat removal whenever the presence of a local defendant shows that the purposes that justify diversity jurisdiction are not involved.

Rather than propose a statutory amendment, clearly something beyond the reach of the Rules Enabling Act, the proposal is to adopt a new Rule 4(d)(6) that would expand the provisions for waiving service. The proposal is complicated, and rests on clear fictions. It is not quite clear just how it is intended to operate. But it seems an indirect way to provide that a plaintiff can defeat early removal by non-local defendants by serving a forum defendant within 30 days of a notice of removal. Service would show that the plaintiff actually means to proceed against the local defendant, and that the local defendant was not named solely to defeat removal. A rule that clearly and directly states that result would almost certainly run afoul of the Rules Enabling Act. Attempting to accomplish the same result by fictitious deemed waivers and relation back seems no better.

The Committee has learned that this proposal is already on the agenda of the Federal-State Jurisdiction Committee. It agreed that it is properly a matter for the Federal-State Jurisdiction Committee. It will be removed from the Committee's agenda.

Mandatory Initial Discovery Pilot Projects

Judge Bates noted that mandatory initial discovery pilot projects are well under way in the District of Arizona and the Northern District of Illinois. The Federal Judicial Center is

engaged in a continuing study of the effects.

Emery Lee began his description of the FJC Report on the pilot project surveys from Fall 2017 through Spring 2019 by saying that "it's going pretty well."

The Report describes closed-case surveys of cases that included a pilot project discovery order. "These are early-terminating cases." The first of them were filed in May, 2017. So far there are perhaps one or two trial cases in the mix. "These are early results."

The response rate to the surveys is better than 30%. "That's good."

Almost half of the respondents report making the required disclosures. That number is more impressive than it may seem, since many cases resolve early.

The executive summary reports:

> Survey respondents generally agreed that the MIDP resulted in relevant information being provided to the other side earlier in the case. Additionally, most survey respondents either disagreed with or were neutral to the concern that the required MIDP exchanges would result in disclosures that would not otherwise have occurred in the discovery process. They were more or less evenly divided on whether the MIDP focused discovery on important issues, reduced the volume of discovery requests, or reduced the number of discovery disputes in the closed cases. Plaintiff attorney respondents were more likely than defendant attorney respondents to agree that the MIDP enhanced the effectiveness of settlement negotiations, expedited settlement negotiation discussions among the parties, and reduced the number of subsequent discovery requests. In general, survey respondents tended not to agree that the MIDP reduced discovery costs or overall costs in the closed cases, nor did they agree that the disclosures reduced disposition times in the closed cases.

Judge Bates described these as pretty positive results.

Judge Campbell said that this is good FJC work. This report does not include statistics. Statistics may prove more reliable than impressionistic survey responses.

Overall, results in the District of Arizona were similar to results in the Northern District of Illinois. That may be a bit

surprising, since lawyers in Arizona have had many years of experience with sweeping initial disclosure in Arizona state courts. It is not surprising that defense lawyers in Illinois are more negative about MID than Arizona defense lawyers or Arizona defendants.

Separate note was taken of charts showing substantial agreement with the propositions that in MIDP cases less discovery was needed to resolve the case and reduced discovery costs.

Judge Dow found it reassuring that the results in the Northern District of Illinois are similar to the results in Arizona. "Most Northern District lawyers are fine with it." Half-way through the program the rules were altered to give judges more discretion to pause MID pending disposition of a motion to dismiss. Many lawyers objected to the need to make initial discovery responses in actions that might well be dismissed on the pleadings. The change "was very welcome." And there are cases where MID is followed by little or no added discovery. That is one goal of the program. Here too, statistics may tell more than the survey responses. Some lawyers resisted the program fiercely, and have been hard to reconcile to it.

Dr. Lee noted that the FJC collected docket information this summer. The study remains in its early stages.

Judge Bates noted that it has been difficult to get courts to participate in pilot projects. He expressed the Committee's thanks to Judges Campbell, Dow, and St. Eve for their help in enlisting their courts in the MIDP, and to Dr. Lee for bringing the FJC study along.

New Business

No new business was suggested by any Committee member.

Next Meeting

The next Committee meeting will be on April 1, 2020, in West Palm Beach.

Respectfully Submitted,

Edward H. Cooper
Reporter

January 30 draft

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ 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's 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's 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-Sponsor:* Durbin (D-IL)	CR 5	**Bill Text:** https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.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
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

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:* 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: referred to Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
N/A		CV 26		• 9/26/19: House Judiciary Committee hearing on the topics of PACER, cameras in the courtroom, and sealing court filings

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SOCIAL SECURITY DISABILITY REVIEW SUBCOMMITTEE

The Social Security Review Subcommittee met by conference call on December 19, 2019, following the October Advisory Committee meeting, and again on February 6 and February 25, 2020 following the Standing Committee meeting in January. Notes on those calls are attached.

This report presents the subcommittee's summary of the matters that must be weighed in determining whether the Advisory Committee should recommend publication of proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). This project has been pursued so long and so carefully that the most likely choices will be either to recommend publication or to report to the Standing Committee that the project should be abandoned.

The draft rules reflect the fact that § 405(g) cases are appeals, not ordinary civil actions. The case is usually decided on the administrative record, as it may be expanded on a remand for further consideration. Although district courts entertain other forms of actions for review of administrative action, often on an administrative record, Social Security cases are distinctive. There are a great many of them, averaging between 17,000 and 18,000 actions a year, and accounting for 7% to 8% of the federal civil docket. These features account for the early decision to work on rules aimed only at Social Security review, not more general rules for district court review of administrative actions.

In many ways the central feature of the draft rules is the Rule 5 provision for presenting the case through the briefs. That is how an appeal is effectively presented.

The actual drafting and content of the draft supplemental rules present few, if any, difficulties. The rules are presented first for that reason.

The challenges arise from the concerns that beset any rules that focus on a specific substantive topic, concerns that often are gathered under the name of transsubstantivity. These concerns have been discussed in depth in earlier Advisory Committee meetings, most notably last October, but they command renewed attention. The determination whether to recommend publication will depend on the balance between the good that might be accomplished by the supplemental rules and reluctance to overcome the transsubstantivity presumption.

Supplemental Rules Draft

Successive subcommittee drafts began as supplemental rules, changed to a rule to be incorporated directly into the body of the Civil Rules (tentatively designated as Rule 71.2), and back to supplemental rules. It remains possible to revert to the Civil Rule form, but the supplemental rules format has seemed to facilitate clear and simple drafting. Only the supplemental rules format is

presented for consideration by the Advisory Committee:

SUPPLEMENTAL RULES FOR SOCIAL SECURITY REVIEW ACTIONS UNDER 42 U.S.C. § 405(g)

RULE 1. REVIEW OF SOCIAL SECURITY DECISIONS UNDER 42 U.S.C. § 405(g)

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

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

RULE 2. COMPLAINT

(a) COMMENCING ACTION. A civil action for review [under these rules][1] is commenced by filing a complaint.

(b) CONTENTS.

(1) The complaint must:

(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

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

(C)[2] state the type of benefits claimed.

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

RULE 3. SERVICE

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district [in which the action is filed]. If the complaint was not filed electronically, the court must notify

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[1] The Style Consultants suggest deleting these words. The suggestion relies on Rule 1(a), and seems worthy. Reliance on 1(a) might carry further: "An ~~civil~~ action for review is commenced by filing a complaint." "Civil" was inserted to emphasize the connection to the Civil Rules, including Civil Rule 3: "A civil action is commenced by filing a complaint * * *." An alternative might be to add "civil" to Rule 1(a): "These rules govern a~~n~~ civil action under 42 U.S.C. § 405(g) * * *."

[2] The Style Consultants ask whether (C) should become item "iii" in 2(b)(1)(B). It would fit well there. But the (A), (B), (C) structure was chosen to evoke the three steps of Civil Rule 8(a) — pleading jurisdiction (1), the claim (2), and relief (3).

the plaintiff of the transmission.[3] The plaintiff need not serve a summons and complaint under Civil Rule 4.

RULE 4. ANSWER; MOTIONS; TIME

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

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

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

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

RULE 5. PRESENTING THE ACTION FOR DECISION

The action is presented for decision by the parties' briefs.

RULE 6. PLAINTIFF'S BRIEF

The plaintiff must serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(c), whichever is later. The brief must support arguments of fact by citations to particular parts of the record.

RULE 7. COMMISSIONER'S BRIEF

The Commissioner must serve a brief on the plaintiff within 30 days after service of the plaintiff's brief. The brief must support arguments of fact by citations to particular parts of the record.

RULE 8. REPLY BRIEF

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

Committee Note

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other

[3] This sentence seems desirable if there is a significant risk that clerks' offices will not notify the plaintiff. That is an empirical question that needs to be explored, perhaps by asking for public comment.

agency to be the Commissioner. There is not enough experience with such actions to determine whether they should be brought into the simplified procedures contemplated by these rules. But a court can employ these procedures on its own if they seem useful, apart from the Rule 3 provision for service on the Commissioner.

The Civil Rules continue to apply to actions for review under § 405(g) except to the extent that the Civil Rules are inconsistent with these Supplemental Rules.

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

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

Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil action be commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. Simplified pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the action as one brought under § 405(g). The elements of the claim for review are adequately pleaded under Rule 2(b)(1). Failure to plead all the matters described in Rule 2(b)(1), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff who wishes to plead more than Rule 2(b)(1) requires to do so.

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

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

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

Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action for decision on the merits. This procedure displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record.

Under Rule 6, the plaintiff's brief is similar to an appellate brief, citing to the parts of the administrative record that support an argument that the final decision is not supported by substantial evidence or is contrary to law. Under Rule 7, the Commissioner responds in like form. Rule 8 allows a reply brief.

Rules 6, 7, and 8 set the times for serving the briefs: 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(b) for the plaintiff's brief, 30 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.

Discussion of Draft Supplemental Rules

The Civil Rules Advisory Committee's study of social security benefit review actions began in November, 2017. The topic was taken up in response to a request addressed by the Administrative Conference of the United States to the Judicial Conference of the United States. The Judicial Conference referred the topic to the Standing Committee, which in turn decided that this Committee should take the lead.

The topic has become familiar after repeated appearances on Committee agendas. A brief summary of the salient points suffices to frame the discussion.

The draft rules reflect the fact that § 405(g) cases are appeals, not ordinary civil actions. The case is usually decided on the administrative record, as it may be expanded on a remand for further consideration. Although district courts entertain other forms of actions for review of administrative action, often on an administrative record, Social Security cases are distinctive. There are a great many of them, averaging between 17,000 and 18,000 actions a year, and accounting for 7% to 8% of the federal civil docket. These features account for the early decision to work on a rule aimed only at Social Security review, not a more general rule for district court review of administrative actions.

In many ways the central feature of the draft rules is the Rule 5 provision for presenting the case through the briefs. That is how an appeal is effectively presented.

The draft rules are simple, far simpler than earlier drafts or the elaborate proposal initially submitted by the Social Security Administration. They are framed around the universally recognized fact that almost all § 405(g) actions focus entirely on review on the administrative record. Almost all, moreover, involve only a claim for benefits for a single individual, or perhaps claimants who rely on a single individual's wage record and circumstances. Rule 1(a) limits the supplemental rules to such actions. Rule 1(b) recognizes that all of the Civil Rules continue to apply except to the extent that they are inconsistent with the supplemental rules. And if an action goes beyond the simple paradigmatic character described by Rule 1(a), the Civil Rules oust the supplemental rules.

The supplemental rules thus seek to establish an appeal-like procedure for actions that, by virtue of § 405(g), are brought as civil actions. Supplemental Rule 3 supersedes the Civil Rule 4 provisions for service of the summons and complaint by directing that the court must notify the Commissioner by transmitting a Notice of Electronic Filing. This procedure has been adopted in some districts, and wins strong support from plaintiffs' representatives and SSA. For the rest, pleading is simplified by Supplemental Rules 2 and 4. The complaint is designed to do no more than identify the plaintiff, including the last four digits of the social-security number that SSA needs to ensure proper identification of the administrative record. The plaintiff remains free to plead "a short and plain statement of the grounds for review," but is also free to omit any such statement. The Commissioner is required to file the administrative record and to state any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, freeing the Commissioner from any obligation to respond to allegations in the complaint, but the Commissioner remains free to plead more. Motion practice under Civil Rule 12 is addressed by Supplemental Rule 4(c) and (d), mostly to provide a convenient reference for unsophisticated claimants. Supplemental Rules 5 through 8 describe the procedure for submitting the action for decision on the parties' briefs. As observed in the committee note, this procedure supersedes the practices in some courts that shape review proceedings by such devices as summary judgment or joint statements of fact.

The overriding goal served by the draft supplemental rules is to establish a good and nationally uniform procedure to displace the great disparities in local practices. The subcommittee has held two meetings with representatives of SSA, the Administrative Conference, the American Association for Justice, and the National Organization of Social Security Representatives. District judges and magistrate judges have been involved in these and other meetings. At least some of the judges express frustration based on their perception that the Civil Rules do not work well for § 405(g)

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

Belief in the efficacy of the draft supplemental rules may be challenged on one remaining ground. Some observers have suggested that some districts are so committed to their current practices that they will find ways to evade national rules through new local rules or individual practices. The judges consulted by the subcommittee have offered no signs of this attitude, but it cannot be discounted out of hand.

The draft supplemental rules have emerged from a multi-staged process of simplification and clarification. The subcommittee believes that they are ready for publication if publication is recommended by the Advisory Committee.

The subcommittee thus believes that the Advisory Committee's determination to recommend publication should begin on the premise that the draft supplemental rules are indeed worthy. The determination should turn on balancing the potential gains to be won against the tradition of transsubstantivity.

The transsubstantivity tradition may rest in part on the language of the Rules Enabling Act, 28 U.S.C. § 2072(a), which recognizes the Supreme Court's "power to prescribe general rules of practice and procedure." There is good reason to abolish the common-law forms of action and the substance-specific procedures that attached to them. A further caution is voiced by § 2072(b), which directs that "[s]uch rules shall not abridge, enlarge or modify any substantive right."

Pragmatic concerns supplement the more abstract concerns that may be drawn from the history and text of the Enabling Act. The social security review work provides illustrations.

Two years of hard work have demonstrated the many twists of social security law that must be reckoned with in framing a rule. A proposal to include a procedure for seeking attorney fees for services in the district court provides an example that has been omitted from the outset. Many misadventures have been identified and set to rights. Many detailed provisions have been pared away, largely for fear of substantive entanglement. What remains is modest. But it is difficult to be confident that the subcommittee has been able to identify and adapt to all of the most important substantive elements and to anticipate the procedures that best accommodate those elements. Expert advice has been offered from many quarters, but risks remain. Publication for comment may

elucidate or allay any perceived risks.

Another and more general concern also gives pause. Any substance-specific rule that is adopted may inadvertently favor one set of interests over another, and even if it achieves a scrupulously neutral balance is likely to be perceived as the product of favoritism by at least one, and perhaps all, sides. Some claimants' representatives in fact have reacted to successive drafts with the suspicion that the rule would somehow advance SSA interests at some cost to claimants.

A final concern is that adopting even one purely substance-specific rule will generate increased pressures to adopt others. Arguments will be made that one or another substantive area presents needs for specific uniform rules as great as social security review, if not greater. One breach makes it impossible to say such rules are never adopted. The fact that substance-specific rules exist now does not much assuage those who harbor this fear. The Rules Committees are constituted to resist such pressures, and can be trusted to resist ill-advised importunings. But informed resistance takes time away from other projects.

Repeated adoption of substance-specific provisions both in the Civil Rules and elsewhere, however, shows that transsubstantivity is at most a presumption, not a prohibition.

Familiar examples of rules that address specific subjects include both broad and narrow provisions. Broad examples include the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Rule G was adopted in response to strong urging by the Department of Justice); the Rules for § 2254 proceedings and the Rules for § 2255 proceedings; and Civil Rule 71.1 for proceedings to condemn real and personal property by eminent domain. An earlier example was provided by the Copyright Rules that were framed around the 1909 Copyright Act and repealed after enactment of the 1976 Copyright Act, surviving only in Civil Rule 65(f), which applies Rule 65 to copyright impoundment proceedings. Civil Rule 5.2 is an example of a narrow provision that limits remote access to court files in social security and immigration proceedings. The Civil Rule 9(b) provisions for pleading fraud or mistake with particularity are sometimes offered as substance-specific, although at least the fraud provision applies across a wide swath of fraud statutes as well as common-law fraud.

Transsubstantivity thus can be addressed by asking whether a particular proposal for procedures that apply only to a specific subject matter promises gains sufficient to overcome the grounds for caution. This perspective was offered at the October Advisory Committee meeting, and reflected the robust discussion described in the draft October minutes in this agenda book. Excerpts from the minutes, slightly revised to fit into this report, suggest the reasons that may overcome concerns about transsubstantivity:

Several reasons can be found for carrying the work forward. The project was brought to the Judicial Conference as a proposal by the Administrative Conference of the United States, based on a deep study of widely divergent practices across different district courts. SSA strongly supports the proposal, even though it has been pared back from the much more elaborate draft that SSA provided at the outset. SSA is in a good position to evaluate the effects of local rules — and there are many and quite different local rules — and less formal local practices.

Every effort has been made to ensure that the Supplemental Rules are neutral as between claimants and SSA. It reflects what some courts are doing by explicit local practices, and what some others are doing at least de facto.

NOSSCR representatives have expressed concerns that it is important to keep judges happy by submitting these review actions by the familiar procedures they have shaped and to which they have become accustomed. That concern, however, has been significantly reduced by the reactions of magistrate judges and district judges that have reviewed successive rules drafts. Some now use procedures closely similar to the draft rules. Others attempt to use general Civil Rules procedures, such as summary judgment, but report that they do not work well. The subcommittee may seek reactions from a greater number of judges. Judge Boal added that the magistrate judges who met with the subcommittee on October 3 generally accepted the rule draft, and did not object to it. Indeed, those who now use Rule 56 work around it, and welcomed the new approach.

The Department of Justice has created a model local rule that closely resembles the rules draft, and has recommended adoption by district courts. So too, concerns about transsubstantivity may be deflected by recognition that many local rules have been adopted specifically for § 405(g) actions. If local rules can do it, why not a national rule that establishes uniformity around a model that replicates the practices reflected in several local rules?

A central reason for the Supplemental Rules approach is that the § 405(g) cases it reaches are appeals on an administrative record. They are quite unlike original actions in the district courts. As one example, there is no need for discovery in the vast majority of § 405(g) actions, and the rare action that may entail discovery is taken outside the Supplemental Rules and governed by the full sweep of the Civil Rules.

Every year brings some 17,000 to 18,000 § 405(g) actions to the district courts. Many districts adopt local rules, or less formal local practices, because they have found that the general Civil Rules do not work for these actions. The draft Supplemental Rules bring them into an appeal process that reflects the actual character of the proceedings.

The concerns that underlie the transsubstantivity principle may not be much implicated by the draft Supplemental Rules.

One concern is that, because the subcommittee wished to ensure that it crafted a rule that was neutral, the draft rule is modest. And even if the rule in fact is neutral, some parties to § 405(g) review actions — even all parties — may perceive that the rule favors their adversaries.

The first reaction to this presentation was that the modest character of the draft rule will encourage supplemental local rules. One obvious example is provided by the deliberate choice to avoid setting page limits for briefs in a national rule. Local rules will set limits, and in the process may supplement the national rule in ways that impair its operation. More generally, the existing body of local rules have an inertia that will carry beyond adoption of a national rule.

Discussion continued with a set of reflections on these themes expressed in parallel terms.

The draft Supplemental Rules seek to establish an appeal framework that adapts the Civil Rules to § 405(g) review actions. The provisions of draft Supplemental Rule 1 that establish the scope of the rule are critically important. Supplemental Rule 1 seeks to limit the rules to the vast majority of actions that require review and decision on the administrative record. The appellate character of the proceedings is not altered by the practice of remanding for further administrative proceedings. The underlying study by Professors Gelbach and Marcus shows that the rates of remand for further administrative proceedings range from a low of about 20% in some districts to a high of about 70%. But when the action is ready for decision in the district court, it acts on the administrative record and award. It does not make an independent determination, but reviews only for substantial evidence. These are appeals.

A very few § 405(g) actions do call for discovery in a district court. One example is provided by claims of ex parte contacts with the administrative law judge. An even more rare example is a claim of illegality not reflected

in the administrative record. Whatever the reasons may be, such actions are taken outside the draft Supplemental Rules and are governed by all of the Civil Rules.

> Section 405(g) itself requires that district courts provide review in the framework of the Civil Rules. It provides for review by a civil action. It includes some provisions to govern the civil-action proceeding, including three distinct provisions for remand to SSA. Filling out an appropriate appeal procedure by a Civil Rule seems an appropriate accommodation of the Rules Enabling Act to the Social Security Act.

These observations may be supplemented by noting the reasons that persuaded the subcommittee that it would be unwise to attempt to draft a transsubstantive rule to govern all actions that seek review of administrative actions in a district court. The realm of administrative agencies is broad, and includes very different entities that act in very different ways on very different subjects. Indeed it could prove difficult to define limits that distinguish purely executive acts from "agency" acts. Almost all social security review actions lie at the end of a long spectrum of actions that concludes with purely appellate review on a closed administrative record. They involve homogeneous circumstances that support a clear, simple, and uniform procedure. And there are a great many of them. There is a real opportunity to achieve significant improvements in procedures that, in some courts, unduly complicate what should be a straightforward appellate review practice.

In sum, the views of those involved in litigating social security review actions differ, reflecting the balance of competing considerations. SSA supports new rules. Organizations of plaintiffs' representatives express reservations. The Department of Justice, which, although it often delegates much of the work to SSA attorneys, has ultimate responsibility for defending the Commissioner's decision, is opposed because of its concern that adopting another set of substance-specific rules will invite further and ill-advised demands for other substance-specific rules.

The subcommittee believes that the stage is adequately set for Advisory Committee deliberations. The concerns about transsubstantivity warrant deep respect. If they are set out at somewhat less length than the considerations that may overcome a presumption against substance-specific rules, that is because they have been carefully and forcefully expressed in earlier Advisory Committee deliberations, and perhaps in part because it is difficult to articulate the presumption in more precise terms.

The Advisory Committee could decide that still further work should precede any decision whether to recommend rules for publication or to abandon the project. But the subcommittee believes that it has done as much as can usefully be done to gather information, reflect, and prepare a strong set of supplemental

rules. The best source of further information would be public comments on a published proposal. The question whether to recommend publication is ripe for decision on the current record.

APPENDIX

Subcommittee Conference Call Notes

Social Security Disability Review Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
November 22, 2019

The Social Security Review Disability Subcommittee met by conference call on November 22, 2019. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Advisory Committee Chair; Judge Jennifer Boal; and Laura A. Briggs, Esq. Rebecca A.Womeldorf, Esq., represented the Rules Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi began the call by noting that the main purpose was to take a first look at a first draft that translates the most recent draft Civil Rule 71.2 into a set of supplemental rules for actions that seek review of Social Security benefit cases. A few weeks can be spared to improve the draft before seeking review outside the subcommittee.

Judge Boal noted that she planned to seek further review of both approaches, Civil Rule 71.2 and supplemental rules, from magistrate judges. Magistrate judges are meeting on March 24 and 25, and that opportunity will be seized even though it comes too late to support careful subcommittee reactions before the Advisory Committee meets on April 1. It also may be possible to arrange for another group of magistrate judges to review the drafts before then. Judge Lioi added that she will work with the Federal Judicial Center to seek to arrange for review at a time when district judges are gathered for some other purposes.

Discussion turned to the supplemental rules draft. Several participants agreed that this version is easier to follow than the draft Civil Rule 71.2. The format of several rules facilitates clear expression, addressing more topics. This is a complicated subject. Many of the lawyers who bring actions to review SSA decisions will quickly master a new rule, but others will understand the supplemental rules format quicker and better. And claimants who proceed pro se will find the supplemental rules much easier to manage.

After an initial reflection about page limits for briefs, a topic that returned later, discussion began to follow the sequence of the supplemental rules draft.

Draft Supplemental Rule 2 initially provided that an action for review under § 405(g) should be commenced by filing a “notice of review.” The idea was to emphasize the appellate character of the action without inviting the many perplexing consequences that attach to notices of appeal under the Appellate Rules. But these reasons were found inadequate to justify the departure from

ordinary district court procedure. Section 405(g) directs that review be sought in a civil action. Civil Rule 3 directs that a civil action is commenced by filing a complaint. Civil Rule 7 lists acceptable pleadings; the list does not include a "notice of review." It is better to stick with the familiar vocabulary, even though a supplemental rule would expressly displace inconsistent provisions of the Civil Rules. The draft presented for discussion at this meeting was revised to rely on a complaint. This change was approved.

Draft Supplemental Rule 2(b)(2) provides an explicit statement of a proposition that draft Civil Rule 71.2 reflects only in the committee note: the plaintiff may, but need not, add to the complaint "a short and plain statement of the grounds for review." This addition was accepted. It does not invite anticipatory briefing of the claim, only such specific matters as the plaintiff may hope will improve SSA's response.

Draft Supplemental Rule 3 was discussed briefly. This draft carries forward the one proposal that has been enthusiastically accepted on all sides, providing for service on SSA and the local United States Attorney by a Notice of Electronic Filing sent by the court clerk. This provision explicitly provides that service need not be made under Civil Rule 4, ensuring that there is no need to reconcile it with Rule 4(i).

Draft Supplemental Rule 4 carries forward the provisions of draft Civil Rule 71.2 for answer, motion, and relevant time limits. Immediately before the call Judge Bates provided a clarified version for both rules. Without further discussion it was agreed that this version would be substituted in the next drafts.

Another aspect of draft Supplemental Rule 4 was also discussed. Drawing from a suggestion made at the Advisory Committee meeting in October, it modifies the draft provision that the answer "must include" the administrative record and any affirmative defenses to provide that the answer "may be limited to" the record and affirmative defenses. This formula better integrates with the further provision that Civil Rule 8(b) does not apply. The result is clearer support in rule text for the proposition that SSA may choose not to respond to specific allegations in the complaint.

The sequencing of draft Supplemental Rules 5, 6, 7, and 8 came on for discussion. Supplemental Rules 6, 7, and 8 carry forward the draft Civil Rule 71.2 provisions for the plaintiff's brief, Commissioner's brief, and reply brief. Draft Supplemental Rule 5 introduces them by stating that "[t]he action is presented for decision by the parties' briefs." It was suggested that perhaps Supplemental Rule 5 should be relocated to follow the provisions for the briefs, to emphasize that the court undertakes to decide only after the briefs are submitted. An express reference might be added to note that the court can choose whether to provide an opportunity for oral argument. But countervailing considerations were suggested. The purpose of locating Rule 5 as an introduction

to the briefing process is in part to emphasize the appellate character of the action for review, but also to provide an explicit rule text for a committee note statement that the briefing process supersedes such procedures as submitting the action for decision by a motion or cross-motions for summary judgment, joint statements of fact, or like devices. These considerations prevailed, leaving open the prospect that additional emphasis might be gained by adding one word: "presented for decision only by the parties' briefs." The possible reference to oral argument was put aside because judges understand that they have a choice whether to provide oral argument, and the rule should avoid any possible implication that the judge cannot render decision at an oral argument.

A question raised by both Civil Rule 71.2 and Supplemental Rule 7 drafts asked whether the Commissioner's brief should be referred to as a "response" brief. It was decided that "Commissioner's Brief" works well, and should not be confused by adding "response" to the title.

The draft Supplemental Rule 9 page limits for briefs prompted extensive discussion. Page limits were considered in the early stages of this project, but were abandoned in face of fierce opposition by claimants' lawyers. Part of the resistance may have arisen from the SSA proposal that briefs be limited to 15 pages. In addition, there was a real concern that the Civil Rules have never descended to this level of detail, in part because local practices vary considerably and are well entrenched.

Draft Supplemental Rule 9 sought to address brief-length questions by three alternative versions. One would incorporate Appellate Rule 32(a). The second would incorporate Appellate Rule 32(a)(7) on brief length. The third simply set 30-page limits for the Plaintiff's Brief and the Commissioner's Brief, and a 15-page limit for any Reply Brief.

Incorporation of some part of the Appellate Rules has the advantage that it simplifies drafting. But it has serious disadvantages. One is that it requires readers to resort to a separate set of rules outside the supplemental rules and the Civil Rules. Some lawyers, and most pro se plaintiffs, will find that unfamiliar and inconvenient. Beyond that, there are reasons to believe that provisions that work well in the courts of appeals may not be well suited to the district courts. Rule 32(a) includes seven paragraphs for reproduction; cover; binding; paper size, line spacing, and margins; typeface; type styles; and length — including an alternative type-volume limitation.

The choice to be made about a draft rule for page limits may be affected by the reason for including any provision at all. The topic was included in this first draft in part because SSA has wanted a uniform national page limit and in part because the more open structure of supplemental rules may make it a better fit. But strong reasons remain for not having any provision at all. Local practices for briefing are familiar; intruding a national rule for

this specific category of actions is likely to meet resistance, and could easily work poorly for that reason. Some districts have local rules for social-security review actions that incorporate specific page limits; displacing them by a national rule again may prove unwise. And nothing should be done that might imply preemption of local page-limit rules or practices without providing an express national limit.

The decision at the end was to carry forward only the alternative that sets specific page limits, without addressing any of the inevitable questions about what parts of a brief are excluded from the page count, much less paper size, margins, and the like. The purpose is not to endorse even this simple provision, but only to carry it forward for further discussion.

Some aspects of the current draft Rule 71.2 were discussed.

Simplification of the interrelated time limits for motions and answers may leave out some rather unlikely situations — as if a Civil 12(b) motion is made and decided less than 46 days after the complaint is filed, but Civil Rule 12(a)(4) seems to work without any comparable provision. Why incorporate 12(a)(4) but then elaborate it?

The draft committee note says that the social-security review rule applies only when there is but one claim by one plaintiff on a single administrative record, but a single plaintiff may present more than one claim on a single administrative record. This will be revised. A plaintiff who has pursued both disability and supplemental security income benefits in a single administrative proceeding, for example, should join both claims in a single action for review. Some passages in the draft Note may be repetitive. The ongoing review process will be alert to this question.

Discussion turned to the next steps. Not even the full subcommittee, much less the Advisory Committee, have had a chance to review the supplemental rules draft. That forces attention to the choice of materials to be presented to the Standing Committee meeting in January. Should the draft supplemental rules, as revised to reflect today's discussion, be included?

The current draft Civil Rule 71.2 was presented to the Advisory Committee in October with the subcommittee's request for advice on the desirability of pursuing this project toward a rule proposal for publication. The subcommittee believed that the draft had been developed about as well as can be after two years of consultation with plaintiffs's representatives, SSA, and several judges not involved in the rules committee structure. The request for advice reflected two closely intertwined reasons for caution. One is the inherent difficulty of learning enough in the rules committee process to craft a rule specifically aimed at one subject matter, even one that has become familiar to the district courts by accounting for 7% to 8% of their dockets. Caution about this difficulty has led to a rather modest proposal that omits, for

example, any attempt to craft provisions for awarding attorney fees for work in the district court review proceedings. A second reason for caution is concern about honoring the Rules Enabling Act restrictions that authorize only "general" rules of practice and procedure, and fence out any provisions that abridge, enlarge, or modify any substantive right. In addition to the difficulty of crafting a rule that is intrinsically good, adoption of substance-specific rules presents a familiar "slippery slope" concern. Adoption of a specific rule, either as a Civil Rule or as supplemental rules, will be used to support arguments by various interest groups that their favorite substantive topics also deserve separate rules. Powerful arguments can be advanced to counter such arguments. The Administrative Conference and SSA are distinguishable from private interest groups, social-security review actions present uniform procedural characteristics that are almost purely appellate in character, and the sheer volume of these appeals framed as civil actions provide strong distinctions. But the arguments will be made. It may be accepted that future Rules Committees will recognize the distinctions and reject whatever arguments are pressed for additional but unwarranted supplemental rules. Frustrated proponents, however, may then turn to Congress, seeking to bypass the Enabling Act process.

These concerns led to a decision to seek discussion in the Standing Committee of the transsubstantivity concern, focusing not so much on the merits of the draft presented to the Committee in October as on the broader question of proceeding toward a substance-specific rule. The choice between a Civil Rule and a set of supplemental rules, however, may bear on this discussion. If the supplemental rules approach is indeed more effective, that bears on the choice whether to proceed further. So too it may be that simply identifying the topic as supplemental will underscore the unique character of these actions as justification for taking on this subject but not others.

These purposes suggest that both a draft Civil Rule 71.2(a) and a draft set of supplemental rules should be attached to the part of the Committee Report that takes the transsubstantivity issues to the Standing Committee in January. The Standing Committee will be advised that the drafts have not been reviewed by the Advisory Committee, and that the Advisory Committee has not come to a decision whether to recommend that the subject to advanced to a recommendation to publish a proposal for comment. The purpose will be to begin discussion of transsubstantivity concerns without inviting a final decision either way. The assumption will be that if the committees decide to proceed to publication, the present drafts will provide a sufficient basis to present refined rule text by next April.

Finally, it was agreed that both draft Civil Rule 71.2 and the draft supplemental rules should be presented in seeking further advice from magistrate judges and district judges. Those who participated in the October 3 meeting with magistrate judges came away with rather different impressions. One participant believed

the magistrate judges were “underwhelmed” by draft Civil Rule 71.2. Others thought they were more favorably impressed. Some said they were attempting to apply the Civil Rules, but find the Civil Rules do not work. Others said that they had established local practices quite similar to draft Rule 71.2, so adopting it as a uniform national rule would make little difference. Presenting both drafts in further discussions will provide a focused opportunity for further reflection and evaluation.

Social Security Disability Review Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
December 19, 2019

The Social Security Disability Review Subcommittee met by conference call on December 19, 2019. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Advisory Committee Chair; Judge Jennifer C. Boal; Professor A. Benjamin Spencer; Ariana J. Tadler, Esq.; and Laura A. Briggs, Esq. Rebecca A. Womeldorf, Esq., represented the Rules Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi began the discussion by noting that the November conference call had provided an opportunity to explore the alternative Civil Rule 71.2 and supplemental rules drafts, and suggested that today's call provides an opportunity for any further discussion that may prove useful. The November call also explored the central question: whether, assuming the present drafts are about as polished as can be with current resources, they contribute enough value to § 405(g) review procedure to warrant the risks that beset any effort to adopt substance-specific rules of procedure. That question may be the central question, now and as the subcommittee works toward a decision whether to advise that the Advisory Committee recommend publication of new rules provisions. Further reactions will be sought from magistrate judges, and perhaps district judges, but the subcommittee should work toward making a recommendation to the April 2020 Advisory Committee meeting.

Looking to the rules drafts, one question asked whether the simple reference to Rule 12 motions in Supplemental Rule 4(c) and Civil Rule 71.2(c)(3) is too broad. Will it ever be appropriate to make a Rule 12(c) motion for judgment on the pleadings? It does not seem useful to presume that such a motion may never be appropriate. The question was dropped, with the reflection that if the motions are never appropriate they will seldom be made.

The choice between a single Civil Rule 71.2 and a set of supplemental rules was addressed briefly. Several participants agreed that the supplemental rules read easier. They are "far more straightforward" in ways that will help lawyers and will be even more helpful for pro se litigants.

The Supplemental Rule 9 provision setting presumptive page limits for briefs was noted. It was added simply to show that it may be easier to address such details in supplemental rules than in a single civil rule. But proposals for page limits have drawn powerful resistance from claimants' representatives. The Civil Rules generally do not go to this level of detail. There are different practices around the country. The draft sets a 30-page limit; judges in some districts that impose shorter limits are

likely to resist what they will see as a rule inflicting uselessly long briefs on them. Another participant said that it would be better to leave page limits to local practices. At the end of the call it was agreed that draft Supplemental Rule 9 would be deleted, along with the accompanying part of the committee note.

A question was raised about the statement in the third paragraph of the draft committee notes that the regular Civil Rules apply if the plaintiff adds a claim for relief "beyond review on the administrative record." What of an argument that SSA has filed an incomplete record? The subcommittee agreed that this is not a problem — the plaintiff still is seeking review on the record, and is arguing only that review must be on the actual record, not just part of it. Earlier discussions have shown that claimants believe that SSA at times fails to file the complete administrative record, but earlier drafts that required SSA to file the "complete" record were abandoned as unnecessary. The rule can rely on the statutory command to "file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based."

A new question, never before encountered, was raised. Section 405(g) is incorporated by reference in other statutes. Some, identified by SSA, are noted in the draft committee note. But there are others. A decision by the Medicare Appeals Council, for example, is reviewed through 42 U.S.C. § 1395ff(b)(1)(A), which incorporates § 405(g) and directs that any reference to the Commissioner of Social Security in § 405(g) is a reference to the Secretary or Department of Health and Human Services. How does this fit with the scope rule that applies the social security review rules to "an action * * * for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim"? A supplier of Medicare services, for example, may challenge a denial of reimbursement. Does the rule language incorporate the broader statutory definition? Should it? Section 405(g) refers to an action for review to be brought by "an individual." Providers of Medicare services may be individuals, but are perhaps more likely to be organized in some form of entity. Should the form make any difference? Can discussion in the committee note usefully address these questions? Subcommittee members have little experience with these questions. This problem was left open for further research.

Discussion turned to the question whether sufficient justification has been shown to proceed further with substance-specific rules that are limited to § 405(g) actions. Is transsubstantivity an obstacle that should defeat the project?

Professor Marcus offered a number of observations, noting that they do not lead to any particular conclusion. A uniform procedure for all federal courts has been the goal since the Enabling Act was enacted in 1934, and transsubstantivity has been seen as an important part of uniformity. "Special deals for special folks" are inherently risky. The Advisory Committee once deliberated the

possibility of adopting simplified rules for a vaguely described set of small-stakes actions, but abandoned the project. Patent troll activity recently led Congress to consider the need for special rules of procedure, an undertaking that never advanced to a point requiring rules committee drafting. Quite recent legislative efforts look toward establishing simple nonjudicial procedures for small-stakes copyright cases. And for some 35 years now, the Civil Rules have formally recognized the practices of "managerial judging," which ensure that actions in different substantive areas, and even actions within a single substantive area, are governed by substantially different procedures from one case to the next. Recently promoted discovery protocols, such as those for individual employment actions, are a clear illustration.

Continuing, Professor Marcus noted that several Civil Rules "deviate a bit" from transsubstantivity. Rule 26(a)(1)(B) excludes many categories of actions from mandatory initial disclosure. Rule 16(b)(1) authorizes local rules that exempt categories of cases from the scheduling order requirement. Rule 9(b) has from the beginning established special pleading standards for allegations of fraud and mistake, superseding Rule 8(a)(2)'s general pleading standards; it is said to carry forward common-law pleading standards, but still is a departure from transsubstantivity. Rule 71.1 for condemnation actions emerged only in 1951, after a long period of uneasiness about creating special rules for condemnation actions. Rule 71.1 is a far greater intrusion on general Civil Rules practices than the draft social security review rules. Supplemental Rule G for civil forfeiture was adopted after much vigorous debate about particular provisions, pitting the National Association of Criminal Defense Lawyers against the Department of Justice. Rule G also is far more intrusive than the draft social security rules.

Professor Marcus concluded by suggesting that § 405(g) cases "do seem rather distinctive." The fact that there are many local rules that address them shows that they are already excluded in some ways from the general Civil Rules. The draft rules can be said to "consolidate, focus, maybe improve." Concerns about the slippery slope identify a risk, but perhaps it is not a great risk.

A different view of transsubstantivity was ventured as a tentative possibility. National uniformity is indeed the central goal of Enabling Act rules. Procedure should be the same in all federal courts. But that does not of itself dictate the nature of uniformity. The common premise expressed by most invocations of transsubstantivity is that a single procedure should apply to all actions in federal court, no matter what the subject matter and no matter what the realistic procedural needs and opportunities are. Actions to collect defaulted student loans, antitrust actions, securities actions, RICO actions, individual employment actions, institutional reform litigation, and all the rest are governed by a single set of rules for pleading, discovery, pretrial scheduling and conferences, summary judgment, and the rest. But there is a price to be paid for uniformity at this level. The procedures that

work well in some categories of litigation, or at least in many actions across various categories, may impose waste and even prohibitive costs in others. Perhaps there is room to consider the values of a nationally uniform procedure for a category of actions, such as social security review actions. If there is enough potential procedural advantage, perhaps the terms of § 2072 do not stand in the way.

Discussion then went in a related direction. If there is little to be gained by specific social security review rules, there is little point in testing the concepts of transsubstantivity. And, on this view, there is not much to be gained. The committee note does not really identify the purpose of the rules. All it says is that they reflect the appellate character of these proceedings. The same justification would apply to all administrative review proceedings in the district courts. We have not articulated any point that distinguishes social security review actions from other administrative review actions. Although SSA urges the sheer volume of these cases, emphasizes their appellate character, and laments the costs of disuniformity, these concerns are not persuasive. There is no clear identification of the costs, apart from claiming the benefits of uniformity. The Department of Justice represents the government, and prefers to leave these procedures to local practices that judges want. And, as urged on the last call, the magistrate judges seemed underwhelmed by the proposals.

Beyond that, the claimants' bar is opposed. We should respect that. Judges are, at best, neutral. And violating the principle of transsubstantivity is a cost that should not be incurred without sufficient justification.

A set of rules that addresses all cases that are in the nature of appellate review would be transsubstantive. But that would be a much larger undertaking.

This comment was summarized by an observation that looking to those who regularly engage in social security review actions, SSA strongly supports the proposal. Claimants are mildly opposed. And the Department of Justice also is opposed, although there too the opposition may be mild — it rests largely on concern about inviting other proposals for substance-specific rules. So there is not overwhelming support for creating specific rules.

The familiar examples of rules that seem to depart from transsubstantivity include as central examples Rule 71.1 for condemnation actions, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, and most notably Supplemental Rule G, all involve in rem proceedings, at least in part. Nor is the appeal-like character of social security review actions so distinctive from other district court actions for administrative review as to provide clear support.

A counterpoint was offered on the Department of Justice position. Their concern is with breaching the transsubstantivity

barrier. They offer some support for uniformity by sponsoring a model local rule that, to the extent it is adopted, will increase uniformity across district lines.

And a different take was offered on the reactions of the magistrate judges who met with the subcommittee in October. It was better than "underwhelmed." Their overall view was that the Civil Rules do not work for these cases, and they have responded by taking up different practices. Many of these practices are consistent with the proposed rules, and those who have found other work-arounds think the proposed rules will work as well. So judges around the country are trying to craft solutions. New rules would provide benefits for districts that have tried to rely on summary judgment but find it is not a suitable vehicle. Good new procedures will reduce costs both for SSA and for claimants.

Another subcommittee member said that her opposition to the proposed rules is not "strenuous," but she remains concerned about transsubstantivity. Once we start down this road, many people will come knocking on our door for other supplemental rules.

"If we do go where we may not belong, supplemental rules are better. Clarity is less intrusive."

The subcommittee agreed that efforts should continue to get additional responses from magistrate judges and, if possible, to arrange to gather reactions from district judges who handle high volumes of social security review actions. It will be better to get their views no later than early February so as to leave time for subcommittee deliberations looking toward a recommendation for the April 2020 Advisory Committee meeting.

The Adivsory Committee's report to the Standing Committee meeting in January will describe the uncertainties about transsubstantivity that have occupied the subcommittee. Their perspectives and advice will be helpful in determining what should be recommended.

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Social Security Disability Review Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
February 6, 2020

The Social Security Disability Review Subcommittee met by conference call on February 6, 2020. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Advisory Committee Chair; Judge Jennifer C. Boal; Hon. Joshua E. Gardner; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq. Rebecca A. Womeldorf, Esq., represented the Rules Committee Staff. Professor Edward H. Cooper participated as Reporter.

Judge Lioi noted that the call had been scheduled for only half an hour. Discussion should focus on the complications recently discovered in defining the scope of any new social security review rules, the possibility that some other categories of benefit review actions might be brought into any new rules that may be proposed, and the discussion at the January Standing Committee meeting. For convenience discussion might focus on the supplemental rules format.

The complications that surround the scope provision in Supplemental Rule 1 arise from recently discovered statutes that consider the head of a different agency to be the Commissioner of Social Security for the purpose of bringing review of agency action into § 405(g). These statutes present two questions: Should the supplemental rules be extended to include those review actions? Whether yes or no, the answer should be expressed as clearly as can be in rule text and committee note.

Doubts were expressed about expanding the scope of the rules. It seems telling that no one has said anything about the statutes that incorporate § 405(g) by the fiction of recognizing other officials as pretend Commissioners of Social Security. Silence suggests that such actions are relatively rare, at least in comparison to the many social security review actions that are brought every year. Silence might even imply that others have thought about such § 405(g) review provisions and concluded that they are not sufficiently similar to social security review actions to be considered for the new rules. However that may be, silence has deprived the subcommittee of any information that would inform consideration of these questions. At present, we know nothing about the features that might make these other actions more or less similar to social security review actions for purposes of framing appropriate judicial review procedures. Caution seems warranted.

The separate question whether to address these other § 405(g) actions in rule text presents similar challenges. The Social Security Administration responded to a direct question by expressing preference for the rule text adopted in the most recent supplemental rules drafts. They suggested alternative rule text that would refer directly to Titles II and XVI of the Social Security Act, but noted that this text would exclude a relatively

small number of other decisions "relating to benefits and beneficiaries but that might be considered something other than a 'claim . . . for . . . benefits.'" It would be better to adhere to the present more general language to ensure that these decisions are included in the rules.

Discussion of these questions began with the observation that the issues are quite complicated. If rules are to be adopted, "we want to include what we want, nothing else." The answer may be hard to find.

Another comment was that the current draft looks good. Dealing with the scope problem in the committee note should work better than attempting to complicate the rule text. The scope question can be raised when any proposed rules are published for comment. Two other participants agreed with these observations.

Discussion turned to the question whether an attempt should be made to expand the proposed rules to include other categories of individual-benefit review actions that are so similar to social security review actions as to justify the same procedures. This approach would not attempt to sweep in all actions for district court review on an administrative record. It might be that expanding the rules would reduce concerns about transsubstantivity, reducing concerns that the rules respond to a particular interest. On the other hand, it is possible that expanding the rules would invite still more pressure to include still more categories of review in these rules or to adopt substance-specific rules for quite different categories of actions.

Discussion suggested that it may be difficult to know how to go about gathering sufficient information to make up for the recent emergence of this question. The question was brought to mind by the Appellate Rules Committee's consideration of an amended Appellate Rule 25(a)(5) that would incorporate Civil Rule 5.2(c) protections for review of Railroad Retirement Board decisions. Perhaps there are like categories of benefit decisions that are reviewed in district courts on a closed administrative record. But how to gather information about such possibilities?

One approach could be to ask SSA what it knows about similar actions. Perhaps NOSSCR and AAJ could be asked, although there is reason for pessimism in the fact that their representatives have said nothing about the possibility of broadening any new rules to include other categories of benefit-review actions. Or the Rules Law Clerk might be asked to undertake research, at least if the task can be defined with sufficient clarity to make research feasible.

Another approach would be to ask for DOJ experience. The Department has expressed concerns about departing from transsubstantivity by adopting social security review rules, and might view an expansion to include other categories of actions as desirable or as undesirable. The DOJ response was that the broader

the rules, the closer the approach to irresistible pressures to slide down the slippery slope into ever more substance-specific rules.

The question was renewed. Most of the administrative review actions that come to D.D.C. raise complex issues that would not be well served by the proposed supplemental rules. Review ordinarily is confined to the administrative record, but that does not make these actions so similar to social security benefit actions as to fit within the same procedures. But there may be narrower categories that would fit well. This question was first raised by a comment about a § 405(g) action by a Medicare provider for reimbursement. Actions by individual claimants for Medicare benefits would be even more similar to social security benefit cases.

This discussion concluded with a renewed suggestion that the approach taken in the draft committee note seems wise. The Note states that the proposed rules do not apply even to § 405(g) actions that do not involve decisions actually made by the Commissioner of Social Security, but adds that a court might adopt similar procedures by analogy when that seems useful. The note, however, might be expanded to point out that the draft Rule 3 provision for service on the Commissioner should not be adapted to actions against any other official.

The discussion in the Standing Committee's January meeting was briefly summarized. The discussion was very helpful, and more positive than might have been anticipated. Several participants expressed appreciation for the simplicity and clarity of the draft rules. Some addressed transsubstantivity concerns by recognizing that although transsubstantivity is an important concern, it does not raise insurmountable barriers. Substance-specific provisions can be found in several Civil Rules, and some Appellate Rules as well. There is a strong case for adopting specific social security review rules. Professor Coquillette, the guru of transsubstantivity and long-time Reporter and now Consultant to the Standing Committee, seemed to accept the value of publishing proposed rules for comment. He continued to prefer the supplemental rules format.

The call concluded by agreement that the subcommittee should work to make a firm recommendation to the Advisory Committee at the April meeting, either to recommend publication of proposed rules or to recommend that the task be abandoned. Attention should focus on the supplemental rules format that has found considerable support. The subcommittee's report should include discussion of transsubstantivity, a subject that was discussed but not much resolved at the Advisory Committee meeting last October.

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Social Security Disability Review Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
February 25, 2020

The Social Security Disability Review Subcommittee met by conference call on February 25, 2020. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Advisory Committee Chair; Judge Jennifer C. Boal; Hon. Joshua E. Gardner; and Ariana J. Tadler, Esq. Rebecca A.Womeldorf, Esq., and Julie M. Wilson, Esq., represented the Rules Committee Staff. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi opened the meeting by noting that the first purpose was to decide on what should be reported to the Advisory Committee for its April 1 meeting. The central question is whether the Advisory Committee should recommend publication of the proposed supplemental rules for social security review actions brought under 42 U.S.C. § 405(g). The most likely alternative would be a determination that the subcommittee's work should be concluded, abandoning the project. Work on drafting the supplemental rules has proceeded so far that little remains to be done in polishing the current draft, but if time permits suggestions for further refinements will be welcome.

Initial discussion presented impressions about the discussion at the Standing Committee meeting in January. Several members of the Standing Committee thought it would be useful to publish a draft for comments. This position did not imply any judgment whether any rules should be adopted for § 405(g) actions, nor even whether an Advisory Committee recommendation for publication would be approved. The Standing Committee recognized that it is important to be wary of adopting rules that depart from the transsubstantivity preference for avoiding rules that focus on a specific substantive subject. But publication would provide valuable comments from many perspectives on the importance of establishing uniform national rules for this important subject to displace a wide variety of distinctive local practices. This potential support for publication in the Standing Committee, however, should not influence the subcommittee's work. The subcommittee has worked long and hard, receiving information from many sources outside the subcommittee and the Advisory Committee and continually revising rules drafts through many stages. It should frame its own independent advice to the Advisory Committee.

A subcommittee member urged caution. We cannot be "confident that we're there yet, or ever will be." Publication runs the risk of encouraging people to think that rules actually will be adopted, an expectation that could still be defeated after publication.

This doubt was joined by another subcommittee member. The Department of Justice recognizes that review of Medicare benefit claims also falls within § 405(g). Like social security benefit claims, Medicare benefit claims involve review on an administrative

record. There is a risk that adopting a rule limited to true social security cases would be read to imply that different procedures are appropriate for Medicare benefit review cases; the suggestion in the committee note that the proposed rules could be applied by analogy in other proceedings that have characteristics similar to social security review cases is not much comfort. Beyond that, it has been difficult to find other substantive areas that are so similar to social security review actions as to warrant similar procedures.

A different view was offered. District courts react to social security review actions by adopting local rules or individual judges' orders. They recognize that the Federal Rules of Civil Procedure do not fit these actions, and try to work around them. It will be good to publish proposed rules, recognizing that concerns about transsubstantivity may yet overcome the case for adoption.

The discussion of Medicare cases led to the question whether there are local district rules that address them, whether or not similar to local social security review rules. No one identified any local rules, but a judge observed that she treats medicare review cases in the same way as social security benefit cases. We do not have clear information on the volume of Medicare review actions, but it seems to be small. Information will be sought about the number of these benefit cases, and if possible about the number and treatment of actions by suppliers of Medicare services.

The view favoring publication was taken up by another subcommittee member. Her court has a local rule for these cases that is similar to the current subcommittee draft, although perhaps more detailed. "We cannot ignore the fact that the Civil Rules do not work for these cases." And practice is not uniform across the districts. Uniformity is important when it can be achieved. Publication will help us to find out more.

A related view was that the explanation for proposing rules unique to § 405(g) cases should be more than the proposition that the general Civil Rules do not fit perfectly. The same proposition holds true in countless other areas. Among many examples are patent cases, other administrative review cases, and the Medicare cases already discussed. We need reasons to distinguish social security cases. Among the reasons might be the great variety in what courts do now, under local rules and otherwise; the sheer volume of these cases; and the homogeneity of these cases — there are strong reasons to believe that the vast majority of them can be managed by a simple and uniform procedure. An added reason may be that uniform national rules have been urged by the Administrative Conference of the United States with the strong support of the Social Security Administration. That reason should be approached cautiously. Even though the proponents urge that a good and uniform national practice will benefit claimants, SSA, and the courts, the Rules Committees should remain cautious about proposals that address a specific subject matter and may involve special interests. For this proposal, "the executive branch is itself divided" —— the

Department of Justice is reluctant about the proposal, mostly for fear of violating the transsubstantivity tradition. This tension in turn reflects variations in the division of work loads in § 405(g) cases in different districts. Formally, the Department of Justice represents SSA. It may act primarily through Assistant United States Attorneys, or may designate SSA attorneys as Special Assistant United States Attorneys to carry virtually all responsibilities, or arrange different divisions of responsibilities. Something depends on how busy the local United States Attorney's office is. And it may be relevant that SSA attorneys often practice in different districts within a single SSA region, while their DOJ associates practice only within, and are familiar with the local practices of, a single district.

This discussion carried on with the observation that the allocation of responsibilities between the Department of Justice and other agencies also varies from area to area. Primary responsibility may lie with the agency, or with the Department, depending on many factors.

Discussion turned to the question whether the subcommittee should attempt to reach a unanimous recommendation, or should work toward a majority report subject to dissents, or should instead report the arguments for and against publication to the Advisory Committee. The perspective will be just that —— whether it is appropriate to publish a proposal, not whether any subcommittee member would, as presently advised, vote for a recommendation to adopt any new rules.

The concerns that weigh against publication were reviewed. One is the much-discussed reluctance to adopt rules specific to a particular subject area. There also is reason to resist the impulse to act simply because a federal agency wants rules for its own cases, particularly when the Department of Justice may not be inclined to favor the proposal. The Department deals with local rules in many different areas, and manages comfortably. The volume of social security cases is not of itself sufficient justification for special rules.

A response pointed out that Supplemental Rule G was adopted to govern civil forfeiture actions in response to strong urging by the Department of Justice. And Rule 71.1 was adopted for condemnation actions, well after the Civil Rules were first adopted, at the urging of several Attorneys General. "There are both sides of this balance."

A rejoinder was that the question should be framed to ask whether there is sufficient reason to depart from the principle of transsubstantivity. There is not for social security review actions.

A related question asked why the Department of Justice has proposed a model local rule for social security review actions if it does not believe that national uniformity is important. The

reply was that an important motive was the desire to expand the practice, pioneered an a small number of districts, that allows for service of the summons and complaint by a Notice of Electronic Filing. The remaining provisions, which come close to the provisions of successive subcommittee drafts, provide a chance to learn from local experience if they are adopted. Promoting a model local rule, moreover, leaves the way open for individual districts to decide that local conditions and traditions work better for them than a general model.

This discussion continued with a reminder that the Rules Committees often conclude that it is not appropriate to adopt a uniform national rule, but also recognize that uniformity and good practices can be promoted by other means. Model local rules may be drafted. Or judicial education programs may be developed. Or provisions may be added to such guides as the *Manual for Complex Litigation*.

These means of pursuing uniformity were questioned. If some districts believe that the Civil Rules do not work for social security review actions, but also believe that they are compelled to follow the Civil Rules, a model local rule may be rejected as inconsistent with the national rules. A national rule will liberate them. Publication of proposed rules will generate information on this point.

Another familiar doubt was repeated. “Open the gates and we will be inundated” by requests for special-interest rules in other areas.

This doubt was supplemented by expressing doubt whether the proposed rules will have the intended effects. Still, transsubstantivity and the “slippery slope” remain the greatest concerns.

The discussion concluded by agreeing that the subcommittee Report should present the Advisory Committee with a full statement of the competing perspectives. Each subcommittee member holds a different and complex view of the balance between the arguments for and against publishing proposed rules.

As a final note, it was agreed that the proposal should be presented only in the supplemental rules form. The Advisory Committee will be reminded that it remains possible to draft essentially the same provisions as additions that fit within the Civil Rules themselves, but if anything is to be published it will be better to provide a single and clear focus. It also was agreed that the subcommittee must be comfortable with recommending specific rule text for publication. Subcommittee members were invited to circulate any further drafting refinements for discussion through e-mail exchanges, recognizing the great difficulty in attempting to schedule another conference call during the few days that remain before agenda materials for the April meeting are due in the Administrative Office. In this vein, one

member expressed approval of the committee note language that suggests that the social security rules might be adopted by analogy for other cases where they fit, but cautions that the provision for providing notice of the action by a court Notice of Electronic Filing cannot be adopted by simple analogy. And the Style Consultants will be asked to review the current draft as soon as possible.

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MULTIDISTRICT LITIGATION SUBCOMMITTEE

Since the Advisory Committee's last meeting, the MDL Subcommittee has continued to explore and gather information about the issues it has been considering. It has held conference calls on November 25, 2019, January 10, 2020, and March 10, 2020. Notes on the first two calls are included in this agenda book. Notes on the March 10 call will be circulated separately.

In addition to subcommittee conference calls, this activity has included attendance by representatives of the subcommittee at various events focused on these issues, including:

> Symposium, Class Actions and MDLs —— The Next 50 Years, Lewis & Clark Law School, Portland, OR, November 1-2 2019.
>
> Texas Law Review Symposium, Remedies in Complex Litigation, Austin, TX, January 31-February 1, 2020
>
> Southwestern Law School Symposium, New Frontiers in Torts: The Challenges of Science, Technology, and Innovation, Los Angeles, CA, February 7, 2020 (including panels on New Means of Financing Tort Lawsuits and Law Firms, and New Developments in Tort Litigation)

As it has throughout the subcommittee's work, the Judicial Panel on Multidistrict Litigation has been very supportive and helpful.

This work is ongoing. At the Advisory Committee's October 2019 meeting, the subcommittee reported that it had concluded that issues regarding third-party litigation funding (TPLF) did not seem particularly pronounced in relation to MDL proceedings. To the contrary, this sort of activity seems at least equally important in a broad range of types of litigation. Accordingly, the subcommittee recommended suspending further work on the possibility of developing an amendment idea directed toward TPLF in MDL proceedings. The Advisory Committee approved that recommendation.

At the same time, the subcommittee's work has shown that TPLF is a phenomenon of growing importance, and also that it is evolving. Therefore, the subcommittee also recommended that TPLF remain on the Advisory Committee's agenda, and that it monitor developments in TPLF. The question whether a rule change is appropriate to deal with these developments therefore remains under consideration. That monitoring activity has begun and is continuing. The Rules Law Clerk is doing research on developments, and a collection of relevant materials is being gathered.

This report updates the Advisory Committee on the three areas that remain on the MDL Subcommittee's "front burner."

(1) Early Vetting, PFS and DFS Requirements, and an Initial "Census" of Claims: This topic responds to what might be called the "Field of Dreams" problem —— sometimes JPML centralization of

litigation is followed by the filing of a large number of new claims. “If you build it, they will come.” It appears to the subcommittee that there has been a significant shift in the positions of attorneys about how best to address these issues as subcommittee discussions have also evolved. That evolution continues.

One early response was included in H.R. 985, the Fairness in Class Action Litigation Act, passed by the House of Representatives in March 2017. That proposed legislation would have required all personal injury claimants in MDL proceedings to submit evidentiary support for their claims of exposure and injury within 45 days and require the court to rule on the sufficiency of those submissions within 90 days after that. The Senate did not act on this proposed legislation, and it lapsed with the arrival of a new Congress in January 2019.

This legislation appeared to build on the plaintiff fact sheet (PFS) practice that had emerged in many MDL personal-injury proceedings, calling for plaintiffs to provide certain specifics and materials without formal discovery. FJC research investigated the use of PFS orders, and found that they were already used very frequently in larger MDL proceedings, and used in virtually all of the “mega” MDL proceedings with more than 1,000 cases. In most of those “mega” proceedings, defendant fact sheets (DFS) were also required, often calling for defendants to provide information to the plaintiffs without the need for formal discovery.

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

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

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

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

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

In re Juul (Judge Orrick, N.D. CA): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding *In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation* (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by representatives of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve 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 here involve alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of complexity to the census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

In re Zantak (Judge Rosenberg, S.D. FL): This litigation involves a product designed for treatment of heartburn. The

MDL includes class claims and personal injury claims, and some may go back decades. The litigation is in the very early stages of organization, and presided over by a member of the MDL Subcommittee. The court has indicated that a census will be done before appointment of leadership counsel. A hearing is scheduled on March 20, so it is possible that, by the time of the April 1 Advisory Committee meeting, Judge Rosenberg will have additional developments to report.

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

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

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

(2) Interlocutory Review of Orders in MDL Proceedings: Although the positions of the parties have moved closer together in regard to the census idea described above, no similar confluence has occurred with regard to facilitating interlocutory review of rulings by MDL transferee judges.

The different contours of a possible appeal rule described here fit within the rulemaking authority established by 28 U.S.C. § 1292(e). Section 1292(e) authorizes the Supreme Court "to 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 court of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)." This authority was exercised in promulgating Rule 23(f), which establishes discretion to permit an appeal from an order granting or denying class-action certification. If comparable needs for increased opportunities for interlocutory appeals are found for MDL proceedings, the authority to prescribe a rule would be § 1292(e).

A starting point in the subcommittee's consideration of this issue was the provision in H.R. 985 requiring courts of appeals to accept appeals of any order in an MDL proceeding if review "may materially advance the ultimate termination of one or more of the civil actions in the proceedings." Sometimes proponents of such a provision have urged that it be coupled with some sort of directive for "expedited" appellate treatment.

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

Opponents of rule-based expansion of interlocutory review in MDL proceedings emphasized that there are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). 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 proponents and opponents of rule amendments have submitted detailed reports on the actual experience under § 1292(b) in MDL proceedings. The Rules Law Clerk has provided an extensive report to the subcommittee on transferee judges' decisions whether to certify issues for appeal.

One concern the subcommittee had about whether § 1292(b) might not be suited to MDL proceedings was that it authorizes a district court to certify an order for immediate appeal only on finding that (i) there is a "controlling question of law" as to which (ii) "there is substantial ground for difference of opinion" and (iii) immediate review would "materially advance the ultimate termination of the litigation." These statutory criteria might not be suited to the sorts of situations raised by the proponents of increased review. Some issues (*e.g.*, *Daubert* decisions) might not present a "controlling question of law." Immediate review might not, in sprawling MDL proceedings, "materially advance the ultimate termination of the litigation."

The Rules Law Clerk research did not disclose a significant number of instances in which the issues cited by proponents of

rulemaking were advanced under § 1292(b) in MDL proceedings. Instead, a wide variety of orders have prompted § 1292(b) requests in MDL proceedings. Moreover, judges asked to certify orders in those proceedings do not suggest that the statutory standards constrain their ability to grant certification if appropriate, although they scrupulously examine each factor and frequently comment on their circuit's receptivity to § 1292(b) appeals. No case shows that a district judge has denied certification because of inflexibility of the statutory criteria. And given the wide variety of issues actually presented as grounds for § 1292(b) review in MDL proceedings, there may be at least some basis for worrying that under a new rule efforts to obtain review might occur more frequently and in regard to many kinds of orders beyond those cited by the proponents of expanded opportunities for interlocutory review.

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

- There are not many § 1292(b) certifications in MDL proceedings.
- The reversal rate when review is granted is relatively low (about the same as in civil cases generally).
- 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.

On October 1, 2019, Emory Law School hosted an all-day event for the subcommittee in Washington, D.C., that provided a very thorough discussion and permitted subcommittee members to get a clear picture of the competing views on this topic. It showed that the proponents and opponents of change continue to disagree fundamentally, but also that the discussion has evolved.

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

The proponents of expanding interlocutory review assert that in MDL mass tort litigation defendants have found it difficult or impossible to obtain review of core legal issues such as preemption until after a bellwether trial, and perhaps not even then if defendants win at trial. In particular, in their view § 1292(b) does not work well because the statutory standard is too confining and because it provides something like a "veto" to the district judge. The argument is that this state of affairs denies defendants access to authoritative resolution of legal issues.

The response from the plaintiff side is that the final judgment rule is a key aspect of our judicial system, and that § 1292(b) and Rule 54(b) provide safety valves for instances in which interlocutory review is appropriate. From this perspective, the showing has not been made that these existing routes to interlocutory review fail in MDL proceedings, or that MDL proceedings are so different from other litigation that a special appealability rule is justified.

Although the two sides remain divided on these issues, it does seem that the views have evolved. On at least some points, the participants in the Oct. 1 event appeared largely to agree: (1) the goal is not to provide an appeal of right, but instead to enable the court of appeals (as under Rule 23(f)) to decide in its discretion whether to accept the appeal; (2) the goal is not to preclude the district judge from expressing views on whether an immediate appeal is justified, perhaps in a manner like the certificate of appealability in habeas cases; (3) the focus is not on a limited set of legal issues (*e.g.*, preemption, *Daubert* rulings) so long as the issues are important to resolution of a significant number of cases; and (4) it is not clear that any rule should be limited only to some MDLs (*e.g.*, "mass tort" MDLs, or "mega" mass tort MDLs), but there is no effort to expand it beyond MDL proceedings. Notwithstanding these areas of agreement, there remains a fundamental disagreement on the need for a rule expanding access to interlocutory appeal.

The subcommittee continues to work on these issues. As reflected in the notes of the subcommittee's January 10, 2020, conference call, the current focus is on a number of issues:

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

proceeding to the judicial officers involved.

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

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

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

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

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

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

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

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

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

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

As part of its effort to obtain guidance about these interlocutory appeal issues, the subcommittee expects to learn more from experienced plaintiffs' attorneys, defense attorneys, and judges during a conference on June 19, 2020. Unlike its prior conferences, this one will focus on MDLs that are not "mass tort" actions. The subcommittee's broader outreach is designed partly to aid it in evaluating the "scope" issue discussed above.

(3) Settlement Review, Appointment of Leadership Counsel, Attorney's Fees, and Common Benefit Funds: This may be the toughest question the MDL Subcommittee faces, and it introduces the idea of trying to develop for at least some MDL proceedings some judicial supervision regarding settlement like that provided in Rule 23 for class actions.

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

the original 1966 revision of Rule 23.

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

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

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

Notwithstanding these structural differences between class actions and MDL proceedings, one could also say that the actual evolution of MDL proceedings over recent decades – particularly "mass tort" MDL proceedings – has somewhat paralleled the emergence of settlement as the common outcome of class actions. Almost invariably in MDL proceedings involving a substantial number of individual actions, the transferee court appoints "lead counsel" or "liaison counsel" and directs that other lawyers be supervised by these court-appointed lawyers. The *Manual for Complex Litigation* (4th ed. 2004) contains extensive directives about this activity:

> § 10.22. Coordination in Multiparty Litigation —— Lead/Liaison Counsel and Committees
>
> § 10.221. Organizational Structures

§ 10.222. Powers and Responsibilities
§ 10.223. Compensation

So sometimes – again perhaps particularly in "mass tort" MDLs —– the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs —– individually represented plaintiffs' attorneys), they may have a limited role in managing the course of the MDL litigation. A court order may forbid them 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 litigation.

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 those 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 ordinarily 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, 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 litigation. 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 this authority. 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.

One more recent development deserves mention, however. On Sept. 11, 2019, Judge Polster granted class certification under Rule 23(b)(3) of a "negotiation class" of local governmental entities in the opioids MDL pending before him in the Northern District of Ohio. Paragraph 13 of the certification order explains:

> The order does not certify the Negotiation Class for any purpose other than to negotiate for the class members with the thirteen sets of national Defendants identified above. Accordingly, this Order is without prejudice to the ability of any Class member to proceed with the prosecution, trial, and/or settlement in this or any

> court, of an individual claim, or to the ability of any Defendant to assert any defense thereto. This order does not stay or impair any action or proceeding in any court, and Class members may retain their Class membership while proceeding with their own actions, including discovery, pretrial proceedings, and trials. In the event a Class Member receives a settlement or trial verdict, it may proceed with its settlement/verdict in the usual course without hindrance by virtue of the existence of the Negotiation Class.

In re National Prescription Opiate Litigation, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019) (memorandum opinion, not accompanying order). Paragraph 8 of the order provides:

> Class Counsel and only Class Counsel are authorized to (a) represent the Class in settlement negotiations with Defendants, (b) sign any filings with this or any other Court made on behalf of the Class, (c) assist the court with functions relevant to the class actions, such as but not limited to maintaining the Class website and executing a satisfactory notice program, and (d) represent the Class in Court.

Id.

It is not clear what will come of this initiative. But if it provides a vehicle for judicial involvement in settlement of an MDL proceeding under the auspices of Rule 23, it may illustrate the sort of authority and guidance discussed above without the need for a rule amendment. On Nov. 8, 2019, the Sixth Circuit granted a petition under Rule 23(f) to review Judge Polster's order. *See In re National Opiate Litigation*, Sixth Cir. Nos. 19-305 and 19-306.

For the present, the subcommittee has begun discussing a variety of issues, as reflected in the notes of its March 10 conference call. 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 or census topics 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* 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 ed. 2004) contains a list of considerations for a judge appointing leadership counsel. Rule 23(g) has a set of criteria for appointment of class counsel. Though similar, these provisions are not identical. Any rule could opt for one or another of those models, or offer a third template. When an MDL includes putative class actions, it would seem that Rule 23(g) is a reasonable starting place, however.

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(b)(4) that counsel act in the best interests of the class as a whole, not only of 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 conduct) are under discussion. Given that most (or all) claimants involved in an MDL actually have their own lawyers (not ordinarily true of most unnamed class members), it may be that rule provisions ought not seek to regulate these matters.

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

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

Judicial settlement review: As some courts put it, the court's role under Rule 23(e) is a "fiduciary" one, designed to protect unnamed class members against being bound by a bad deal. But in an MDL each claimant ordinarily 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 litigation 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 the difference from actual class action settlements is fairly modest. Indeed, in some cases 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. Then Rules 23(e), (g) and (h) would apply. But it is certainly possible that in some MDLs there are claims included in class actions and other claims. 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 is a concern that merits ongoing attention.

The foregoing sketches a set of issues the subcommittee has begun discussing, and it invites input from the full Advisory Committee on these topics. At the same time, it is critical to appreciate that the subcommittee's discussions are at present very tentative. No decision has been made to develop a potential rule amendment addressing appointment of leadership, financial arrangements, or judicial settlement review.

* * *

On March 10, 2020, the subcommittee had a conference call to begin discussing the foregoing issues in some detail. (Notes of that conference call should be provided separately later.) For the present, it seems useful to identify some points raised during that call on which the subcommittee seeks reactions from the full Advisory Committee.

The call focused on whether to work toward some formal statement of many practices that have been adopted —— and, for some, become widespread —— in managing MDL proceedings. The approaches that might be pursued include expanded provisions in the Manual for Complex Litigation, continued development in the annual conference for MDL judges, further development of the website the JPML maintains to disseminate practices, or new provisions in the Civil Rules. If none of those possibilities is taken up, knowledge of successful practices will continue to be communicated as experienced MDL litigators transport them from one proceeding to another, and as MDL transferee judges communicate among themselves.

Apart from the inherent complexity and continuing development of these subjects, a particular caution was noted repeatedly. MDL judges have begun to make significant progress in expanding and diversifying the ranks of lawyers who take on leadership positions. Anything that is done to formalize developing best practices should not impede progress on this important matter.

The practices considered range from the initial stages of assuming control of an MDL proceeding through to the court's role with respect to settlement. Although they are well known, at least to judges and lawyers who regularly engage with MDL proceedings, one reason for seeking some formal statement would be to make them still better known, and perhaps to sort out the more successful

variations. Beyond that, adoption in the Civil Rules could resolve doubts about the courts' authority to adopt practices that, in the name of managing the proceedings, dig into substantive rights and issues of professional responsibility.

One major topic of discussion asked whether the judicial role in settlement is the most important, and whether it can be approached without taking on the management questions that arise earlier in the proceeding. Some judges undertake to review and offer advice on the quality of proposed settlement terms, even though they lack the formal approval authority established under Rule 23 for a class action judgment that binds class members to a settlement. A few even become involved in settlement negotiations, directly or indirectly. One view is that settlement topics are more important than other topics, and might become the sole subject to be approached in further work. A caution is sounded, however, by recognizing questions whether a court rule can properly address judicial involvement in settlement without some further anchor in formal rules. A judge must approve a proposed class-action settlement because the result binds class members. That practice carries forward when an MDL proceeding is settled by certifying a class and entering judgment on an approved settlement. But there is no thought that, where the MDL proceeding is not one or more class actions, an MDL judge should be given authority to bind individual parties to a proposed settlement simply because they have been aggregated, often unwillingly, in an MDL proceeding that often takes place in a court they did not choose and that lacks power to try the case.

One anchor for involving the MDL judge in settlement proposals could be the authority to designate a leadership structure. This authority is widely recognized and exercised. But the level at which transferee judges prescribe the specific duties of leadership (and sometimes proscribe the authority of non-leadership lawyers to act) varies greatly. A judge who assumes responsibility for establishing or confirming a leadership structure might well have continuing authority to supervise the role and performance of the leadership team in negotiating settlement terms to be offered to parties who are not clients of any leadership lawyer participating in the negotiations. There might be some further advantage —— and certainly would be greater complexity —— in considering the nature of the other responsibilities members of the leadership have to parties who are not their clients.

Appointing a leadership structure can lead naturally to regulating additional matters. One is the opportunity for participation by lawyers who represent individual clients but do not have a role in the leadership. A closely related topic that is commonly addressed is the creation of a common benefit fund fed by forced contributions from all lawyers in the MDL, and possibly even lawyers not in the MDL but active in parallel state court proceedings. Contributions commonly are calculated as a fraction of fees earned as individual actions are resolved. The next step may be to further diminish fees earned from individual clients by

imposing caps that reflect a belief that the services rendered to individual clients by lawyers who do not participate in common benefit activities —— and possibly by some who do, in small measure —— are unreasonable.

This bare description underscores the questions whether the mere creation of an MDL proceeding establishes authority to regulate matters of attorney-client contracts, ordinarily governed by state law, and to affect matters of professional responsibility that likewise are 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 those structural elements, however, does not automatically carry over to creating a role for the MDL court in reviewing proposed terms for individual settlements, much less a role in the negotiations. As with settlements in the full range of civil litigation, judges have different views about judicial involvement in settlements. A wary approach would be required in considering an attempt to regularize a role for judges in working toward settlements in MDL proceedings.

The subcommittee focused on identifying some of these problems without attempting to determine whether to suggest that the Advisory Committee take on the task of attempting to develop new Civil Rules provisions. It will continue to ask at least these questions:

1. Is there any need to formalize rules for practices, whether in structuring management of MDL proceedings or in working toward settlements, that are familiar and that continue to evolve as experience accumulates?

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

3. There are powerful indications that any formal rulemaking proposals would be opposed by all sides of the MDL bar and would be resisted by experienced MDL judges. Is that an important concern that should call for caution? [Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free from 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 rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal

authority now?

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

APPENDIX

Subcommittee Conference Call Notes

MDL Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
November 25, 2019

On Nov. 25, 2019, 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, Helen Witt, Joseph Sellers, Emery Lee (FJC Research), Margaret Williams (FJC Research), 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 of the Subcommittee).

(1) TPLF

The subcommittee has returned issues related to whether a rules response to third-party litigation funding is in order to the full Advisory Committee. Professor Marcus will be "point person" on this effort, and he has been collecting relevant materials that come his way. Members of the subcommittee who encounter potentially useful information are asked to forward it to him.

In addition, it will likely be productive to have the new Rules Law Clerk do some research. One focus would be local rules dealing with disclosure of TPLF arrangements. An initial memo on that subject was prepared by a previous Rules Law Clerk for the Advisory Committee's Spring 2018 meeting. Judge Rosenberg prepared another such memo earlier this year. Though monitoring changes in local rules can sometimes be challenging, it would be useful to do so. It was noted that local rule changes are supposed to be filed with the court of appeals with authority to review the decisions of the pertinent district court. It might be that obtaining information from courts of appeals would be more efficient.

One thing to focus upon regarding local rules would be whether such rules focus on their face on TPLF or speak more generally of whether nonparties have a "financial interest" in the outcome of the case. At least the N.D. Cal. has a local rule specifically directed to TPLF arrangements in class actions.

In addition, Wisconsin adopted a disclosure rule for its state courts that was similar to one proposed to the Advisory Committee about two years ago. It would be useful to find out what experience the Wisconsin state courts have had with this new rule.

Prof. Marcus and Ms. Womeldorf will consult about how best to use the Rules Law Clerk's services on this project.

(2) Vetting/PFS/"census" of claims

On Nov. 19, Judge Orrick (N.D. Cal.) entered Case Management Order No. 2 in the JUUL MDL (MDL 2913) directing a "census" of claims submitted in that proceeding. The order commands all counsel who have applied for leadership positions to provide data on their clients. Plaintiff counsel who have not applied for leadership positions may also choose to provide the census information, in which case they will receive the reciprocal census information that the order directs defendants to provide.

All participating counsel are directed to enter into contracts with Ankura, which is designated to serve as the online platform for census data in the cases. Plaintiff counsel subject to the order are also to supply data on any potential claimant with whom they have a retainer agreement. Exhibits to the order set forth the data that must be provided respecting use of JUUL products and injury. Any plaintiffs claiming personal injury must provide medical records or explain why those have not yet been provided. The due date for uploading by plaintiffs is Dec. 19, 2019.

By Jan. 20, 2020, defendants are to comply with their census obligations, which call for them to produce individualized sales data for all plaintiffs submitting census data. Defendant must produce sales data they have for such individuals indicating the type and quantity of products purchased, date of orders, and other details about orders by these claimants.

Prof. Jaime Dodge of Emory Law School is directed to work with Ankura and the parties to prepare a report for the court providing aggregated information. This report will serve the "dual purposes of leadership selection and understanding the nature of the litigation." The order does not mention judicial screening of claims.

This development may mean that we will see some initial results in a few months. But the JUUL case also points up the scope issues that we have discussed before. The main proponents of special rules for vetting claims are pharmaceutical companies and medical products companies. Would JUUL be in either of those categories? Perhaps the way to categorize (as H.R. 985 did) is to focus on whether claims are for "personal injury," but it's possible that data breach or other claims might support emotional distress damages that could be considered "personal injury" claims.

The subcommittee's question for the present is whether it should do anything more than remain in a "holding" pattern on this issue. It was observed that waiting two years might be hard to justify. The schedule set by Judge Orrick calls for responses by both sides within two months, but experience suggests that there will be requests for extensions.

A different issue is to forecast what insights might emerge when claimant data are submitted in the JUUL litigation. The Emory

Institute headed by Prof. Dodge once suggested (in regard to the 3M litigation in Florida) that it might undertake some data analysis. Getting meaningful results or data for these experiments can be tricky.

One view was that "it's hard to believe we'll be ready to endorse a rule change any time soon." It may be that, even if this "census" effort seems very successful, it is better suited to inclusion in a manual or in programs the Judicial Panel puts on for transferee judges.

It is also conceivable that there may be other experiments. Prof. Dodge made a presentation about the "census" idea during the Panel's conference for transferee judges in October. In addition, it might be that the Panel's annual questionnaire to transferee judges could focus on the census possibility.

For at least some time, the subcommittee will remain in a "holding" pattern, to be re-examined when it next meets by conference call.

(3) Interlocutory appellate review.

This topic, unlike the previous one, presents a stark division between the defendant and plaintiff perspectives presented to the subcommittee. Though there has been some evolution in the views expressed, the two sides remain far apart. The subcommittee approached the situation with a broad-ranging discussion.

Before the call, Judge Dow identified a series of issues that would bear on what might be in any rule proposal:

1. Scope
    a. All MDLs, using common-sense discretion as a guide
    b. More granular attempts at definition:
        i. Subset of MDLs (mass tort/PI) or beyond MDLs (mass actions too)
        ii. Define by number of actions
        iii. Define by category (cross-cutting or identified topics such as *Daubert*, preemption, jurisdiction, general causation)
2. District court role — veto, input, or none
3. Stay: discretionary or automatic
4. Expedition: only upon motion, presumed, automatic

One challenge here is to provide concreteness without provoking unwarranted controversy. One way to put that is with the question "To draft or not to draft?" Should the subcommittee start drafting "sketches" or "cartoons" or something very preliminary about possible rule amendment ideas that might be pursued. That sort of effort often brings home drafting difficulties that a general discussion does not make clear.

A very real competing concern is that any drafting may be taken as indicating that the subcommittee is inclined to press for a rule change —— that "the train has left the station." Several participants agreed that working up a draft could produce an uproar.

So perhaps the right sequence is first to work through the policy choices that would bear on drafting, such as the ones identified by Judge Dow. Once those are resolved, drafting could go forward.

One starting point would be to ask whether there is a problem with the appellate options provided already, particularly 28 U.S.C. § 1292(b). In effect, Rule 23(f) could be viewed as an exception to § 1292(b), in that it authorizes an interlocutory appeal without requiring that the district judge certify the class certification ruling for such review. And Rule 23(f) does not require that the court of appeals apply the criteria that § 1292(b) articulates in deciding whether to accept a petition for appellate review of a class-certification order.

In terms of authority to use a rule to add an exception to the § 1292(b) requirements, Rule 23(f) is one example, and § 1292(e) recognizes more broadly that a rule can authorize an interlocutory appeal not otherwise authorized under § 1292.

A reaction was that this question could be viewed as whether there is a need for an additional "exception" to the requirements of § 1292(b). One subcommittee member indicated uncertainty about whether the presentations the subcommittee had received really indicated that a rule change was warranted. To date, we have received input from what's really a relatively small segment of the bar, so an exception that applied beyond the sort of litigation that segment has emphasized would need to be approached with care.

It was suggested that, as things have evolved, it seems that the chief unhappiness is with the statutory requirement of district court certification as a prerequisite for seeking review under § 1292(b). We are not aware of any distress among MDL transferee judges that the statutory criteria unduly limit certification, or among courts of appeals that the statutory criteria prevent them from granting review when it might be a good idea.

But the subcommittee has been told that defense counsel in particular are deterred from seeking review because they believe that transferee judges would be offended by the request and would not certify their orders for immediate review.

The opponents of expanded interlocutory review, meanwhile, emphasize the purposes Congress had in mind when it added § 1292(b) to the judicial code in 1958, urging that the current circumstances do not fit what Congress had in mind. But there has been a sea change in litigation since 1958 that bears importantly on the issues now before us. Rule 23 was amended comprehensively in 1966.

More to the point for current purposes, the Multidistrict Transfer Act was not passed until ten years after § 1407 was enacted, and only in the last decade or so has the volume of cases subject to an MDL transfer order mushroomed towards its current total of 40% to 50% of the federal civil docket.

Although the library research on § 1292(b) decisions does not show that the statutory criteria have created difficulty, the information about delay looks daunting. In general terms, when review is granted the district court will have about a two year wait for a decision. And then the affirmance rate is quite high.

Under these circumstances, one might say that there is a very good reason for honoring the district court "veto" over § 1292(b) review in MDL proceedings. If review is granted, that judge will then have to confront the question whether to halt the litigation of all the MDL cases, or at least the ones potentially affected by a reversal, awaiting the decision of the court of appeals.

This discussion prompted some counter-arguments from a subcommittee member. It's not just the veto that has been questioned, at least for these very important and far-flung litigations. The statute says review is only proper for a "controlling question of law." That may often not be easy to say about such things as a *Daubert* ruling, for example. The basic legal issues that affect such a ruling are pretty well settled. But the question whether certain causation or other expert evidence the plaintiffs rely upon should be admissible may be crucial to hundreds or thousands of individual MDL cases.

Perhaps the same could be said for the "substantial ground for difference of opinion" prong of the analysis. If that is limited to the "controlling question of law," review may be undercut because the precedent on what Fed. R. Evid. 702 requires is pretty settled. But the question whether that settled precedent was properly applied in these cases may be highly debatable. As to at least some kinds of rulings, there should be room to make such an argument in support of immediate review.

Regarding the delay issue, there is also a counter-argument. Surely delay is a major concern. But suppose a situation in which defendant wins at trial, perhaps a bellwether trial. Suppose plaintiff does not appeal. At least then, there should be a possibility of review anyway. Otherwise, does the district court have to contemplate unlimited additional trials with other plaintiffs but no appellate review unless one of those plaintiffs wins?

Another member of the subcommittee expressed agreement with these concerns; these issues deserve further attention.

A reaction was that the most promising idea is to retain a focus on the transferee judge's conclusions about whether immediate review would assist in processing the transferred claims. That

might be the right focus for a rule here —— not "ultimate termination of the litigation" but something more like "expeditious completion of the MDL proceedings."

An additional point was added: During the discussion of these issues in the meeting of the Appellate Rules Committee, one of its members suggested that any district court input might focus on whether immediate review would be of value only if the court of appeals "expedited" that review. Although there might be uncertainty about what "expedited" means (and there is no interest in adopting specific time limits for appellate resolution), this sort of focus might respond to concerns about undue delay. Perhaps waiting six months for a decision would expedite MDL proceedings while waiting two years would not.

A rule focusing on "expedited" appellate treatment could also include something like the "veto" in current § 1292(b) —— perhaps it could say that certification can be conditioned on "expedited" appellate review, and that there may not be review if the court of appeals does not agree to provide it on an "expedited" basis. That would be something of a "veto," but might be resisted on the ground that the district court may not thus intrude in the court of appeals' management of its docket.

Alternatively, a rule might say that the district court should address the question whether having "expedited" review would be important to facilitating completion of the MDL pretrial processing, but leave it to the court of appeals to weigh that and other matters in deciding whether to grant review.

Comments made by Standing Committee members about "expedited" review might bear on these questions. More than once, during Standing Committee meetings, members of that committee have noted that the parties may always request expedited review and offer reasons why it is warranted in a given case. It may be that in some MDL proceedings, the broad importance of certain orders, and the potential delay of hundreds or thousands of cases would constitute a strong argument for granting "expedited" review.

Indeed, it might even be said that § 1292(b) already authorizes such a presentation to the court of appeals, because it depends on a district court certification that immediate review "may materially advance the ultimate termination of the litigation." That could include a certification saying that immediate review would serve the statutory purpose only if it were "expedited." Maybe there is no need for any change in rule or statute at all; all that is needed is creative use of what's already there.

This discussion drew a reminder that only about 15% of the current MDL proceedings —— around two dozen —— exhibit the characteristics the proponents of increased appellate review emphasize. It is true that these two dozen MDL proceedings include a very large portion of all the individual cases subject to an MDL

transfer order, but that question points up the scope issue introduced at the beginning. Some of the ideas raised during this call might be considered as supporting a "new § 1292(b)." If something of that dimension is under study, the subcommittee needs more input; it has had a lot of input from a segment of the MDL bar, and not much from anyone else.

Discussion turned to methods for getting the input that might be most important. The subcommittee has heard repeatedly from attorneys in the sector of MDL litigation that has generated the calls for rulemaking. Are there ways to gather the views of lawyers who handle other sorts of MDLs? If there is some notion that every MDL should be subject to this new rule, outreach to that sector of the bar seems important.

A response is that probably the Judicial Panel could without great difficulty provide a list of leadership counsel for pending MDLs, and that list could be approached in writing to solicit input. A caution was raised —— this input must be sought from the defense as well as the plaintiff bar. On that score, the goal would be to identify any lead or liaison counsel for the defense side in pending MDLs. Often courts make such appointments as well as appointing lead counsel for the plaintiffs. And an invitation for comment could say that the recipients were invited to share the invitation with other lawyers known to be interested in the issues raised.

An alternative might be a miniconference, but generally those involve a much smaller number of respondents. An invitation by letter to submit written commentary can reach a much broader audience. On the other hand, it can also prompt repetitious position statements that would have been less common in the miniconference setting.

Either possibility might support circulating some sort of "draft" or "sketch" or "cartoon" of a possible rule change idea. That could trigger an inappropriate over-reaction, however.

These possibilities triggered some reflection on past amendment efforts. For example, regarding Rule 37(e) on evidence preservation, the Discovery Subcommittee held a very informative miniconference at the DFW airport that had before it a variety of sketches of possible amendment ideas to make the discussion more concrete. The ultimate preliminary draft published for public comment included only a few of the ideas sketched in the materials for that miniconference.

The more recent Rule 30(b)(6) experience provides a different comparison. It began with elaborate sketches of perhaps a dozen possible rule changes that responded to specific concerns about experience under the rule. Those sketches appeared in agenda books and were discussed by the pertinent subcommittee for some time. That circulation of ideas did not provoke a firestorm.

Then the 30(b)(6) Subcommittee put out an invitation for comment on a half dozen ideas for possible rule amendments, without any depiction of what a rule change might actually say —— no "sketch," "cartoon," or "draft." That invitation drew more than 100 written responses, some of them fairly duplicative of others. Then the Advisory Committee published a preliminary draft amendment including only a few of the ideas in the prior invitation for comment. That drew some 2,300 written comments and a very large turnout at the hearings on the proposal. Repeatedly, the written comments addressed ideas that were in the original invitation for preliminary comment but not actually in the draft amendment as finally put forth.

In sum, it is difficult to forecast the reaction to a subcommittee's focus on specific possible amendment wording for discussion purposes. At least for purposes of clarifying the various issues identified by Judge Dow, it seems desirable to have some sort of exemplar of what a rule might look like. At the same time, it seems important that anything of that sort be only for internal subcommittee dissemination and discussion. The heart of the challenge is something of a chicken/egg problem —— how can one focus usefully on policy choices like the ones Judge Dow identified (above) without some appreciation whether or how those choices might look and work in actual rules?

All the same, it will be important not to make it seem that "the subcommittee is going in this (or that) direction." But it may be difficult to get useful input without showing some cards. It is also important to have in mind that transparency is important in this process, though it does not eliminate the need for subcommittee discussion that does not make a "public record" of all details discussed.

To emphasize the need for a better appreciation of the views of others, one subcommittee member noted that it's not clear how the rest of the Advisory Committee feels about the possibility of a rule change that applies to all MDLs, not only a smaller array of them (assuming that array could be described in a rule). The JUUL litigation points up some of the difficulties that may attend such a description. It surely has enough claimants to satisfy a "100 cases" and probably a "1,000 cases" criterion. But maybe it is not a "personal injury" case, at least for some claimants. Judge Orrick's order for a census applies to "any alleged injury other than economic loss." That suggests that some claimants may seek recovery only for economic loss. The second claim in Exhibit A to Judge Orrick's order is "addiction." Is that a claim for personal injury? Another category is "mental health/behavior issues/suicide/suicidal thoughts/attempts." Is that a "personal injury" claim?

Confronting these challenges, the consensus of the conference call was that some representation of the drafting issues would be very helpful in illuminating the policy choices identified by Judge Dow. Professor Marcus is to try to put together a memorandum for

the subcommittee that provides a basis for further subcommittee discussion. One starting point would be the memo done by Professor Cooper during the past summer, intended to illustrate the pending issues. Any such memorandum should make it clear on its face that it is only designed to support subcommittee discussion and does not indicate any subcommittee inclination toward any particular rule amendment, or toward proposing a rule amendment.

(4) Settlement Review

The discussion of appellate review had used up most of the time allocated for the subcommittee call, so there was limited time for this final subject.

A starting point is to recognize that two of the papers drafted for the Lewis & Clark conference attended by Judge Dow contain valuable information and deserve careful attention from the subcommittee.

Prof. Noll provides a report on his review of the initial orders appointing plaintiff leadership counsel in all but one of the more than 200 MDLs pending in June, 2019. He expresses some support for rules addressing these issues, but is wary of detail. At a minimum, such a rule would counteract any argument that the transferee judge lacks authority to take the sorts of actions that have become commonplace. In addition, but cautiously, a rule might identify topics that could be addressed in such an appointment process. On many topics that are in fact addressed in appointment orders, however, Prof. Noll thinks that appropriate provisions cannot be identified in advance; only an order tailored to the specific litigation would be helpful.

In regard to Prof. Noll’s analysis, it was noted that one model for a rule that provides some direction is Rule 53(b)(2). The special master rule was extensively revised in 2003 to take account of the various roles such officers of the court had come to play in modern litigation. One recurrent point made during this amendment process was that orders appointing special masters should include attention to a number of matters not always included in such orders before the 2003 amendment. Rule 53(b)(2) therefore identifies required features of such an order appointing a special master.

Whether a similar listing of required contents for an order appointing leadership counsel would be feasible or desirable is dubious in light of Prof. Noll’s analysis. For one thing, lead counsel stand on a different footing from special masters; lead and liaison counsel are not “officers of the court” in the same sense as special masters. If there is to be a rule on leadership counsel, Prof. Noll would likely favor one with a high degree of generality that leaves much to the discretion of the transferee judge. But the starting point should surely be attention to what topics often or ordinarily appear in such orders.

The other article —— by Prof. Baker and Mr. Herman —— explores the variety of cross-cutting incentives and tensions that can emerge in modern MDL litigation. The main focus is on what might be called professional responsibility issues, and for rulemakers that means caution is in order. But the exploration of these issues introduces a needed dose of reality about the potential impact of rules in this area. Two decades ago, there was an effort to devise Federal Rules of Attorney Conduct that was ultimately abandoned. It does not seem that the authors favor federal rulemaking to deal with the problems they explore.

As with interlocutory appeals, there could be questions on this subject about scope. Should a rule about lead counsel apply to all MDLs? Should it apply only to MDLs? There may well be single-district consolidations that would justify appointment of lead counsel. Should a rule disregard that possibility?

* * *

The conclusion of the call was that the subcommittee should point towards a further conference call in early January. By that time, there may be some information about the initial returns on Judge Orrick's "census" order. And in addition, the subcommittee should have before it a memo from Prof. Marcus on the issues presented by the interlocutory review question.

MDL Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
Jan. 10, 2020

On Jan. 20, 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 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), Allison Bruff (Rules Law Clerk), Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Reporter of the Subcommittee).

TPLF

Judge Dow reminded the other members of the subcommittee that if they come across materials relating to the TPLF topic the subcommittee has decided not to pursue at present they should send those to Prof. Marcus, with a copy to Judge Dow. In addition, Allison Bruff, the Rules Law Clerk, will be doing research about this topic.

Preliminary Census

There have been several developments that indicate information will be developing on this new approach. Prof. Jaime Dodge of Emory has been deeply involved in developments on this front, and reports that there are three pending MDLs that may yield insights about the census method, and that another may soon come into existence. These are:

(1) 3M litigation before Judge Rodgers (N.D. Fla.): The census process in this litigation has not emerged quite as rapidly as originally expected. It may produce good information, but it is not clear when that will happen.

(2) In re JUUL: During the Nov. 25 conference call, the subcommittee had before it information about the census method Judge Orrick (N.D. Cal.) was ordering. He directed that Prof. Dodge play a prominent role in designing and implementing this program, and she has provided a report about progress so far. Though the process is just getting started, early reports suggest nearly 100% compliance. The census method is being used here to enable the judge to determine what “buckets” of claims are involved in the litigation. One might say that the judge is “vetting” the entire litigation, and it may be that this effort will affect appointment of leadership counsel. It may also be that, even though this process is not used for formal vetting of individual claims, it is having something of that effect. The forms that must be filled out require relatively specific information, and as a result it may be that some lawyers are not presenting some claims that they

might have presented were there no census system in effect.

(3) The Panel has assigned the Allergan breast implant cases to Judge Brian Martinotti (D.N.J) and this proceeding is getting under way. It seems that the plaintiff lawyers may favor some sort of early information exchange, in part because defendants may have more information, and more accurate information, than many plaintiffs. Judge Martinotti spent many years as a mass tort judge on the New Jersey Superior Court before he was appointed to the federal bench. So he has an extensive background to draw upon.

(4) On Jan. 30, 2020, the JPML will have before it a motion to centralize litigation involving the pharmaceutical Zantak. If that centralization occurs, this litigation may also be a candidate for a census process.

A general observation was that it remains unclear whether this activity will ultimately generate a proposal for adoption of a specific rule amendment. But the subcommittee's ongoing interest in the issue may be paying dividends even if no rule amendment ultimately emerges. It seems that the subcommittee's attention is one thing that is, in turn, encouraging both courts and counsel to pay attention to these ideas. So the consensus was (a) to retain this topic on the subcommittee's agenda, and (b) to defer more definite work until there is more definite information.

Interlocutory appellate review

During its Nov. 25 conference call, the subcommittee explored a variety of issues presented by proposals for expanded access to appellate review in at least some MDL litigations as to at least some pretrial rulings. The suggestion then was that having more concrete ideas about how such issues might appear in rule language would assist the subcommittee in evaluating the policy judgments about what offered promise.

Prof. Marcus accordingly drafted a memorandum suggesting ways in which various of the ideas previously discussed might be presented as rules. The goal of this memorandum was not to advance any of the formulations as a desirable direction for the subcommittee's work. Rather, the memo was prepared only to facilitate the subcommittee's discussion during this conference call about the choices initially explored on Nov. 25.

Scope —— all MDLs or only some of them

The proponents of rule amendments have largely or entirely been experienced in a relatively narrow band of MDL proceedings, though these "mass tort" proceedings often include a very large number of individual claims. On Nov. 25, the subcommittee reflected on the possibility that a rule amendment might apply to all MDLs or, perhaps, even go beyond MDLs and include "mass tort" litigations not the subject of Judicial Panel orders. Professor

Marcus introduced the issues raised by the memorandum.

The first issue is whether to include all MDLS. Two formulations were introduced as possibly encompassing all MDLs:

> when civil actions are transferred pursuant to 28 U.S.C. § 1407 [for coordinated or consolidated proceedings]
>
> when coordinated or consolidated pretrial proceedings are conducted pursuant to transfer under 28 U.S.C. § 1407

The first formulation borrows from § 1407(b), while the second borrows from H.R. 985. Both of them might need to be revised to ensure that the description includes (a) cases that the transferee judge already had before the transfer order, and (b) cases "direct filed" in the transferee district after the Panel's transfer order is entered. Neither of those categories is made up of cases transferred by the Panel's order. But those are drafting issues that should not obscure the basic issue —— ought any rule apply to all MDLs, with the expectation that the courts of appeals will make sensible determinations about whether to authorize appeals in individual cases?

Alternatively, assuming one were inclined toward a rule that applied to all MDLs, that might incline one to conclude that no rulemaking is needed since § 1292(b) suffices. Judge Furman's very thorough and thoughtful order in the In re GM Ignition MDL litigation offers an example of creative and impressive use of the current statute to support interlocutory review under the statute.

One reaction was that although Judge Furman very effectively marshals case authority for using the statute in this manner, it is not certain that every transferee judge would take the same approach. And it is less clear whether courts of appeals would also take that approach.

A subcommittee member said that the policy arguments in favor of expanding review opportunities in MDL litigation have not seemingly been limited to pharmaceutical or medical products litigation. This member initially thinks that the subcommittee needs to hear from lawyers and judges involved in other types of MDL proceedings to evaluate the wisdom of a broader category than was suggested by the proponents of change.

Another member expressed great concern about going down this path at all, in large measure due to the likely delays that would result. Without giving up those misgivings, however, this member added that, as illustrated by Prof. Marcus' memorandum, it is very difficult to draw a principled or workable line in a rule between covered MDLs and those that are not. And we should surely not proceed with the broader idea of applying such a rule to all MDLs until we have heard from those experienced in other sorts of litigation.

Another member expressed agreement with these comments.

Another member also agreed.

Another member agreed that trying to limit a rule to only some MDLs looks artificial. But this member also shares the overarching misgivings about proposing a rule at all. Nonetheless, the Marcus memo is persuasive that we need to use a "non-granular approach."

The Emory Institute has offered to arrange a conference with lawyers and judges involved in other sorts of MDL litigation to explore the question whether a rule applicable to all MDLs would be desirable. The question arose how to put our issues before such a group. It might be troubling to circulate something that looks like a rule proposal emanating from the subcommittee. The subcommittee has not decided to proceed with a rule change. Something from the subcommittee might be misconstrued. The two formulations above are only illustrative of the challenges of drafting a rule that applies to all MDL proceedings. The subcommittee is hardly committed to this approach.

A response was that the subcommittee need not embrace or advance any particular proposal. Probably it could present invitees to such an event with the proposals it has received, and raise questions about how such proposals would work in other sorts of MDL proceedings than the ones it has been hearing about. This idea drew support; a memorandum taking no positions but highlighting issues on which the subcommittee seeks information should be sufficient to acquaint the group with what we want to know about.

There was consensus on seeking input from a broader group and about other sorts of litigation. The drafts seeking to confine a new rule to "tort" cases or "personal injury" cases or cases involving "pharmaceutical products or medical devices" or involving at least a certain number of claimants show that trying to use those guideposts to exclude some MDLs and include others does not hold promise.

Type of order

A different possibility, also suggested on occasions by proponents of amendment, is to focus on the type of order. On occasion, the focus is on the substantive type of issue addressed in the order —— preemption, *Daubert* scrutiny of expert testimony (perhaps only causation evidence), and jurisdictional issues have been proposed. Alternatively or additionally, it has been suggested that a rule should be limited to "cross-cutting" issues, that will be quite important to at least a significant portion of the cases involved in the litigation.

The Marcus memo included efforts to put these concepts into rule language. As a measuring rod, it was suggested that one might ask whether Judge Furman's order in *In re GM Ignition* would fit within various limiting phrases in the memo. For example, it does

not appear that preemption is in any way involved in Judge Furman's cases. Moreover, it could be that "preemption" could arise in cases very different from those that the subcommittee has heard about. Perhaps even a challenge in court to local efforts to enforce the immigration laws would involve issues of preemption —— preemption of local authority by federal authority —— though it may be difficult to imagine such a case being an MDL.

A first reaction to the possibility of limiting a new rule to certain types of orders is that it may well seem unhelpful to the court of appeals, which is to have the ultimate authority to decide whether to authorize an appeal. Judge Furman's opinion, for example, seems to set out what the court of appeals would need to evaluate the request for interlocutory review. One can readily imagine an appellate judge saying something like "We can figure this out if we are given the information we need; an overlay of types of orders only complicates things."

Another reaction was that there is every reason to expect that transferee judges will similarly make sensible use of this authority if it is added to the rules; asking them to pigeon-hole their orders is not useful.

Another member noted that there is a consensus on the subcommittee that the district judge's attitude toward immediate review should be part of any new rule. Putting in limitations to types of orders is superficially "objective," but the basic point is that we must trust the good sense of the judges rather than trying to embrace legal pigeon holes.

That drew agreement, and the additional comment that the type of order approach also invites satellite litigation about whether a given order fits within or without a listed type eligible for immediate review.

The consensus was to drop (for the present, at least, pending further input from those involved in other forms of litigation) the idea of limiting a rule to certain kinds of orders.

Role of the District Court

The Marcus memo also included alternative ways of dealing with district court input. One could regard § 1292(b) and Rule 23(f) as resting at the ends of a spectrum on that topic. Section 1292(b) gives the district judge in effect a veto; unless the district court certifies for appeal there cannot be an appeal. Rule 23(f), on the other hand, gives the district judge no role to play; the petition for review goes directly to the court of appeals.

The two ideas presented in the Marcus memo addressed both a question of timing and a question of initiative. One approach, modeled on Rule 23(f), would permit a party to petition for review, and leave it to the court of appeals to invite input from the district judge on whether it should grant review. Alternatively, a

different approach might require a first application to the district judge, who would then offer views on immediate appealability and forward the matter to the court of appeals.

Another idea was advanced: Why not retain the district court veto as an element of a rule? That could be useful if the rule articulated a standard significantly different from what § 1292(b) says (a topic treated below).

A first reaction was that, moving forward, it would be important to solicit reactions from court of appeals judges on what would work best for them. In terms of retaining the veto, it was also noted that at least some lawyers say that at least some transferee judges may wield the veto as a tool to press the parties to reach a settlement. A middle ground is the model of the certificate of appealability in habeas cases. There the district court may state that certain issues appear not to warrant appellate review, but that is not a veto.

Particularly looking at Judge Furman's order, it was noted that district judges can (as § 1292(b) requires) address the need for immediate review. And making that depend on an invitation from the court of appeals seems likely mainly to waste time. It is difficult to imagine that courts of appeals would not want to know what the district judge thinks about this subject. So from their perspective it would make sense to have that in the package when it arrives at the court of appeals. And from the district court's perspective, it would ordinarily seem better to address that question when the issues are fresh in the district judge's mind rather than months later when the court of appeals asks to be filled in.

A member reacted that district court input is critical. Judge Furman's opinion shows that he thought carefully about these questions and explained his views, all as part of his order on a motion for reconsideration. This effort both provided a roadmap for the court of appeals and facilitated its decision whether to grant immediate review.

Another member agreed. Another member agreed, and added that it is hard to imagine how the court of appeals can sensibly evaluate the need for review without first hearing the views of the district judge. Delaying that until the court of appeals asks for it would just lead to more delay and waste motion.

The consensus was that a rule should provide for an expression up front by the district court about the desirability of interlocutory review as part of the submission to the court of appeals, rather than only when the court of appeals asks for it.

Stay

The Marcus memo presented essentially two approaches: (a) there would be no stay unless the district court or the court of appeals so ordered, or (b) there would be a stay of "affected cases" unless the district court or the court of appeals decided against that. The second option was not favored, but included for completeness.

The consensus was that an automatic stay would be a bad idea. The basic choice should be left to the district judge. That is the Rule 23(f) model, and it should be used here also.

Expedited review

Section 1292(b) says that the district judge must take account of whether immediate review would materially advance the ultimate termination of the litigation in deciding whether to certify for review. A member of the Appellate Rules Committee suggested that resolution of that question under the statute might depend on whether the appeal would receive "expedited" review.

The subcommittee has no interest in trying to prescribe an exact period for "expedited" review. There are some time limits for judicial action in the rules. For example, Rule 16(b)(2) says that a judge must issue a scheduling order "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." But a time limit for a judicial decision of a case seems palpably different from this case management directive. Indeed, it may be expected that the legal issues raised in MDL appeals are difficult enough to require more deliberate consideration than many other appeals.

Moreover, it would be quite peculiar for a Civil Rule to impose a time constraint on a court of appeals, even if an Appellate Rule could do so. Indeed, there may be a real question about whether any rules committee can so limit a court of appeals.

Another idea included in the Marcus memo was that the district court's insistence on "expedited" review could constrict the court of appeals' latitude to accept the appeal without promising to act in an expedited manner. How would that work? Could the respondent on the appeal move to dismiss the appeal if the court of appeals had not resolved it within a specified number of days?

The Speedy Trial Act illustrates the complications that can arise from efforts to impose time limits on judicial action. Enmeshing the Civil Rules in such intricacies is not inviting.

On the other hand, from the appellate perspective it might be helpful to know whether the district judge thought interlocutory review would be useful only if done quickly. Rather than mandate action by the court of appeals, it could be desirable to prod or direct the district judge to offer views on this subject as part of

the process of obtaining the district court's attitudes on immediate review.

In a way, that might also be related to the stay issue discussed above. Perhaps the district judge should be encouraged to tell the court of appeals whether granting review would result in a stay of the district court litigation. That could bear on the court of appeals' decision about how rapidly to address the appeal.

A question arose —— what exactly is "expedited review"? One member had requested it on occasion, but was never certain exactly what it meant. A reaction was that the court might be more receptive to accelerated briefing than to accelerated decision-making.

More generally, it was observed, the circuits differ quite a lot on what would be much faster than the normal time for decisions. In some, perhaps, the normal decision time is six months, while in others the normal may be two years. How can we have a national rule that specifies what a given circuit must do if there is such a range?

The consensus was that there should be no effort to put handcuffs on the court of appeals, but that prompting the district court to focus on the question of expedited appellate review could helpfully be included somehow, perhaps in a committee note.

Standard for granting review

Again, § 1292(b) and Rule 23(f) offer competing models. The statute articulates several criteria. The Rules Law Clerk's research suggests that often district judges do not consider them free-standing and independent, but rather as considerations that should all be in mind in making the basic decision whether to certify for appeal. Rule 23(f), on the other hand, offers no criteria; it is up to the court of appeals to decide whether to grant discretionary review. But the courts of appeals have generally articulated standards they use as part of their case law.

A starting point is to appreciate that on their face the statutory standards may be inappropriate in the MDL context. In particular, the question whether an immediate appeal would "materially advance the ultimate termination of the litigation" (as § 1292(b) says) seems inapplicable to proceedings that are, by statute, only pretrial. Whether transferee judges or courts of appeals take such a literal view is uncertain; at least some say that an MDL proceeding presents a particular justification for interlocutory review.

As noted earlier in the call, it could be that a rule retaining the district court veto could serve a useful purpose in MDL proceedings by articulating a more suitable standard.

Discussion focused on one possibility for future consideration:

> materially [advance] {facilitate} [expedite] the pretrial proceedings before the district court

This formulation invokes § 1407's statement of what the transferee judge should be doing. An alternative added reference in a rule to settlement, but that drew opposition. The transfer is limited by statute to pretrial proceedings. The Supreme Court in the *Lexecon* case was quite clear that the transferee judge does not have authority beyond that point, and may not hold a trial absent party consent. Settlement may indeed terminate the litigation, but it is not readily regarded as among the stated purposes of the statutory transfer.

This approach was favored as compared with the wording of § 1292(b), because it is keyed to the MDL context. True, review might have an effect on settlement, but that would not seem something that the rule should address.

Moving forward on leadership appointment and settlement review

Having completed the discussion of interlocutory review issues, the subcommittee turned to another set of issues the it has been considering —— judicial control and handling of appointment of leadership counsel and involvement in "global" settlements.

A conference at Lewis & Clark Law School in 2019 explored these issues with considerable care. In particular, a paper by Prof. David Noll presented during that conference reviewed the appointment orders entered in all but one of the MDL proceedings during the past decade or so, and commented on the features found in those orders. The orders took different forms. Some had detailed prescriptions on responsibilities and authority conferred on leadership counsel, and constraints on the activities of other lawyers. Others were quite brief.

One upshot of the conference was that the more general appointment orders can (and sometimes do) lead to striking "ethical" problems later. If leadership counsel are negotiating settlements that are presented to their own clients and the clients of other lawyers (who may be marginalized by the order) there may be the appearance or actuality of conflicts of interest. It seems that thoughtful and thorough early orders can define the roles and responsibilities of the lawyers in ways that can avoid great difficulties later on.

At the same time, it is clear from the variety of provisions in specific orders that there is no "fill in the blanks" master order that would usefully apply to all MDL proceedings. Specific orders need to be devised for specific proceedings. So if there were a rule, it should have a high degree of generality.

A caution was raised: On occasion in the meetings subcommittee members have attended it has seemed that experienced judges and also the lawyers on both sides of MDLs oppose developing rules on these topics. Is it sensible to pursue this set of issues further in light of the apparent opposition of those experienced in this form of litigation?

That sort of opposition to the rule arose at the Lewis & Clark conference in another paper that illustrated ethical challenges but said that a rule was not needed. Another take on that view, however, is that a rule could be a way to highlight the potential for such difficulties up front so the parties could design a good way to deal with them.

The consensus was that the subcommittee should continue to look at these issues and "keep the momentum going." That does not mean that a rule should be devised. To the contrary, as was done during this conference call about appellate review, what might be most useful would be to put together possible rule language and step back to discuss the issues raised with the sorts of language that might address them in mind. That need not signify that the subcommittee has made any decision to pursue rulemaking on this subject, much less that it endorses any particular rule language. Instead, looking at possible language can provide a concrete context for the policy discussion. Today's resumed discussion of interlocutory review shows that this method can be effective to help the subcommittee resolve difficult issues, and a similar treatment could be useful on this separate concern.

At the same time, we are not at a point to seek greater outside input on these issues. Regarding appealability, the way forward is to see how and when the Emory people can put together an event that will enable the subcommittee to hear from lawyers and judges involved in other types of MDLs. On the leadership appointment/settlement review issues, the next step would be for Judges Dow and Bates and Professors Cooper and Marcus to confer about how best to proceed. Meanwhile, Judge Dow will circulate the revised version of Prof. Noll's article to the subcommittee so that members can learn about what he found.

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APPEAL FINALITY AFTER CONSOLIDATION
JOINT CIVIL-APPELLATE SUBCOMMITTEE

The joint subcommittee of the Appellate and Civil Rules Committees was appointed 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 *Hall v. Hall*, 138 S. Ct. 1818 (2018), 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. This rule confirmed one of four approaches that had been taken in the courts of appeals —— although most circuits had taken one of three other approaches. At the end of its opinion, the Court suggested that if its ruling created problems, the solution should be studied in the Rules Committees.

The FJC has undertaken a research project to help the subcommittee determine whether empirical data can help in studying possible rules amendments. Dr. Emery Lee has taken the lead in this project. The subcommittee is deferring further consideration of early drafts of possible rules amendments while the FJC research advances.

The research project has begun by gathering data about Rule 42 consolidations in all civil actions filed in all districts in 2015, 2016, and 2017. This period includes actions that were terminated before the decision in *Hall v. Hall*, as well as others that continued after the decision. That will provide an opportunity to learn whether useful comparisons can be made between experience under *Hall v. Hall* and under each of the four approaches that had been taken before *Hall v. Hall*. Not all of these actions have concluded; it remains possible that additional consolidation orders will be entered. The early thought that it might prove useful to expand the study to include actions filed in 2018, 2019, and 2020 has been abandoned. The number of consolidations found during the initial study period should suffice to provide as much data as needed, and there is little reason to pursue an inquiry that would take the work into 2022 or 2023.

Data collection was completed for all 94 districts by the end of February 2020. A few major results are summarized below. The next steps will be to undertake analysis of the data to uncover the number of events that may fall under the decision in *Hall v. Hall*. Those events then will be examined to determine experience with appeals actually taken or attempted, and, to the extent possible, experience with appeals that might have been taken but were not.

Total civil action filings during the study period were 843,996, including multidistrict proceedings. Consolidations in MDL proceedings, however, were excluded in counting Rule 42 consolidations. The data found a total of 20,730 cases included in Rule 42 consolidations. 5,953 were “lead” cases; the remainder were “member” cases. Together, these cases accounted for 2.5% of all

civil actions, and an indeterminate higher fraction of all civil actions that were not included in MDL proceedings. This number of actions is large enough to justify, indeed to require, that the next steps be carried out by sampling.

The data show that ten nature-of-suit codes account for 58% of all Rule 42 consolidations. Patent actions alone account for 13%, followed by "civil rights other" (7%); other contract actions (6%); prisoner civil rights (6%); securities (6%); bankruptcy appeals (6%); motor vehicle personal injury (4%); habeas corpus (4%); insurance (4%); and consumer credit (3%). One question that should be addressed in determining how heavily to sample the data is whether some of these types of actions are sufficiently distinct from general civil filings to be undersampled. Bankruptcy appeals, for example, seem distinct from other civil actions, and the concept of finality in bankruptcy is more flexible than § 1291 finality.

A comparison of consolidation rates among the districts suggests that the rates are affected by the types of filings that characterize the districts. Districts with a high share of patent actions, for example, tend to be among those with the most consolidations.

The ways in which courts dispose of consolidated actions are important in tracing the effects of *Hall v. Hall*. Eighty-four percent of the lead cases in the study have terminated in the district court. Thirty-two percent were coded as "settled." Another 22% were "other dismissal," and 10% were voluntary dismissals —— often these dispositions reflect settlements. Thirteen percent were dismissed on motion. Only 2% were disposed of at trial.

For lead cases that were disposed of, the average time from filing to disposition in the district court was 517 days. Since one in six cases had not yet reached disposition, the overall average likely will prove somewhat longer. For all consolidated cases, however, the average time was 379 days.

Deciding how to select the sample for further study is the next step. The focus should be on dispositions that are likely to generate issues under *Hall v. Hall*. Settlements seem less likely candidates —— even when fewer than all cases in the consolidation are settled, settlement of one is not likely to generate an occasion for appeal. But even settlements may need to be examined carefully —— one action in the consolidation may be terminated by the court, to be followed later by a settlement that disposes of all remaining actions, and that then gives rise to an attempt to appeal termination of the first action. Dispositions on motion are more likely candidates, whether by a Rule 12(b) motion, summary judgment, or some other motion.

Once the sample of cases is established, the next step will be to identify dispositions that fit within the ruling in *Hall v. Hall*. For those cases, an attempt will be made to find out whether

and when appeals were taken or attempted, whether the parties paid heed to *Hall v. Hall*, whether appeals were taken too late and thwarted by not paying attention, whether appeals were taken too late but survived because neither the parties nor the court invoked *Hall v. Hall*, and any added questions that may be suggested by working through the case files.

Much work lies ahead for the FJC study, even if it remains focused just on actions filed in 2015, 2016, and 2017. The subcommittee will pay close attention to the study as it progresses, seeking to identify any ways in which it can help guide the continuing work.

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E-FILING DEADLINE JOINT SUBCOMMITTEE
Suggestion 19-CV-U

The Time Computation Project adopted an all-rules definition of the "last day" for filing. Civil Rule 6(a)(4) is an example:

> (4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends: (A) for electronic filing, at midnight in the court's time zone; * * *

Judge Chagares, inspired in part by experience with a local rule in the District of Delaware and the rule in Delaware state courts, has suggested that the last day might be redefined to end "when the clerk's office is scheduled to close." The proposal is being studied by a subcommittee constituted of representatives from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

The proposal contemplates several advantages from moving the deadline back. Work-life balance for attorneys and their staffs is important. Judges too may benefit by being relieved of opportunities —— which may tend to be felt as duties —— to watch for late filings. Some litigants and firms may be better able than others to seize the opportunity for late filing, and may file late simply as a tactical maneuver.

The midnight deadline may have advantages that counter the potential disadvantages. Some filings may benefit from just a few more hours of revision and polishing. A fixed time is clear, and may be substantially uniform unless many courts change it by local rules. And lawyers operating across time zones may encounter de facto mid-day deadlines when bound by clerk's office closing times.

The subcommittee is engaged in seeking information about local rules; actual filing time patterns; whether filings after the clerk's office closes are associated with particular types of litigation or law firms; what is the experience with pro se litigants in courts that permit them to file electronically; the hours clerks' offices are open; the use of drop boxes; and still other questions. The FJC has begun a comprehensive study of local rules and filing data: "This is a big data project, and every datum tells a story." The FJC also will survey attorneys.

The subcommittee continues to gather information, including developments in the FJC research project.

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PROPOSED AMENDMENT TO RULE 7.1

The proposal to amend Rule 7.1 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.

(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.

* * * * *

Committee Note

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 is further amended to require a party 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 at the time the action is filed. 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.

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 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 party's disclosure statement or discovery responses indicate that the party 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 at the time the action is filed. Those are the citizenships that determine whether there is diversity jurisdiction. Later changes of citizenship do not change the information required and do not require supplementation under Rule 7.1(b)(2).

Intervenor Disclosure: Rule 7.1(a)(1)

The proposal to expand disclosure to include "any nongovernmental corporation that seeks to intervene" adopts a similar provision that has been adopted in Appellate Rule 26.1 and that is expected to take effect next December 1 for Bankruptcy Rule 8012(a).

Two of the three comments support the proposal. The third suggests changes that would expand disclosures for parties as well as intervenors, amending Rule 7.1(a)(1) beyond anything fairly included in the published proposal. Disclosure would extend beyond corporations; "publicly held" would be defined in some way; and disclosure would be required as to any entity required to register under federal securities laws. These changes could not be recommended without further study by the Advisory Committee and publication for comment.

The proposed amendment of Rule 7.1(a)(1) can be recommended for adoption as published.

Diversity Disclosure: Rule 7.1(a)(2)

Many comments support proposed Rule 7.1 (a)(2)'s provisions for diversity disclosure. Some comments oppose the provision. They require study, but in the end do not seem persuasive. Several comments suggest changes in the proposal as published; some of these changes will be described below, with illustrations of rule text or committee note revisions that would implement them. One or two might be adopted —— the suggestion that the committee note should be revised to include language recognizing that the court may order that a disclosure statement be sealed may be the most persuasive of the suggestions. Or the rule could be recommended for adoption as published.

Proposed Rule 7.1(a)(2) responds to the difficulties that are frequently encountered in determining whether diversity jurisdiction exists in an action that includes noncorporate entities as parties. Although these difficulties have persisted from the beginning of diversity jurisdiction, they have proliferated with the widespread resort to the LLC form to organize commercial activities. In determining diversity jurisdiction, an LLC takes the citizenship of each of its owners. If an owner is itself an LLC, the LLC party also takes on the citizenship —— including attributed citizenships —— of the LLC parent. Information about the identity of LLC owners is often difficult to come by. There are real risks that federal courts will undertake to exercise diversity jurisdiction when it does not exist, or —— perhaps worse —— will discover a diversity-destroying citizenship only after the court and the parties have expended substantial effort on the action.

Proposed Rule 7.1(a)(2) does not purport to modify the rules for determining diversity jurisdiction, either as to LLCs or as to any other form of entity that can be made a party. It may be that current rules as to LLCs should be modified, as some of the comments suggest. An Enabling Act rule, however, cannot either reinterpret § 1332 or amend it. The rule takes § 1332 jurisprudence as it is, and as it may evolve in the future. The boundaries of subject-matter jurisdiction are taken so seriously that a defect may be noticed even for the first time on appeal, and even though the parties have not raised it. Early disclosure protects not only against the parties' indifference but also against deliberate unilateral or joint suppression of facts that defeat jurisdiction.

Nor does proposed Rule 7.1(a)(2) displace Rule 8(a)(1). A party that seeks to invoke diversity jurisdiction must plead a short and plain statement of the grounds. That includes pleading the party's own citizenship. Rule 7.1(a)(2) takes over at that point. If the citizenship of any other individual or entity is attributed to the party in determining diversity jurisdiction, the party must file a disclosure statement. Rule 7.1(b) sets the time

for filing the statement at a party's "first appearance, pleading, petition, motion, response, or other request addressed to the court." A plaintiff, for example, must both plead its citizenship in the complaint and, if applicable, also file a disclosure statement that names and identifies the citizenship of any individual or entity whose citizenship is attributed to it.

The summary of comments attached below identifies the themes advanced to support the proposal. Some of these comments came from organizations, such as the Federal Magistrate Judges Association Rules Committee, the Defense Research Institute, and the Illinois State Bar Association. Many comments suggested that little or no burden is imposed by the required disclosure, reflecting the belief that at least in most circumstances a party knows or has ready access to the required information. Disclosure is faster and less expensive than jurisdictional discovery. A few suggested that absent a disclosure requirement, some parties may deliberately withhold jurisdiction information for strategic purposes. These suggestions were paralleled by a few examples of great losses incurred by delayed disclosure. Quite a few said that disclosure will remedy problems that arise from casual removals of state-court actions made without appropriate efforts to determine whether in fact diversity jurisdiction exists.

Two of the three comments opposing the proposal were provided by familiar organizations that regularly comment on published rules proposals. Many of the reasons offered by the American College of Lawyers and the New York City Bar Committee on Federal Courts are similar, and can be described together.

One common theme is that the plaintiff has the burden of pleading and, if challenged, establishing diversity jurisdiction. Not many cases show problems arising from the failure of pleading to forestall late disclosure of facts that defeat diversity. If pleading seems inadequate to the chore, a special pleading provision for LLC citizenship could be added to Rule 8(a)(1). Diversity questions can better be addressed at the Rule 26(f) conference and in the Rule 26(f)(3) discovery plan. Discovery of jurisdictional facts is better than Rule 7.1 disclosure, which should be limited to facts that bear on judicial recusal. Or diversity facts can be discussed at the scheduling conference.

Disclosure can impose substantial burdens. It may extend to thousands of individuals, and require information that is not available to a party at the time for disclosure directed by Rule 7.1(b). The burden may be compounded by the need for legal research into the rules that apply to unfamiliar forms of entities, or to familiar forms that still generate legal uncertainty (Lloyd's is offered as an example that even today provokes a circuit split.)

The burden of disclosure includes invasion of confidentiality. The LLC form is often chosen from a desire for confidentiality. The rule text that permits the court to "order otherwise" does not provide sufficient protection. (This concern is reflected in the

suggestion noted below that the committee note be expanded to recognize the court's authority to seal a disclosure statement.)

Disclosure is "overkill" if there is an alternative basis for subject-matter jurisdiction. (This objection could lead to complex applications when there are alternative but uncertain grounds for jurisdiction such as federal-questions (including "complete preemption" of claims framed under state law) and supplemental jurisdiction. It may be better to require disclosure whenever diversity jurisdiction is invoked. If disclosure shows diversity jurisdiction exists, it will often be possible to avoid what may be complicated alternative grounds for jurisdiction.)

Disclosure should end as soon as it reveals a citizenship that destroys diversity. And it may prove especially difficult in multiparty, multiclaim cases that generate uncertainty as to the grounds of jurisdiction as to some parties.

Both the American College and New York City Bar comments suggest that the problems addressed by disclosure would be better addressed by legislation or Supreme Court reinterpretation of § 1332.

These grounds for opposing proposed Rule 7.1(a)(2) were considered in earlier deliberations. Nonetheless, they deserve careful reconsideration now in deciding whether to recommend Rule 7.1(a)(2) for adoption in any form.

Modifications of the Published Proposal

Some comments expressed uncertainty as to naming and identifying the citizenship of every individual or entity "whose citizenship is attributed to that party at the time the action is filed." The concern seems to reflect removal from state court, and would be addressed by adding a few words: "filed in federal court." Those words would cover actions that were not removable as initially filed in the state court, but became removable at a later time. But they may not be needed. Rule 7.1(a)(2) addresses actions in federal court, and "in federal court" can easily be read into the rule without the added words. Nor would the added words reduce the removing party's burden to allege diversity jurisdiction, even when the state-court complaint does not identify the plaintiff's citizenship.

Concerns about privacy have been expressed in terms that go beyond the general concern about the confidentiality of such information as the ownership of an LLC. One comment refers to substantial interests in privacy or safety, and another explicitly addresses the "status of non-citizens." The Federal Magistrate Judges Association suggests that the committee note be expanded to authorize sealing: "the names of identified persons might be protected against disclosure to the public, or to other parties." References to sealing court records should be approached with great caution, but this proposal deserves serious consideration.

Disclosure is sought only to implement the limits on diversity jurisdiction, not for any bearing on the merits of the action. There is no reason to believe that federal courts are deliberately undertaking to defy the limits on diversity jurisdiction. The public interest in the facts that bear on application of diversity doctrine as it applies to noncorporate entities seems slight.

The Federal Magistrate Judges Association comment suggests one other addition to the committee note: " * * * the court may limit the disclosure upon motion of a party * * *." These words would ensure that the Note does not imply an independent responsibility of the court. But they also might imply that the court cannot act without a motion. "may limit" is not the language of duty.

The Defense Research Institute makes a suggestion that would add these words to rule text: "identifies, as specified by that statute, the citizenship of * * *." This suggestion seems to tie to its support of the suggestion noted above, which would require a party to disclose facts that establish its own citizenship independently of attribution from others.

Another suggestion is based on the proposition that a party may be unable to ascertain attributed citizenships without undue effort. "Unless the court orders otherwise" should be expanded to recognize discretion to limit the investigation a party must undertake.

Suggested Expansions

Some comments urge that the proposed rule should be expanded in various ways.

One suggestion is that the rule should require every party to disclose its own citizenship in addition to citizenships attributed from others. This proposal implies that the plaintiff cannot be relied upon to accurately plead its own citizenship even apart from attributed citizenships, and that the defendant cannot be relied upon to challenge incorrect allegations of its citizenship. Expanding the proposal in this way seems desirable only if there are substantial grounds to support that view. The American Association for Justice explicitly opposes this suggestion, finding that no concerns have been identified to support it.

Another suggestion is that the rule text should apply to all forms of jurisdiction based on citizenship, including alienage. Alienage jurisdiction is included in § 1332(a), hence in the proposed rule text. Reliance on § 1332(a) does not extend to minimal diversity statutes such as CAFA, § 1332(d); interpleader, § 1335; or single accident multiparty, multiforum actions, § 1369. Since only minimal diversity is required, the problems that prompted the proposal seem much diminished. The complications that arise from the CAFA provisions limiting jurisdiction when citizenships are concentrated in a single state, § 1332(d)(3) and (4), could make disclosure completely unworkable.

Rule 7.1(b): Time to Disclose

Two comments suggest that the time to disclose set by present Rule 7.1(b) be revised to ensure that disclosure statements are not delayed. The Defense Research Institute would add "with its first appearance, pleading, petition, motion, response, or other request addressed to the court or within 60 days of the [sic] filing the case in district court, whichever is earlier * * *." As written, this proposal would seem to require disclosure even before a party is served. A slightly different suggestion would address the service issue by adding these words: "or within 21 days after service of the first filing in the case, whichever is earlier." That could work if "first filing" were changed to something like "or within 21 days after the party is first served with [anything] in the action." But the need to fill this gap remains to be considered. Is there a need for even diversity-fact disclosure by a party that never makes an appearance, files a pleading, petition, motion, or response, or makes an "other request" to the court? Will all of those acts be so long delayed as to generate tardy and costly disclosures that defeat jurisdiction? Has there been any indication of like problems with tardy disclosure under present Rule 7.1 of interests that require recusal?

If it is decided that Rule 7.1(b) should be amended, a choice must be made whether to recommend adoption without publication, or to defer a recommendation to adopt proposed Rule 7.1(a) pending publication of a Rule 7.1(b) proposal.

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APPENDIX

Summary of Comments

RULE 7.1(a)(1): INTERVENOR

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

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

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

RULE 7.1(a)(2): ATTRIBUTED CITIZENSHIP

General Support

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

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

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

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

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

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

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

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

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

0024: Richard Shapiro.

0025: Ian Taylor.

0026: Leland Belew: The defendant manufacturer of the ladder claims "not to really exist anywhere." Records of the state of

incorporation can be out of date, and do not provide a reliable basis for determining the principal place of business. Jurisdictional discovery is ongoing. Disclosure would be better.

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

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

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

0031: Nicholas Deets.

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

0034: Mike Stephenson.

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

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

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

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

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

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

0042: Cayce Peterson.

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

0044: Chris Zainey: Similar to 0043.

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

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

0047: Michael Cruise.

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

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

0050: Crystal Rutherford.

0051: Mark Larson.

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

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

0054: George Tolley.

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

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

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

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

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

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

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

0062: Kent Winingham.

0063: Kirk Laughlin.

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

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

0066: Lee Cope.

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

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

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

0070: Charles Monnett.

0071: Ryan Skiver.

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

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

0074: Bill Cremins.

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

0076: Edward Zebersky.

0077: David Arbogast: "[A]ll too often, a defendant sued in state court removes a case to federal court who lacks diversity of citizenship."

0078: Christine Spagnoli.

0079: Marion Munley.

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

0081: Katie Nealon.

0082: Melinda Ghilardi.

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

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

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

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

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

DRI also proposes an amendment to Rule 7.1(b)(1) to forestall the risk that a party may go for a long time without triggering the time to disclose: "file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court or within 60 days of the [sic] filing the case in district court, whichever is earlier * * * [A similar suggestion is advanced by GianCarlo Canaparo, 0010: "or within 21 days after service of the first filing in the case, whichever is

earlier.] {Note that 60 days after filing often will not work —— sixty days may elapse before a defendant is served, a new party is joined, and so on. 21 days after service of the first filing in the case could work if it means after service on the party obliged to make a disclosure, but again cleaner drafting would be required.}

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The court may be able to dismiss for failure to adequately allege diversity, bypassing the need for disclosure. If diversity is adequately alleged but not challenged, there is no need. Nor is there a need if there is an alternative basis for jurisdiction. The

court can act sua sponte to require more information when that seems appropriate.

(3) The party asserting jurisdiction bears the burden of establishing it. It may be appropriate to allow general pleading —— e.g., by alleging that no party is a citizen of State X —— leaving it to a party who resists jurisdiction to disclose the diversity-destroying facts.

(4) The rule is overkill. Disclosure should be concluded on revealing a single citizenship that defeats diversity. The committee note recognizes that this is a ground for halting disclosure, but there is a "conundrum." Rule 7.1(b) requires disclosure with the party's first appearance —— how can a party then know which citizenship will defeat diversity?

(5) In multiparty, multiclaim cases it may be difficult to determine from the pleadings whether diversity jurisdiction is even alleged as to some parts of the action.

(6) Disclosure may impose a substantial burden, reaching "potentially thousands of individuals and entities * * * as of the filing date." The burden may be compounded by the need to undertake legal research to determine, under evolving and at times conflicting [state] law, which individuals and entities are included in citizenship attribution. (Lloyd's is offered as an example of a unique structure that makes diversity analysis difficult, and that has created a circuit split, see footnotes 5 and 6.)

(7) These problems should be addressed by legislation. If Congress shares the concern about ascertaining diversity, "it stands to reason that Congress would expand § 1332(c) to identify a simpler method to determine the citizenship of non-corporate entities."

0004: Andrew U.D. Straw: This comment expresses frustration with orders in an MDL proceeding that allowed the United States, as defendant, to ignore the rules for timely answers, and deflected plaintiffs' attempts to win defaults and default judgments.

0012: Mapin Desai: This comment protests the payment of "unlimited attorney fees" in bankruptcy, focusing on a particular bankruptcy.

TAB 9

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RULE 12(a): FILING TIMES AND STATUTES

Suggestion 19-CV-O

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~~[5] a federal statute, the time for serving a responsive pleading is as follows:

(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:~~

(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 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

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

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).

This structure should eliminate the risk of confusion created by the uncertainty whether there is, or ever will be, a statute that sets a different time for a United States officer or employee sued only in an individual capacity.

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TAB 10

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RULE 12(a)(4): EXPAND TIME FOR RESPONSIVE PLEADING FOR FEDERAL OFFICER

Suggestion 20-CV-B

This proposal, submitted on behalf of the Department of Justice, would extend the time set by Rule 12(a)(4) to serve a responsive pleading after the court denies a Rule 12 motion or postpones its disposition until trial, but only 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 officer or employee would have 60 days, not the 14 days allowed other litigants.

The proposal relies on analogies to other rules that extend the time to act in such cases. The nearest analogy is Rule 12(a)(3), which allows the individually-sued employee 60 days to serve an answer to a complaint, counterclaim, or crossclaim. The analogy to Appellate Rule 4(a)(1)(B)(iv) is almost as close. Rule 4 extends appeal time for any party to 60 days when a current or former United States officer or employee is sued in an individual capacity, etc. Rule 4 "includ[es] all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person." (A parallel provision in Civil Rule 4(i)(3) requires service both on the United States and also on the officer or employee.)

The amendments of Rule 12(a)(3) and Appellate Rule 4 that extend the time to answer or appeal 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 responded to requests by the Department of Justice. The Department often provides a defense in these actions. The Department needs more time than most litigants, both to determine whether to provide a defense and then to begin defending.

The proposal to amend Rule 12(a)(4) draws in part from the same practical concerns about the time needed for action by the Department of Justice. But more attention is given to a consideration unique to a motion to dismiss. Government employees sued in an individual capacity often invoke official immunity. Collateral-order appeal is ordinarily available when an immunity motion to dismiss is denied. It may be available as well when the court defers disposition, whether to trial or to an indeterminate date. This elaboration of the final-judgment rule rests on the conclusion that both qualified and absolute immunity have been recognized to protect not only against liability but also against the burdens of litigation. The prospect of litigation may deter robust discharge of public responsibilities, and the burdens of actual litigation may distract a public officer or employee from these responsibilities.

Extending the time to serve a responsive pleading to 60 days matches the time available for the Department to decide whether to represent the officer or employee, and whether to appeal. It also

protects the officer or employee who may not know, on Day 14, whether the Department will provide representation on appeal. It further protects against the possibility that serving a responsive pleading within 14 days might be taken to imply that no appeal will be taken.

Extending the time to 60 days protects the right to appeal in more important ways as well. The responsive pleading may plunge the officer or employee into the very litigation burdens that the right to appeal is designed to defer and, if successful, obviate. Rule 12(a)(4) recognizes the court's power to set a different time to serve the responsive pleading, but a burden is imposed even by the need to request an extension, and the request may be denied.

The officer or employee defendant also gains an advantage from the extended time. Appellate Rule 4(a)(1)(B)(iv) extends appeal time to 60 days even if the United States declines to represent the employee or to file an appeal. The officer or employee may prefer not to file a responsive pleading prior to the decision whether to appeal.

These reasons for extending the time to respond may be countered by the ever-present Rule 1 concern for the "speedy" —— or at least not unnecessarily delayed —— determination of every action. The plaintiff may have a valid claim. A claim based on a right so clear as to defeat an immunity defense presents a particularly strong need for prompt litigation, a need reinforced by the prospect that affirmance of the order that denies dismissal, or that recognizes discretion to defer a ruling, may be followed by a second appeal from denial of a motion for summary judgment.

Emphasis on the need to protect the purposes of official immunity might suggest that any amendment should be limited to cases in which official immunity has been advanced as a ground for a Rule 12(b)(6) motion to dismiss. That limitation would not amount to much if most of the Rule 12 motions in these cases include a motion to dismiss on official immunity grounds. Drafting a provision that limits a 60-day period to immunity cases might prove difficult. But in any event, the arguments from the Department's need for time to deliberate the appeal questions remain.

A different ground for reluctance might be found in the question why a similar extension of the time to respond should not be given to public officers or employees sued under 42 U.S.C. § 1983 for acts under color of state law. They too may be represented by government lawyers, and their government lawyers may experience the same complex organizational needs as Department of Justice lawyers. And it is possible that in some circumstances, such as claims arising from acts by a joint task force, state officers or employees will be coparties and join a motion made by the United States officer or employee. This argument, however, failed when Rule 12(a)(3) was adopted and limited to United States officers or employees.

On balance, the reasons to adopt the proposed amendment should carry the day. That would leave the drafting question. The draft advanced by the Department is clear enough:

> (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 except that 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 a responsive pleading within 60 days of the court's action; or
>
> * * *

One quibble: Garner's Guidelines for Drafting and Editing Court Rules, Chapter 4.6, lists "except that" as words to avoid. "But," or "some other more pointed term," should be used. It is awkward, however, to fit "but" into a sentence that relies on "must serve." "[M]ay serve" might do, but it might imply that the defendant need not serve a responsive pleading at all: ", but * * * may serve a responsive pleading within 60 days * * *."

A better style would be:

> , 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.

Another possibility would be to save a few words by cross-referring back to Rule 12(a)(3) —— ", or within 60 days when Rule 12(a)(3) sets the time to serve an answer at 60 days;" Cross-references, however, interrupt the flow. They are better reserved for circumstances that promote a substantial reduction in words.

The committee note can be borrowed, with some variations, from the draft submitted by the Department of Justice:

Committee Note

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days to serve a responsive pleading after the court denies a motion under Rule 12 or postpones its disposition until trial. The United States often represents the officer or employee in such actions. The same reasons that support the 60-day time to answer in Rule 12(a)(3) apply when an answer is required after denial or deferral of a Rule 12 motion. In addition, denial of the motion may support a collateral-order appeal when the motion raises an official immunity defense. Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days in these cases, and includes "all instances in which the United States represents that person [sued

in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf] when the judgment or order is entered or files the appeal for that person." The additional time is needed for the Solicitor General to decide whether to file an appeal and avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

FEB 26 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NW
Washington, DC 20544

Dear Ms. Womeldorf:

I am writing on behalf of the United States Department of Justice to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 12(a)(4)(A).

Currently, the time to answer a complaint after a district court has denied a motion to dismiss is 14 days. *See* Federal Rule of Civil Procedure 12(a)(4)(A). Personal liability suits against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), however, are subject to immunity defenses that usually carry an immediate appeal right when they are rejected by a federal district court. The appeal time under such circumstances is 60 days, the same as in suits against the federal government itself. Requiring an answer when the appellate court might uphold the immunity defense is inconsistent with the idea of "suit immunity" underlying modern official immunity defenses. It also risks jump-starting the mandatory disclosure obligations and pretrial discovery that immunity is supposed to guard against. An official's timely compliance with Rule 12(a)(4)(A) might also create confusion as to whether she is foregoing appeal.

As discussed in more detail below, we propose consideration of an amendment to Civil Rule 12(a)(4)(A) that would extend the answer deadline in suits against government officers and employees in their individual capacity to 60 days from notice of the district court's action. Such an amendment would eliminate the official's need to respond to the complaint before the federal government has made an appeal decision.

DISCUSSION

A district court decision denying a dismissal motion asserting an official immunity defense is usually subject to an immediate appeal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996). The Solicitor General must authorize the appeal if the government is to take it on the official's behalf. *See* 28 C.F.R. § 0.20(b). For that reason Federal Rule of Appellate Procedure 4(a)(1)(B)(iv) gives federal officers and employees 60 days in which to appeal even though the government itself is not a party. But while the Solicitor General considers appeal, the official remains subject to the requirement in

Federal Rule of Civil Procedure 12(a)(4)(A) that she serve an answer to the complaint 14 days after notice of the district court's ruling on his motion. The requirement that the official plead in response to the complaint's allegations is inconsistent with the immunity defense, which is conceived as "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure recognize that the government is uniquely-situated among federal litigants and that the government's interests sometimes warrant special timing rules. Civil Rule 12(a) has long allowed the government 60 days in which to serve an answer to a complaint. Appellate Rule 4 has similarly allowed for 60 days to appeal when the government is a party. Over time both rules were amended to acknowledge the government's interests in personal-capacity suits based on its employees' official acts and the government's need for extended time to address them. For example, Civil Rule 12(a) was amended in 2000 to provide federal employees 60 days in which to respond to complaints in personal-capacity cases. That amendment now appears in Federal Rule of Civil Procedure 12(a)(3). The advisory committee note accompanying the amendment observed that "[t]ime is needed for the United States to determine whether to provide representation" to the employee and that if it does represent her "the need for an extended answer period is the same as in actions against" the government itself. Appellate Rule 4(a) was similarly amended in 2011 to ensure that personal-capacity suits against federal employees are covered by the 60-day "government" appeal time. The advisory committee note accompanying that amendment made a direct link to the extended response time in Civil Rule 12(a)(3) and the reasons supporting it. The Committee stated that the appeal-time amendment "is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints[.]" It acknowledged that "[t]he same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal." *Id.* (At the same time Rule 4 was amended, Congress amended 28 U.S.C. § 2107 to also provide for a 60-day appeal time in government-employee cases).

The extended time periods under these rules reflect two things. First, the government needs more time than private litigants to assess a case and determine a district court response. Second, the government, and the Solicitor General in particular, require an extended time to make an appeal decision. The same considerations also warrant allowing a government employee 60 days in which to answer a complaint after denial of a dismissal motion. The need for 60 days is especially acute when the order is appealable. The current 14-day response period requires an employee to answer a complaint before the Solicitor General has had time to decide whether to file an appeal. That undercuts the "suit immunity" protection official immunity defenses promise, and it risks creating confusion about whether the employee will forego appeal and instead defend in district court.

"The basic thrust of" qualified immunity and similar defenses "is to free officials from the concerns of litigation," *Iqbal*, 556 U.S. at 685. Those include "disruptive discovery," *id.*, but it also includes more. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1990). The obligation to answer a complaint is one such customary litigation burden and one not properly imposed before immunity is resolved. The qualified-immunity defense presents a particularly good example. It is the most often-litigated immunity. It bars suit unless an official violated clearly-established rights. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The point of making "clearly-established law" the immunity standard is to avoid as much as possible the need for officials to join issue on and to litigate the facts. *See Mitchell*, 472 U.S. at 526-27. By limiting liability to clearly-established violations, the qualified-immunity standard achieves that by narrowing the range of cases that require further pleading, discovery, or trial. It is why, for example, a genuine dispute of material fact on the underlying constitutional claim does not foreclose summary judgment when the law is not clearly established. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled in part on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009).

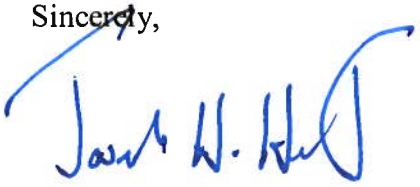
When an official *does* answer a complaint, the next likely event is an order for the parties to meet and confer and to plan for discovery and other pretrial activities. Those also are customary litigation burdens and ones qualified immunity is intended to guard against. *See Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). Taken in that light, qualified immunity is properly understood as "a right not to be subjected to litigation beyond the point at which immunity is asserted." *Id.* At least so long as an immediate appeal might vindicate an official's immunity claim, the obligation to answer a complaint should lie beyond that point.

Answering the complaint would avoid the chance of default, but it risks causing confusion as to whether the official will appeal. And as just mentioned, answering also carries the risk that the court will require the parties to begin discovery and other pretrial activities. An official might seek an extension of time, but an impatient court might deny it or even condition relief on undertaking disclosure or engaging in discovery planning. The extended times already available under Civil Rule 12(a)(3) and Appellate Rule 4(a)(1) correctly reflect the insight that extension motions are not a sufficient safeguard for the government's interests in these cases.

The proposed amendment to Civil Rule 12(a)(4) would solve these problems. It is a modest proposal consistent with the 2000 amendment to Civil Rule 12(a)(3) and the 2011 amendment to Appellate Rule 4(a)(1). A sketch of the proposed amendment is included. The draft adapts the Rule 12(a)(3) extended-response time language to the situation in which a district court denies a federal officer or employee's motion to dismiss.

Please let me know if I can provide any more information regarding this proposal. Thank you for your consideration.

Sincerely,



Joseph H. Hunt
Assistant Attorney General

Attachment

(a) Time to Serve a Responsive Pleading.

(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 order 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 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.

(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 except that 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 a responsive pleading within 60 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

* * * *

Sketch of Suggested Advisory Committee Note:

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days in which to serve a responsive pleading after a court denies a motion under this rule or postpones its disposition until trial. Suits against United States officers and employees often involve an official immunity defense and a right of immediate appeal if a court denies a motion asserting the defense. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299 307-308 (1996). The 60-day period under amended Rule 12(a)(4) corresponds to the appeal time under Federal Rule of Appellate Procedure 4(a)(1)(B). The Committee Note to the 2011 amendment to that rule explains that if the United States provides representation to the defendant officer or employee additional time is needed for the Solicitor General to decide whether to file an appeal. Extending the time for serving a responsive pleading after denial of a motion under this rule avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

TAB 11

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RULE 4(c)(3): SERVICE BY THE U.S. MARSHALS SERVICE
Suggestion 19-CV-A

At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised questions about the meaning of the Rule 4(c)(3) provisions for service of process by a United States marshal in a forma pauperis case. These questions are being explored with the United States Marshals Service. Initial discussions show that practices vary from one district to another. The Service would welcome greater national uniformity on some practices, but it is not clear whether amending the Civil Rules can usefully do more than remove an apparent ambiguity in the rule text. Nor is it clear whether the Marshals Service feels strongly about possible amendments. It may be best to carry this question forward to next fall. There is no urgent need to act, and further exchanges with the Marshals Service and the Department of Justice may provide a more secure foundation for deciding whether to recommend publication of a proposed amendment.

Rule 4(c)(3):

> (c) SERVICE. * * *
>
> (3) *By a Marshal or Someone Specially Appointed.* At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

"must so order": The central question arises from a potential ambiguity in the second sentence. When is it that the court "must so order"? The two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require the order whether or not the plaintiff has made a request. There is some disarray in the cases that address this ambiguity. Drafting a repair is easy. The question is which way the ambiguity should be fixed. The rule could say clearly that an i.f.p. plaintiff or seaman must move for a court order. It could say clearly that the court must enter the order automatically in every i.f.p. or seaman case. Or a more direct rule could say that the marshal must make service without a court order, changing the present practice that provides for marshal service only if the court so orders. As noted below, the marshals would not be likely to welcome that approach.

Rule 4(c)(3) has its roots in 28 U.S.C. § 1915(d), which provides that when a plaintiff is authorized to proceed in forma pauperis, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." The statute does not limit the category of officers to marshals. Apparently some clerks' offices actively facilitate service in i.f.p. cases.

Facilitating service by issuing process is consistent with the statute's direction that the officers of the court shall issue process —— that is a clerk job, not the marshal's. The clerk's actually making service, for example if state law allows service by mail, is consistent with the statute for the same reason. Section 1915(d) is also consistent with a rule directing service by a marshal without requiring a court order —— "[t]he officers of the court shall * * * serve all process * * *."

The possible ambiguity in Rule 4(c)(3) may be an artifact of the 2007 Style Rules. To be sure, Professor Kimble rejects the view that the present rule is ambiguous. On his view, it clearly requires that the court order service by the marshal without a request by a forma pauperis or seaman plaintiff. At the same time, he recognizes that persistent misreading of clear text may justify adding unnecessary words to correct the misreading. The immediate predecessor, former Rule 4(c)(2), read:

> (2) Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. *Such an appointment* must be made when the plaintiff is authorized to proceed in forma pauperis [etc.] * * *.

Saying that "such an appointment must be made" is more direct than "must so order." It does not seem to tie to a "request of the plaintiff." Still, "such an appointment" might refer to an appointment made on a request of the plaintiff, never mind that "appointed" is used in the preceding sentence only to refer to an "other person or officer," not a marshal.

Reading former Rule 4(c)(2) to mean that the court must order service by a marshal in all i.f.p. and seaman cases without waiting for a request by the plaintiff does not fully resolve the question. Reason still might be found to require a request by the plaintiff. The most likely concern might be that the plaintiff prefers to make service, perhaps because the plaintiff expects to do it sooner than the marshal might. A secondary reason might be that the Marshals Service would prefer to be called on to make service only when that is necessary. The alternative approaches remain open.

Practical considerations should guide the choice to be made, subject to the statutory direction that the officers of the court shall serve all process. Providing for service by someone appointed by the marshal —— or, more conservatively, by the court —— could reduce the burden imposed on the marshals.

It would be possible to venture further, considering a first-ever authorization for service of the summons and complaint by electronic means. The concerns that have thwarted electronic service as a general matter might be reduced if the marshal, or possibly the court clerk, were making the determination that e-service is likely to work for a particular defendant. There may be categories of defendants, including institutions that are frequently sued, that are strong candidates for e-service. But further work would be required before seriously considering this alternative.

Other issues might be considered as well. Marshals do invoke Rule 4(d) procedures to request waiver of service on occasion; there seems little point in amending the rule to require resort to waiver at the plaintiff's request. Uncertainties can be found in tracing through the Rule 4(b) and (c) obligations that remain on the plaintiff to engage with the court and marshal when the marshal is to make service. No practical reason to address those uncertainties has yet been found. There might be some concern that a plaintiff may suffer if the marshal fails to make service within the time set by Rule 4(m), but it seems unlikely that a court would fail to grant relief.

These questions remain on the agenda. Discussions with the Marshals Service will continue. Other means of gathering practical information about current experience and possible improvements will be sought.

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TAB 12

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RULE 17(d): NAMING OFFICE IN OFFICIAL CAPACITY CASES
Suggestion 19-CV-FF

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.[6] State and local law applies to state and local

[6] 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).

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 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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Dear Committees on Federal Rules of Civil and Appellate Procedure, and of the Supreme Court[1] —

Currently, most cases with an official capacity party — notably, virtually all civil rights litigation — are named using the name of the current holder of that office.[2] This results in multiple clear harms:

1. The case name, usually including the short form (first named patties) version, changes every time the office holder changes, as long as the case is ongoing. This has corollary harms:
    a. Notice to the court needs to be filed, causing unnecessary extra work.[3]
    b. Case cites become needlessly confusing, requiring footnotes, *sub nom* tags, etc., especially if a case name keeps shifting because it involves a high-turnover position.[4]
2. Searches of cases involving people who hold office are unable to distinguish between cases:
    a. unrelated to the office, i.e. actually about that individual *personally*;
    b. arising from the office, but in individual capacity (eg § 1983 / *Bivens*); and
    c. related only to the office, not the individual.
3. Using official capacity parties' personal names confuses tracking service of process[5], which capacity has been dismissed, etc, Multiple capacities should be separately listed parties.
4. There is the possibility of entirely collateral dispute of who actually holds the title, as with "acting" officers of uncertain authority.[6] Using an official capacity party's title sidesteps a trap that could drag the court by technicality into an otherwise irrelevant dispute.

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[1] CC to Committee on Federal Rules of Bankruptcy Procedure re FRBP 7017 & 2010, *see* footnote on page 3.
[2] All current rules *allow* designation by title. FRCP 17(d), FRBP 7025, FRAP 43(c)(1), Sup. Ct. R. 35(4). However, this is almost never actually used.
[3] Substitution is automatic. FRCP 25(d), FRBP 7025 (general) & 2012 (trustees), FRAP 43(c)(2), Sup. Ct. R. 35(3).
[4] E.g., there have been at least *five* (arguably six) DHS Secretaries just since Jan. 1, 2017: Jeh Johnson, John F. Kelly, Elaine Duke, Kirstjen Nielsen, Claire M. Grady (disputed), and Kevin McAleenan. Of those, three were Senate-confirmed.
[5] *See* FRCP 4(i)(2) vs 4(i)(3)
[6] *See e.g.* *Centro Presente v. McAleenan*, No. 1:19-cv-2840 (D. D.C. filed Sept. 20, 2019), 8th claim for relief (disputing DHS Secretary), *La Clínica de la Raza v. Trump*, No. 4:19-cv-4980, ECF No. 85-1 (N.D. Cal. filed Sept. 11, 2019) (*amicus* disputing USCIS director), Politico, *Legality of Trump move to replace Nielsen questioned* (April 9, 2019). *See also Lucia v. SEC*, 138 S. Ct. 2044 (2018) (vacating and remanding because ALJ not properly appointed).

On the other side, there is simply no clear benefit to the current norm.[7] There's no issue of reliance, *stare decisis*, or the like. There's no reasonable likelihood of confusion when a party is named by title. No law (that I know of) requires an official capacity party to be designated by their personal name; using an unambiguous job title is sufficient to "name" them. The current rules explicitly allow it.

I propose a simple fix, with provisions for the transition to the updated naming scheme. If:

- a party is named in official capacity; and
- the relevant[8] title for that capacity is unique and capable of succession[9];

then

- such parties *shall* (not *may*) be referenced by title ("title form"), rather than by name ("name form"), in the docket and case name;
- the clerk shall automatically update the docket and case name for official capacity parties[10], to designate by title rather than name, in all ongoing and future cases;
- in citations to cases preceding this change, reference by title, with a parallel reference to the name(s) used to date, is preferred; and
- official case reporters and PACER shall add a title-form alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases and to any index of case or party names, including all prior cases.

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[7] *See e.g. Flores v. [...]*, No. 2:85-cv-4544 (C.D. Cal.) (re detention of immigrant children), which has over the years been titled as *v. Meese*, *Thornburgh*, *Barr*, *Gerson*, *Reno*, *Holder*, *Ashcroft*, *Gonzales*, *Clement*, *Keisler*, *Mukasey*, *Filip*, *Holder* (same person, 2nd term), *Lynch*, *Yates*, *Boente*, *Sessions*, *Whitaker*, and now again *Barr* (also same person, 2nd term). Filed in 1985, and settled in 1997, it is still active, with a Ninth Circuit decision and subsequent motions filed within the last few months. Any case name other than *Flores v. Attorney General* is nigh useless, yet that is the one name it has *not* had.

[8] E.g. David Pekoske is currently both acting DHS Deputy Secretary and acting TSA Administrator. The two are distinct. Either or both might be relevant to a given case. All, and only, *relevant* title(s) should be named.

[9] E.g. ordinary police officers have no title distinguishing them from other officers, unlike the chief of police, which is unique. If they are fired, there is no "successor" to whom their party status could transfer, also unlike the chief. This rule would only apply to parties with a unique title that can have a successor.

[10] In case of uncertainty as to the applicable title(s), the clerk shall request parties to identify the correct title(s).

I therefore petition for rulemaking to amend FRCP 17, FRAP 43, and Sup. Ct. R. 35, as follows:[11]

FRCP 17: Plaintiff and Defendant; Capacity; Public Officers

(d) *Public Officer's Title and Name.*[12]

A public officer who sues or is sued in an official capacity ~~may~~ **shall** be designated by **relevant** official title**(s)** rather than by name **if the title is unique and capable of succession.**~~, but t~~ **A party in multiple capacities shall be designated by title for official capacity, and by name for individual capacity, listed as separate parties. The clerk or court may *sua sponte* substitute party designations, and correct the docket, to conform with this rule.**[13] **T**he court may order that the officer's name be added.

In citations to proceedings where an official capacity party was designated by name, it is preferred to cite as if designated by title under this rule, with a reference to the actual designation(s) used in the proceeding.[14]

FRAP 43: Substitution of Parties

(c) *Public Officer: Identification; Substitution.*

(1) *Identification of Party.* ~~A public officer who is a party to an appeal or other proceeding in an official capacity may be described as a party by the public officer's official title rather than by name. But the court may require the public officer's name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**[15]

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[11] Strikethrough = deletion, bold = addition, plain = original. Italics are headings in original.

[12] **[Add line break after paragraph title.]**

[13] **Rules note: Official case reporters and PACER shall add a title-format alias, and a searchable flag distinguishing personal, individual capacity, & official capacity, to all cases involving an official capacity defendant, and to any index of case or party names. Online editions shall be updated as soon as feasible, and print editions updated on the next printing. Updates shall not alter any page numbering.**

[14] **Rules note: As an example, the preferred citation form is:**

> ***See Flores v. [Attorney General]*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); order (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd*, 862 F.3d 863 (9th Cir. 2017); and order (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris.*, No. 17-56297, __ F.3d __ (9th Cir. Aug. 15, 2019).[1]**

with footnote:

> [1] **Titled as *Flores v. Meese* at initiation; *v. Reno* in 1997 settlement agreement, *v. Lynch* in 2017 district court order; *v. Sessions* in 2017 appeal and 2018 district court order; and *v. Barr* in 2019 appeal and currently. Settlement agreement predates CM/ECF.**

As opposed to:

> ***See Flores v. Reno*, No. 2:85-cv-4544 (Settlement agreement) (C.D. Cal. Jan. 28, 1997); *Flores v. Lynch*, No. 2:85-cv-4544 (Order) (C.D. Cal. Jan. 20, 2017) (ECF No. 318), *aff'd sub nom. Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017); and *Flores v. Sessions*, No. 2:85-cv-4544 (Order) (C.D. Cal. Nov. 5, 2018) (ECF No. 518), *app. dismissed for lack of juris. sub nom. Flores v. Barr*, No. 17-56297 (9th Cir. Aug. 15, 2019).**

[15] This is copied substantively from FRBP 7017: *Parties Plaintiff and Defendant; Capacity*, which says simply "Rule 17 F.R.Civ.P. applies in adversary proceedings, except as provided in Rule 2010(b)." Due to this cross-reference, FRBP needs no separate amendment. Rather than having parallel rules, I believe that all Federal rules should act by reference to a

Sup. Ct. R. 35: Death, Substitution, and Revivor; Public Officers

(4) ~~A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.~~ **F. R. Civ. P. 17(d) applies to any proceeding involving a public officer in their official capacity.**

common set except where there is reason to deviate (and then only to state the minimal difference), as FRBP 7017 does.

The change in practice this proposal seeks was specifically encouraged by the Advisory Committee in its *1961* rules amendments. *See id.* notes on FRCP[16] 25(d)(2) (moved to 17(d) in 2007):

> *Subdivision (d)(2).* This provision, applicable in "official capacity" cases as described above, will encourage the use of the official title without any mention of the officer individually, thereby recognizing the intrinsic character of the action and helping to eliminate concern with the problem of substitution. If for any reason it seems necessary or desirable to add the individual's name, this may be done upon motion or on the court's initiative without dismissal of the action; thereafter the procedure of amended Rule 25(d)(1) will apply if the individual named ceases to hold office.
>
> For examples of naming the office or title rather than the officeholder, see Annot., 102 A.L.R. 943, 948–52; Comment, 50 Mich.L.Rev. 443, 450 (1952)[17]; cf. 26 U.S.C. §7484[18]. Where an action is brought by or against a board or agency with continuity of existence, it has been often decided that there is no need to name the individual members and substitution is unnecessary when the personnel changes. 4 [Moore's Federal Practice (2d ed. 1950)], 25.09, p. 536[19]. The practice encouraged by amended Rule 25(d)(2) is similar.

Substitution is now automatic under 25(d)(1) (now 25(d)), and thus the pre-1961 concerns about abatement and the personal vs office-holder character of *mandamus* no longer apply.

However, 25(d)(2) (now 17(d)) had a distinct purpose: to name officers by title, so that there would be *no* need to name the individual, and *no* substitution at all (not even an automatic one). These purposes are still useful. Failing to heed them causes other harms, as I explained on the first page.

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[16] This change was incorporated into FRAP 43(c) in 1967 without further elaboration.

[17] "In view of the fact that the suit against the governmental representative is so much a part of our system of jurisprudence, probably the most practical solution is a compromise under which suit could be brought against the office instead of the official.[40] If, therefore, the official leaves office while the action is pending, the suit merely continues against the successor. No substitution of names would be necessary if the original official was not sued by name. The courts have long held that an action brought against a board or agency with continuity of existence does not abate upon a change in personnel, and no substitution is needed.[41] There is no reason why this practice can not be extended to allow suit against an office with continuity of existence, though held by successive individuals. Many state courts very early recognized this general approach in holding that a mandamus proceeding goes to the office, not to the official, so that a mandamus action against an official will not abate upon his leaving office.[42]
[40] 4 Moore, Federal Practice 536 (1950)
[41] 102 A.L.R. 943 at 956 (1936); *Murphy v. Utter*, 186 U.S. 95, 22 S.Ct. 776 (1902); *Leavenworth County v. Sellew*, 9 Otto (99 U.S.) 624 (1878); *Marshall v. Dye*, 231 U.S. 250, 34 S.Ct. 92 (1913); *Irwin v. Wright*, 258 U.S. 219, 42 S.Ct. 293 (1922).
[42] 102 A.L.R. 943 at 948-952 (1936)."

[18] 26 U.S. Code § 7484: Change of incumbent in office: "When the incumbent of the office of Secretary changes, no substitution of the name of his successor shall be required in proceedings pending before any appellate court reviewing the action of the Tax Court."

[19] This corresponds to § 25.41–45 in Moore's 3d. ed. (2016).

It is the exception, not the rule, that officers are sued in *both* their individual and official capacities, or that the individual who happens to hold the office is even materially relevant to the case.

When they are, the individual and the office litigate as distinct persons. The individual brings separate motions to dismiss, under different legal standards (e.g. qualified immunity). The official capacity, i.e. the office as opposed to the person holding it at the moment, is really a distinct party. It should be named accordingly, i.e. by the title of the office, and listed as a separate party.

Sometimes an office exists but is unfilled.[20] It of course can be sued anyway — and how, but by title?

Unfortunately, in more than half a century of practice since the Committee endorsed use of titles rather than names by default, the current rule has proven insufficient to make it happen. Almost no litigation actually uses title-based designation; we are still mired in pointless naming of individuals when the suit is against the office. It is well past time to change this rule from "may" to "shall".[21]

I have attached as exhibits relevant portions of the 1961 record on FRCP 25(d)(2), including the law review cited in the Notes and the sections of *Moore's* (3d) corresponding to those cited.

I request to participate remotely at any hearing on the matter, and to receive emailed copies of all relevant agendas, minutes, reports, or other documents.

Respectfully submitted,
Sai[22]
legal@s.ai / +1 510 394 4724

[20] Such gaps will inevitably happen during the period just after events triggering FRCP 25(d) substitution, and before the successor is clear. E.g. right now, there is no DHS Secretary: Sec. McAleenan resigned, the succession rule doesn't permit "acting" officials such as Dep. Sec. Pekoske to become Secretary, and the President has not yet appointed a successor.

[21] If the Committee does not pass "shall", then I ask it to indicate a very strong preference—e.g. "should, by default", "are encouraged to", *vel sim.*—that using titles should be the default (and keep the proposed clerk's designation authority).

[22] Sai is my full legal name; I am mononymous. I am agender; please use gender-neutral pronouns. I am partially blind. Please send all communications, in § 508 accessible format, by email.

TAB 13

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DISCUSSION: CONSENT AGENDA?

A conference call among most of the reporters for the advisory committees and the Standing Committee raised, among others, the question whether committee members would find it useful to establish a consent agenda. Various forms could be devised. A familiar form would be to provide that items on the consent agenda will be brought on for discussion at a committee meeting at the request of any committee member, but otherwise will be removed from the agenda without discussion. An item could be moved to the discussion agenda for the same meeting by a request made at least one week before the meeting; later requests would presumptively postpone discussion to a later committee meeting. Responsibility for assigning matters to the consent agenda would involve at least the advisory committee reporters, and might well involve the committee chair as well.

The Judicial Conference has a consent calendar. The Executive Committee frequently places on the consent calendar Standing Committee proposals that rule amendments be transmitted to the Supreme Court. That practice provides some support for parallel practices in the advisory committees, although the analogy is not complete. The basic purposes are to reduce the time each committee member needs to devote to an item that is not likely to require preparation for active debate, and to free committee discussion time for more important items. But these purposes may deserve more weight in the Judicial Conference procedure. A proposal makes its way to the Judicial Conference only after protracted and careful deliberation and, almost always, public comment. Bypassing even initial advisory committee discussion lacks those protections, even though any single committee member may advance a consent item to the discussion agenda.

Establishing criteria for a consent agenda may not be easy. Some “mailbox” suggestions from pro se litigants reflect misunderstanding of current rules and fail to so much as hint at opportunities to improve style or substance. (Other suggestions from pro se litigants are obviously worthy, and may be quite sophisticated.) But many suggestions are cogent. The shortcomings still may arise from an incomplete grasp of current procedure, or from dissatisfaction with a probably wrong procedural practice adopted by a single court or even a few courts. Still other suggestions advance arguments for fine-grained amendments that might well be worthwhile in their own terms but fail to account for the institutional costs that attend rules amendments from the beginning in an advisory committee on through to recognition and implementation by bench and bar.

The information items that follow this note are offered as models of suggestions that the reporters think might be suitable for a consent agenda if that practice is adopted. These examples should advance consideration whether to adopt a consent agenda.

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RULE 16 SETTLEMENT CONFERENCES

Suggestion 19-CV-GG

This proposal, submitted by retired Judge William P. Lynch, addresses several aspects of Rule 16 settlement conferences. The proposal is presented in a three-page letter that summarizes an article by Judge Lynch, *Why Settle for Less? Improving Settlement Conferences in Federal Court*, 94 Wash. L. Rev. 1233-1280 (2019).

The use of Rule 16 conferences to promote settlement is addressed in Rule 16(a)(5), (c)(1), and (c)(2)(I). The committee note to the 1983 Rule 16 amendments, addressing what then was Rule 16(b)(7), notes that "it has become commonplace to discuss settlement at pretrial conferences." The Note suggests that "settlement should be facilitated at as early a stage of the litigation as possible." At the same time, it recognizes that "it is not the purpose * * * to impose settlement negotiations on unwilling litigants." It also suggests that the judge to whom the case is assigned "may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate." A settlement conference, further, "is appropriate at any time," even in conjunction with a pretrial or discovery conference. Rule 16 settlement conferences are well entrenched. Any questions go to how they are conducted and by whom, not to whether they should occur.

Three major topics are addressed. The first would amend Rule 16 to provide that a settlement conference cannot be conducted by the trial judge; a pretrial judge can conduct a settlement conference, but cannot rule on dispositive motions after an unsuccessful conference. The second would amend Rule 16 or add committee note language to adopt an objective measure for Rule 16(f)(1)(B) sanctions for failure to participate in good faith in a settlement conference. The third would amend the rules to prohibit disclosure on a motion for Rule 16 sanctions of communications made during a settlement conference; the article suggests that Rule 16 should be amended, but the letter redirects the suggestion toward the Evidence Rules.

Participation by Judges

The suggestion that trial judges should be excluded from Rule 16 settlement conferences was developed in detail in an article by Professor Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement,* 78 Ohio St.L.J. 73 (2017). That proposal went further than Judge Lynch's proposal to exclude participation by a "pretrial" judge as well as a trial judge. The concerns raised by Professor Deason, and the sources of insight drawn from social science perspectives, were very similar to the equally thorough development provided by Judge Lynch. These concerns may be briefly noted.

The parties may feel coerced by the fear of displeasing a judge who will preside over proceedings that follow a conference

that does not lead to settlement. “Some judges are proud of the assertive style they use at settlement conferences, which they believe helps them settle difficult cases. But even judges who do not purposely use an assertive style may feel subtle pressure to resolve cases at a settlement conference.”

Strategic behavior may lead the parties to present incomplete and misleading information, and “be less than candid about their analysis of the legal and factual issues.” They feel less able to explore settlement with a judge assigned to the case, for fear of prejudice to ongoing proceedings, and fear the judge is “much more likely to be biased than other neutrals.” Even apart from that, “judges may know less about the case than they think.”

Lawyers’ fears of “bias” are thought to be well founded. Information is often disclosed to the settlement judge in confidence, and it is difficult or impossible for the judge to avoid being influenced by it. Impressions of the parties and their positions formed in the conference are likely to carry over, to the point of affecting credibility determinations and decision on the merits or conduct of a jury trial.

These concerns were considered at the November 2017 meeting. The Advisory Committee decided to remove Professor Deason’s proposal from the agenda. The grounds for the decision are reflected in the relevant agenda materials and Minutes, which are attached. Involvement of the trial judge is appropriate in some circumstances. Judges know that coercion is inappropriate, and most judges are alert to the need to constrain the “soft power” that inheres in their office. A flat prohibition seems too broad, and a suitably nuanced rule may be difficult to achieve.

Res judicata does not govern successive consideration of the same or similar issues. Both Professor Deason and Judge Lynch have presented persuasive reasons to be cautious about participation by trial judges in Rule 16 settlement conferences. But those reasons were explored thirty months ago. The decision made then to remove these questions from the agenda may continue to hold good.

Objective Standards for Sanctions

These questions are new. They relate to Rule 16(f)(1)(B):

(f) SANCTIONS.
(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
(A) fails to appear at a scheduling or other pretrial conference;
(B) is substantially unprepared to participate —— or does not participate in good faith —— in the conference; or
(C) fails to obey a scheduling or other pretrial order.

Judge Lynch accepts the use of sanctions measured by objective standards, including for failure to appear at a settlement conference, being unprepared to participate, or disobeying an order. "The rules" may require the parties to notify the court if they are not prepared, or do not intend, to negotiate at a settlement conference. The parties may be required to state their positions.

But sanctions should not be based on "[s]ubjective behaviors," including "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.'" Such considerations do not provide the parties with a clear understanding of what they must do, and are difficult to implement. Perhaps more importantly, they curtail the right to refuse to compromise. Judge Lynch seems to accept the proposition that a party cannot be required to accept less than it claims, nor to pay anything if it denies liability.[7] In addition, strategic bargaining behavior should be accepted, whether it is the hope to establish favorable legal precedent, send signals of resolve to other potential adversaries, or "'secure the procedural protections and public visibility that trials afford.'"

Judge Lynch provides a few examples of decisions imposing sanctions based on subjective measures of good faith. His concerns can be illustrated by a hypothetical example: It would not do to impose sanctions for refusing to negotiate away a position that cannot be defeated by a motion to dismiss or for summary judgment. Indeed, Rule 11 shows that sanctions cannot be imposed simply for advancing a position that is dismissed on the pleadings or defeated by summary judgment.

The question posed by this suggestion is whether improper measures are used to impose Rule 16(f)(1)(B) sanctions often enough to warrant amending the rule. A committee note could not be adopted without a rule amendment. It is not clear whether amended rule text should be limited to settlement conferences, or should include all failures to participate in good faith in any Rule 16 conference. The reasons that led to an objective standard for most Rule 11 sanctions might justify an all-purposes objective standard for Rule 16. But the subjective "improper purpose" standard of Rule 11(b)(1) might be appropriate for some elements of Rule 16. Some care would be required in drafting any new rule text.

An attempt to adopt an objective standard for Rule 16(f)(1)(B) sanctions also might need to consider related questions posed by

[7] It might be argued that a party cannot resist surrendering positions that are manifestly unfounded as a matter of fact or law. But it would be difficult at best to attempt to import dispositive-motion standards into sanctions for failure to participate in good faith in a Rule 16 settlement conference. The "later advocating" provision in Rule 11(b) should suffice to support appropriate sanctions.

Rule 16(c)(1). Its first sentence directs that a represented party "must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference." Does or should this direction require stipulations or admissions that a party is unwilling to make? Coerced partial "settlement" seems no more appropriate than coerced complete settlement. The second sentence directs that "[i]f appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." This direction is only to consider possible settlement, not to provide a party willing to settle or a representative with authority to settle. But amending part of Rule 16 to clearly exclude sanctions for what the court finds is an unreasonable failure to settle may require parallel revisions to other parts.

One added ground for caution might be that forestalling occasional improper sanctions would not do much to reduce whatever coercive pressures might be exerted by judges anxious to extract settlements from reluctant parties.

So the question: Is there enough ill-advised use of Rule 16(f)(1)(B) sanctions in connection with settlement conferences to warrant further exploration of rule amendments?

Procedural Safeguards

The closing pages of Judge Lynch's article suggest "substantive and procedural safeguards" to be included in district court local ADR rules. Two reflect themes addressed in the sanctions discussion: a party should be required to notify the court if it does not intend to negotiate at a settlement conference, but the parties should be required to attend the conference and be prepared to discuss their positions. The third proposal is that courts should protect the confidentiality of information disclosed at a settlement conference; this proposal is redirected to the Evidence Rules, and apparently is limited to forbidding disclosure in a motion seeking sanctions under Rule 16. The fourth proposal is that reasonable limits should be set on the number and length of settlement conferences to protect against the use of leverage by an economically more powerful party over other parties. Finally, the court "should broach the idea of settlement early in the case to try to select an appropriate time for the settlement conference."

The choice to focus these suggestions on local district rules does not foreclose consideration as part of a Rule 16 project. But it is a good indication that they are not in themselves sufficient reason for undertaking a Rule 16 project that otherwise would not be taken up. They will merit at least initial consideration, however, if a Rule 16 project is taken up.

APPENDIX

November 2017 Advisory Committee Meeting

Excerpt from November 2017 Agenda Book

7 A. Rule 16: Role of Judges in Settlement

This item comes to the agenda in the form of a law review article by Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 Ohio St.L.J. 73 (2017).

The article addresses the overlap of functions when a judge assigned to a case for pretrial and trial also becomes involved in promoting settlement. It offers an exhaustive survey of legal literature and an array of social-science literature. Competing points of view are presented clearly and fairly. It provides an excellent foundation for considering possible rules to regulate the combination of adjudication and settlement functions in a single judge, if the topic is to be explored further.

This topic is presented now to invite discussion. The question is whether it should be developed further, and whether there is a prospect of meaningful rulemaking that warrants additional examination of this issue? This question is in part empirical: how often do federal judges press for settlement in ways that go beyond the bounds that might be set by a formal rule? And it is in part pragmatic —— how effective would a formal rule be in restraining the activities it attempts to prevent?

The specific proposal, pp. 139, 140-144, is that Rule 16 be amended to impose "a structural separation of neutral functions." A judge could serve as a "settlement neutral," but not in a case assigned to the judge "for management and adjudication." The rule would apply in both bench and jury trials. An exception could be made for consent, but only if the suggestion comes "entirely at the initiative of the parties." And the rule should prohibit settlement judges and mediators from reporting settlement communications to the assigned judge.

Other parts of the article contemplate that the judge assigned to the case could urge the parties to consider settlement and suggest local-rule or other ADR procedure.

Three major concerns are identified in combining the functions of assigned judge and settlement neutral.

The inherent force of settlement guidance offered by a judge is enhanced if the judge is assigned to the case for all purposes, affecting the parties in ways that are

characterized as coercion. No matter how vigorously a judge insists that guidance, suggestions, and evaluations are offered just to help, not to pressure, the parties and counsel may reach agreements framed by fear of displeasing the judge.

A judge can function effectively in promoting settlement only by gathering information that would not be presented in pretrial or trial. The information may be presented in ex parte discussions that remain unknown to other parties, and may remain uncountered. It is difficult, if not impossible, to mentally sequester the inadmissible and often untested information from the judicial functions of pretrial management and decision on the merits.

Parties may react to these concerns by being less forthright in discussing the case with an assigned judge. For that reason a settlement judge or mediator may promote better, and perhaps more, settlements.

The article also notes arguments that support an active settlement role for the assigned judge, particularly at pp. 107-108. The assigned judge begins the settlement task with more information about the case, particularly if there has been significant activity in the case before settlement is promoted. And the parties may at times feel that the assigned judge's involvement is more like having a "day in court." Elsewhere, it is recognized that an assigned judge may be able to speak reason to parties who remain unreasonably intransigent despite cautionary advice from their lawyers.

A separate practical concern may be that it might prove difficult to trade off the role of settlement neutral to another judge on a court that has only a small number of judges.

The abstract arguments supporting an active settlement role for the assigned judge are supplemented by exploring the variations in practice that remain today. Some assigned judges continue to participate in pursuing settlement. Some impose tight limits of self-restraint. Others become more deeply involved. Local district rules likewise vary. Efforts to limit assigned judge participation through the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges have come to essentially the same place: a judge may encourage parties to settle, but should not coerce any party to surrender the right to judicial decision. The Code also permits a federal judge, with the parties' consent, to confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

Overall, the arguments in a long familiar debate are presented clearly and cogently. The immediate question is whether to explore further the ultimate recommendation to adopt a rule that prohibits an assigned judge from also assuming the role of a settlement neutral. At least three further questions are wrapped up in this question: Is a flat prohibition the wisest course to follow? If not, is it possible to draft a more nuanced rule that will effect significant improvement on the present array of disparate practices? And if a good rule can be drafted, can it be presented in a way that will subdue predictable resistance from many judges who now combine the roles of assigned judge and settlement neutral, and believe they are advancing the just, speedy, and inexpensive determination of their cases?

Criminal Rule 11(c)(1) provides what might seem a reasonably clear model for a flat prohibition:

> An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.

The very context of the prohibition, however, shows that it is not like civil practice. The Civil Rules do not, and need not, recognize the parties' freedom to discuss and settle. Private settlement is vastly different from a guilty plea.[8] Rule 16, further, has long recognized a role for the judge. The current version is Rule 16(c)(2)(*I*): "the court may consider and take appropriate action on * * * (*I*) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." Rule 26(f), further, directs that in their conference the parties must consider the possibilities for promptly settling or resolving the case.

Nor does Professor Deason suggest removing the assigned judge from any role with respect to settlement. As part of case management, the assigned judge should remain free to guide the parties toward the process of settlement. Urging the parties to explore settlement through a neutral process, including a process that

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[8] The committee note for the 2002 Criminal Rules amendments states that the Advisory Committee had considered the question whether Rule 11(c)(1)(A) permits a judge who does not take the plea to serve as a facilitator in reaching a plea agreement. It decided to leave the rule as it is, with the understanding that inaction was not intended to approve or disapprove the decisions that permit that practice. That cautious approach clearly signals the difference from civil practice.

intimately involves a different judge of the same court, is accepted as a legitimate, indeed important, part of case management.

Once it is accepted that the assigned judge has a legitimate role to play in managing the parties' engagement in the settlement process, the challenge will be to draft rule language that sets boundaries that make sense and that are clear enough to be effective. Some guidance may be found in the underlying concerns. The rule should provide that the assigned judge may not learn from any source information about the case or the parties' positions that does not emerge in managing the case outside the settlement process. That provision will guard against the judge's involuntary, subconscious consideration of information that is not admissible for decision. It should encourage the parties to be as forthcoming as they ever will be in settlement, particularly mediation. The rule also should protect against coercion. The assigned judge should be free to remind the parties of whatever local rules apply to ADR. Beyond that, it is likely useful to provide that the parties can consent to enlisting the assigned judge as a settlement neutral. The risk of coerced consent can be reduced by a provision similar to the Rule 73(b)(1) procedure for consenting to trial before a magistrate judge. This protection would be most effective if it provides that in every case, the clerk must notify the parties of the opportunity to have the assigned judge participate as a settlement neutral; absent consent of all parties, the assigned judge cannot serve as a settlement neutral. (An exception to the "every case" aspect could be made to accommodate judges who do not want to play this role even with party consent.) To be complete, a rule likely should prohibit a motion by any party, or all parties together. Only unanimous consent through the clerk's confidential process would do.

Crafting all of that into Rule 16 will be no easy chore. Complicated rules create familiar risks of misunderstanding and misapplication. Keeping complication even close to the limits of feasibility can easily set prohibitions that are undesirable.

At the outset, one must ask whether this is an example of a solution in search of a problem. Many, indeed perhaps most, judges might say that they already carefully maintain the separation this article advocates, by avoiding substantive involvement in settlement in cases assigned to them. If that is so, then is there a need for rulemaking on this subject? And even if there may be a need to look further into this, another question remains. The tensions arising from participation by the assigned judge in promoting settlement are familiar.

Persuasive arguments for limiting an assigned judge's involvement are met by strong arguments supporting involvement. These tensions will not easily yield to resolution even by an admirably crafted law review article. Does the prospect of meaningful rulemaking warrant pursuing these questions now, or in the near future?

Excerpt from November 2017 Minutes

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement,* 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions —— the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.

These questions are familiar. Professor Deason notes that after exploring these problems both the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges adopted principles that simply forbid coercing a party to surrender the right to judicial decision.

These questions are regularly explained in the Federal Judicial Center's educational programs for judges, including the programs for new judges. Discussion at those programs shows that many judges prefer to avoid any involvement with settlement discussions. Some, however, believe that they can play an important role in

facilitating desirable settlements. It may well be that judges who have this interest and aptitude play important roles.

Judge Bates followed this introduction by noting that this suggestion has not come from the bar. “Judges do have a variety of perspectives. I would guess that most judges work hard to avoid involvement in settlements.” Judges often refuse active participation, but do encourage the parties to explore settlement.

Judge Fogel noted that some judges do become involved in settlements, usually with the parties’ consent. Some, on the other hand, refuse to become involved even if the parties ask for help from the judge. Judges divide on the question whether it is even appropriate to urge the parties to consider settlement. “Judges have different temperaments and skill sets.” The Code of Conduct gives pretty good guidance on the need to avoid coercion. “We should educate judges to be alert to uses of ‘soft power.’” It is difficult to see how a court rule could improve on the present diversity of approaches.

Another judge fully agreed. “The key is coercion, and judges need to be aware of subtle pressure.” Most often the judge assigned to the case assigns settlement matters to a magistrate judge. But as a case comes close to trial, and at the start of trial, the judge knows a lot about the case, and can really help the parties reach settlement. The proposed rule “would have my colleagues up in arms.”

A Committee member described one case in which, before a jury trial, the judge told one party that something bad would happen if the case were not settled. Other than that, he had never encountered a judge who pressed one party to settle. “But as it gets closer to trial —— often a jury trial —— there may be pressure on both sides.”

A judge suggested that it is easy to abide by the command of Criminal Rule 11(c)(2) that the judge not participate in discussions of plea agreements. “But for civil cases, where lawyers want the judge to talk to them, it is hard to draft a rule that would not make me nervous.”

Another judge observed that there are different pressures in bankruptcy and other bench trials.

The discussion concluded by deciding to remove this proposal from the agenda.

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William P. Lynch

P.O. Box 67525
Albuquerque, NM 87193

Phone: (505) 225-7847
Email: wlynchadr@gmail.com

November 25, 2019

Hon. John D. Bates
Chair, Advisory Committee on Civil Rules
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Ave., NW, Room 4114
Washington, DC 20001

Re: Rule 16 and settlement conferences

Dear Judge Bates and Members of the Advisory Committee on Civil Rules:

Alternative dispute resolution processes have been fully incorporated into federal court, and settlement conferences have long been used by federal judges to attempt to settle cases. Because the vast majority of cases settle before trial, a settlement conference may substitute for a party's "day in court," so it is important that settlement conferences provide parties with both substantive and procedural justice. I was a New Mexico state district judge and a United States Magistrate Judge in the District of New Mexico for over twenty two years until I retired in 2017, and conducted hundreds of settlement conferences during that time. I have enclosed a copy of an article that I recently published in the Washington Law Review that analyzes whether settlement conferences in federal court are of high quality and provide parties with procedural fairness so that they perceive that the settlement conference process is fair and that they were not coerced into settling their case. The article recommends several possible changes to Federal Rule of Civil Procedure 16.

First, the article recommends that Rule 16 be amended to (1) preclude trial judges from conducing settlement conferences in their own cases and (2) bar judges who conduct settlement conferences from ruling on dispositive motions after holding an unsuccessful settlement conference. Second, the article suggests that the Rule or Advisory Committee notes provide for an objective standard for assessing whether a party participated in good faith at a settlement conference.

Allowing judges to actively promote settlement of civil cases contrasts sharply with the prohibition of judges being involved in settlement discussions in criminal cases. Federal Rule of

Criminal Procedure 11 was amended in 1975 to provide that the court "must not participate" in discussions with a defendant to reach a plea agreement. The United States Supreme Court recognized that this prohibition ensures that a defendant will not "be induced to plead guilty rather than risk displeasing the judge who would preside at trial." United States v. Davila, 569 U.S. 597, 606 (2013).

Judicial involvement in settlement conferences brings with it the possibility that the parties will settle the case under an explicit threat of coercion. See Kothe v. Smith, 771 F.2d 667, 668-69 (2d cir. 1985). Even if judges do not explicitly threaten retribution if the case does not settle, judicial involvement in settlement discussions brings with it an implicit threat of coercion. The parties may worry that their refusal to settle could affect the judge's rulings on dispositive or procedural motions in the present or future cases. The potential for coercion is exacerbated by Rule 16(f)(1)(B), which allows the court to sanction a party who "is substantially unprepared to participate—or does not participate in good faith—in the conference." The Rule and Advisory Committee Notes do not define what constitutes good faith participation at a settlement conference, and judges have reached conflicting and contradictory results when assessing this issue.

In addition to concerns about possible judicial coercion at settlement conferences, recent studies of decisionmaking by judges raise several questions about whether the trial or pretrial judge should hold a settlement conference in the case. Judges may be exposed to a great deal of inadmissible information during a settlement conference. Psychological studies demonstrate that judges have difficulty disregarding inadmissible information once they have learned it. A second danger is that judges may be influenced by feelings about the parties that are generated during the conference. Third, judges, like all people, are subject to intuitive biases, such as confirmation bias or the hindsight bias, that may unconsciously impact the judge's rulings after the settlement conference. Given all the issues that arise when a judge conducts a settlement conference, Rule 16 should be amended to prohibit trial judges from holding settlement conferences in their cases, and pretrial judges should not rule on dispositive motions after an unsuccessful settlement conference.

To ensure that parties do not feel coerced into settling their case and to reduce the likelihood of satellite litigation, Rule 16 or the Advisory Committee notes should adopt an objective standard for assessing whether a party participated in good faith at a settlement conference. Sanctions are appropriate if a party violates a rule or order specifying objectively determinable conduct, such as failing to attend the conference or failure to submit a position paper prior to the settlement conference. Sanctions should not be awarded for failing to bargain sufficiently, failing to make a reasonable offer, and failing to have a representative present with "full settlement authority." A settlement conference involves the exercise of judgement by the participants—the parties, insurers, lawyers and judge—in a complex situation with multiple variables. Each of the participants brings his or her own interests and perspectives to resolution of the case. A party should not have to surrender its honest evaluation of the cases to avoid the

imposition of sanctions based on a court's subjective evaluation of whether the party participated in good faith at the settlement conference.

Confidentiality is essential to the integrity of settlement conferences. It allows parties to raise sensitive issues and discuss creative ideas and solutions that they may otherwise be unwilling to discuss. Yet many parties disclose information discussed at a settlement conference when claiming that the other party failed to participate in good faith at the conference. The Alternative Dispute Resolution Act of 1998 directed local districts to provide for the confidentiality of ADR processes and to prohibit the disclosure of confidential communications. This process led to inconsistent rule being adopted by federal district courts. While the article suggests that Rule 16 be amended to provide that communications during a settlement conference should not be disclosed in a motion seeking sanctions under Rule 16, in retrospect I believe that this issue may be better addressed by the Federal Rules of Evidence, and I will contact the Advisory Committee on Evidence Rules to bring this issue to their attention.

This letter is just a brief summary of the article, which elaborates (I hope in not too much detail) on this and other issues concerning settlement conferences. I know the Committee has many pressing issues, but I wanted to send the article to you to see if it merits discussion by the Committee. If I can provide any further information to you, please let me know.

Sincerely,

William P. Lynch

cc w/ enc: Members of the Advisory Committee on Civil Rules
Hon. Debra A. Livingston, Chair, Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules

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TAB 15

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TIME LIMITS IN SUBPOENA ENFORCEMENT ACTIONS
Suggestion 19-CV-II

This proposal is expressed in general terms that might be read to address all proceedings to enforce a "subpoena." As noted below, that seems an overreading. Considering it only as a proposal for proceedings to enforce Congressional subpoenas, the question can be framed clearly.

The first line focuses on "presidential obstruction." The third line laments that "[t]he executive department has successfully stonewalled Congressional discovery by using specious arguments and the lack of an enforceable, efficient time standard by the courts to provide any sort of efficient subpoena enforcement."

The suggested cure offers explicit time limits for proceedings in the district courts and courts of appeals. The Supreme Court is addressed in more open-ended terms.

For district courts, decision is required within 7 days from filing a petition to enforce a subpoena. The reply is due within 2 days; a hearing must be held within 2 days; and decision must be rendered within 3 days.

In the courts of appeals, the overall time seems to be 9 days. Two days to docket the appeal; 2 days for the reply; 2 days to hold the argument; and 3 days to decide.

For the Supreme Court, there should be "such an expedited schedule" for filing an appeal or petition for certiorari, "with immediate reply and hearing and decision required as above." Some uncertain provision should be made to force prompt action while the Court is in summer recess.

At least two reasons counsel that this proposal be removed from the agenda even as limited to proceedings to enforce Congressional subpoenas. One focuses on the problems that arise from any rules that establish docket priorities, and particularly from those that would establish severe limits for proceedings that raise issues that are both conceptually complex and immediately sensitive. Suggestions to impose time limits on judges have been regularly rejected, reflecting express Judicial Conference policy.

The second reason is that courts in fact seem to be responding with as much speed as can be made consistent with deliberate consideration and disposition. Due judicial diligence may be frustrating at times, particularly in the highly charged atmosphere surrounding the 2019 impeachment proceedings in the House of Representatives. But political frustration should not justify time limits that depreciate the role of the judiciary. Congress can choose to pursue other paths, most notably contempt of Congress. A congressional choice to resort to the courts should accept the needs of proper judicial procedure.

The proposal would be hopeless if it were read to address all proceedings to enforce "subpoenas." Despite the occasional simple references to enforcement of subpoenas, it does not seem to be intended to go that far. A preliminary list of some of the reasons to read it as limited to enforcement of Congressional proceedings would include at least these items:

Proceedings to compel production of information include many matters independent of pending civil litigation. Should a rule be limited to commands that are technically subpoenas, or should it extend to such similar devices as summonses or even civil investigative demands? What of grand jury subpoenas? District courts regularly encounter proceedings to enforce administrative demands for information, and IRS summonses are familiar. A Freedom of Information Act suit may be brought for the purpose of obtaining information to use in pending or anticipated litigation. The list could be expanded.

Looking only to proceedings internal to civil litigation, Rule 45 subpoenas to testify or produce documents issue in great number, commonly without court involvement. Establishing time limits to resolve disputes about compliance is not an attractive proposition. And, reverting to the problem of definition, what of disputes over Rule 34 requests to produce? Rule 27 proceedings to perpetuate testimony?

If, as seems unlikely, the proposal is meant to venture beyond actions to enforce Congressional subpoenas, it does not deserve serious study.

From: FRED WILCON <fbjon@aol.com>
Sent: Tuesday, December 24, 2019 10:57 AM
To: RulesCommittee Secretary
Subject: Update the procedure to deal with Subpoenas from Congress and Senate

Dear Sir/Madam
If anything has emerged from the latest episode regarding presidential obstruction, it is that the Courts need to have updated and expedited procedures for dealing with the consideration of and enforcement of subpoenas. The executive department has successfully stonewalled Congressional discovery by using specious arguments and the lack of an enforceable, efficient time standard by the courts to provide any sort of efficient subpoena enforcement. This is a disservice to the country and a perversion of justice.

I suggest that there be a very tight procedure for enforcing/ challenging subpoenas and appealing from rulings so that such matters receive immediate priority,above all other pending cases and docket matters so that from district court through circuit courts and even through the Supreme Court, the whole process can be done in three weeks or less. There is no need for more time The issues are usually very clear, and more often than not, the challenges involve specious arguments that are interposed for no other purpose than delay!! (When will the Courts apply Rule 11 to sanction such conduct?) The procedure should apply to subpoenas for witnesses (whether government employees or not) and for documents.
Once a petition to enforce a subpoena is filed, a reply should be required within 2 days. Argument should take place not more than 2 days from then and judges should be required to rule within not more than 3 days from conclusion of argument! (no time out for weekends or holidays) The whole proceeding should be open to the public except if national security issues are (REALLY involved) and there should be a penalty for a false assertion of such an exemption.)
An appeal must be docketed not more than 48 hours from a ruling, with reply and argument and decision to follow on the 2 and 3 day schedule as in the District Court. (En banc hearing in the Circuit court should occur only in extraordinary circumstances and again, on the expedited schedule suggested above.
Appeal to the US Supreme Court should likewise be mandated to take place on such an expedited schedule for filing appeal or request for certiorari, with immediate reply and hearing and decision required as above. (I do not know what to do about when the Supreme Court is not in session, but it seems to me that this could be dealt with so that the process does not just stop over the vacation term from June to October...which is ridiculous!

Presently, there is absolutely no incentive for the Executive branch or witnesses to cooperate with the subpoena process and as demonstrated by the behavior of the current administration, there is every incentive to stonewall, resist, appeal and argue, even the most ridiculous and far fetched arguments, because their sole objective is to waste time.

This is a very serious matter that requires immediate attention or the judicial branch will find itself reduced to an almost irrelevant branch of government because it cannot and does not act in a manner that is timely to the needs of the system.

Thank you for your consideration. I hope some important changes will be made, and made soon.

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TAB 16

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RULES 7(b)(2), 10
Suggestion 20-CV-A

Professor Aaron Caplan's proposal may be introduced by setting out his proposals to amend the texts of Rules 7(b)(2) and 10:

Rule 7. Pleadings Allowed: Form of Motions and Other Papers

* * *

(b) MOTIONS AND OTHER PAPERS. * * *

(2) *Form.* The caption requirement of Rule 10(a) applies ~~The rules governing captions and other matters of form in pleadings apply~~ to motions and other papers.

Rule 10. Form of Pleadings

(a) CAPTION; NAMES OF PARTIES. Every pleading must have a caption with the court's name, a title of the action, a file number, and a name of the paper, arranged to resemble the form appended to this Rule 10 ~~Rule 7(a) designation.~~ The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(The "Form of a Caption" is set out below at p. 6 of 20-CV-A.)

These proposals recognize "that the problems noted in this letter are quite technical." They rest on the conclusion that incorporating Rule 10 into Rule 7 creates "insoluble paradoxes," that are resolved in practice by "ignor[ing] the problematic language" when someone notices the problems. It would be better to polish the language so there is no need to tell students to ignore what the rule actually says.

What are the paradoxes?

Motion Captions First, Rule 10(a) says that every pleading must have a "Rule 7(a) designation." Rule 7(a) lists all permitted pleadings. It does not apply to motions. So how can a motion have a Rule 7(a) designation? "Name of the paper" fits better.

Second, Rule 10(a) says that every pleading must have a "title," and says that the title of "other pleadings" after the complaint may refer generally to other parties after naming the first party on each side. "Title" "clearly means the title of the action," not the name of the motion or other paper. And the name of the motion or other paper is not otherwise covered by Rule 10(a) since, as above, it only refers to a "Rule 7(a) designation" of a pleading.

Third, there is an ambiguity in the Rule 10(a) provision that the title of the "complaint" must name all parties, while the title of "other pleadings" need name only the first party on each side. Which is a third-party complaint for this purpose —— a complaint,

or an other pleading? The proposal does not address this in rule text, but includes a "Form of a Caption" that not only illustrates application of the rule in general terms, but also includes a spot for naming the third-party defendant. (The Form may be meant to imply that the third-party complaint is an "other pleading" because it names only AB, Plaintiff, and CD, Defendant. But the form may be intended to apply only to pleadings after the complaint —— if it were meant to apply to the complaint, it would be "AB and CD, plaintiffs" and EF and GH, Defendants.")

Other Matters of Form Rule 7(b)(2) says that the rules governing "other matters of form in pleadings" apply to motions and other papers. So what are the other matters of form? It would not make sense to apply to motions the rules for pleading established by Rules 8, 9, 13, 14, and 17. (Nor, for that matter, such other rules as 12, 22(a)(2), 23.1, 38(b)(1), 44.1, 65(b)(1)(A), and 71.1(c).) Rule 10(b) requires that "claims" and "defenses" be stated in numbered paragraphs that describe "a single set of circumstances." But a motion does not state a claim or a defense; pleadings do that. And motions should not be subject to the constraint that requires separate paragraphs, etc.

Rule 10(b) permits a "later pleading" to refer by number to a paragraph in an earlier pleading. That could apply to motions, but does not justify the paradox of incorporating "pleading" rules into the motion rule.

Rule 10(c) says that a statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. Since motions are included, this functions only as to an "other paper." If that is useful, it would better be included in Rule 10(c) than absorbed by the vague puzzle posed by Rule 7(b)(2). (This could be accomplished by adding "other paper" to Rule 10(c), an amendment not covered by the proposal.)

Rule 10(c) also treats a copy of a written instrument that is an exhibit to a pleading as part of the pleading for all purposes. That has meaning for pleading practice under Rule 12(b)(6) and (c). But it is not useful for motions that are supported by written instruments.

The proposal rests on a close parsing of rule text. It may be wondered, however, whether those who "simply ignore the problematic language" are ill-advised. No one should think that Rule 7(b)(2) means that the caption of a motion or other paper should include a designation that describes which 7(a) pleading it is. From the beginning in Rule 10(a), it is clear that incorporating the Rule 10 rules governing captions and other matters of form in pleadings is a process of analogy, not literal reading. The motion indeed should have a "caption" that includes the action's title, the court's name, and a file number. It should have a name, just not "a Rule 7(a) designation." Motion to dismiss, for summary judgment, for * * *.

And it seems useful to provide for numbered paragraphs and cross-references. For example, a motion to amend a pleading should set out claims and defenses in numbered paragraphs without fussing whether it is a pleading when permission is required and has not yet been given. There even may be some value in providing assurance that affidavits, declarations, writings, recordings, deposition transcripts, admissions, and other things filed with a motion are part of the motion.

The same observations seem to hold for "other papers." The list is long. Examples might include a disclosure statement; a statement noting death; initial disclosures; answers to interrogatories, requests to produce, and requests for admission; a demand for jury trial; a notice of voluntary dismissal; evidence of an official record; a notice of intent to rely on foreign law; an affidavit showing failure to plead or otherwise defend; and several more.

Developing any proposal through the full Enabling Act process absorbs valuable resources of the Rules Committees, the bench and bar asked to comment, the Judicial Conference of the United States, the Supreme Court, and Congress. A rule amendment that emerges from this process imposes added burdens. No matter how clear the new rule text, it must become familiar. Lawyers, in particular, will devote some energy to making sure that they understand what the new rule means. And no matter how clear the new rule text, it may offer opportunities for dispute seeking adversary advantage even in favor of those who understand but resist the clear meaning.

In all, as carefully as it is developed and presented, it seems better to remove this proposal from the agenda.

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Loyola Law School
Loyola Marymount University
Los Angeles

Aaron H. Caplan
Professor of Law
919 Albany Street
Los Angeles, CA 90015
aaron.caplan@lls.edu
213.736.8110

January 13, 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 Revision to Rules 7 and 10

Dear Ms. Womeldorf:

Rules 7 and 10 govern the general appearance of papers filed in federal district courts, including their captions. Unfortunately, portions of these rules are internally inconsistent and vague, and do not reflect modern federal practice. The problems have become more significant after the abrogation in 2015 of Rule 84 and Form 1 from the Appendix of Forms. With that form available for additional guidance, litigants had a model for working around the troublesome language identified below. Without the Forms, it is advisable to amend Rules 7 and 10.

The central problem involves motions and papers other than pleadings. Rule 7(b)(2) says, "The rules governing *captions* and *other matters of form in pleadings* apply to motions and other papers" (emphasis added). This alludes to Rule 10, but when carefully considered, the cross-reference an impossibility with regard to captions, and to vagueness and purposelessness with regard to "other matters of form."

1. The Impossible Caption and the "Rule 7(a) Designation"

A motion or other paper filed using Rule 7(b)(2) is to use the same caption as a pleading, which Rule 10(a) tells us must include a "Rule 7(a) designation." But a *motion or other paper* filed under Rule 7(b)(2) cannot have a Rule 7(a) designation, because Rule 7(a) is the short list of permitted *pleadings*. I propose replacing the troublesome phrase "Rule 7(a) designation" in Rule 10(a) with "name of the paper." The proposal uses the word "paper" (rather than "document") to be consistent with Rules 5, 7 and 11.

Rule 10(a) has seen no substantive revisions since its introduction in 1938. The Rule states that a caption must include "a title." Most practitioners, asked to identify the "title" of a court paper, would point to the short phrase that appears in the right half of the caption and often in the footer, such as "Complaint" or "Opposition to Motion to Compel Discovery." However, as used in Rule 10(a), the word "title" clearly means the title of the action – *Smith v. Jones*. This is a necessary implication of the second sentence in Rule 10(a), which requires titles of complaints to name all parties. So where in the caption should a litigant indicate the name of the paper? By process of elimination, it must be the "Rule 7(a) designation." But that term by definition cannot encompass court papers other than pleadings, even though Rule 7(b)(2) implies that it should. This tension could be seen in the former Form 1, which depicted a caption. That form indicated a location for something it called "Name of Document," but nowhere suggested a location for the "Rule 7(a) designation."

Replacing Rule 10(a)'s phrase "Rule 7(a) designation" with "name of the paper" does no harm to the pleading process. Any necessary "designating" of a paper as one of the listed pleadings is accomplished through other rules. Rule 7(a)(3) allows an answer to "a counterclaim designated as a counterclaim," which indicates that counterclaims should be designated as such, and Rule 8(c)(2) gives more detail on the problem of ambiguously or incorrectly designated counterclaims. Rule 10(a) need not mention "Rule 7(a) designation" to deal with this problem, if indeed it does. (In fact, the phrase "Rule 7(a) designation" has potential to be a trap for the unwary if interpreted to mean that a counterclaim may only be "designated" by words in the caption, as opposed to other clear language in the body of the pleading.)

In addition, the Rule governing captions would benefit from a form visually depicting a caption, based on the former Form 1. The proposed language connecting Rule 10(a) to its accompanying form is based on similar language in current Rule 4(d)(1)(C). As with Rule 4's form for requesting and granting waivers of service, a form illustrating a caption seems particularly helpful for two reasons.

(a) The bare language of Rule 10(a) does not indicate the visual design of a caption. (This can be contrasted with the form for a third-party subpoena that once accompanied Rule 45. That form did little more than repeat the language found within the rule, so the current Rule 45(a)(1)(A)(iv) simply says the subpoena should set forth the language from Rule 45(d) and (e). The proposed form for Rule 10 provides substantive information not found elsewhere.)

(b) The second sentence of Rule 10(a) demands that all parties be named in the title of "the complaint." This raises a potential ambiguity regarding the formatting of third-party complaints under Rule 14, which from the perspective of the third-party defendant might or might not be "the complaint." The former Form 1 concisely showed parties how to style third-party complaints, providing necessary information not found within the text of Rule 10 or Rule 14.

2. The Mysterious "Other Matters of Form"

Rule 7(b)(2)'s reference to "rules governing ... *other matters of form* in pleadings" is vague. When we carefully consider which rules those "other matters of form" might be, almost every candidate fails when applied to motions and other papers. The Rule can and should be made more explicit and more accurate.

Which Rules contain "other matters of form in pleading"? Rules 8, 9, 13, 14, and 17 might conceivably be implied, but they are better understood as rules for matters of *substance* in pleadings. From 1983 to 2007, Rule 7(b)(3) expressly directed that Rule 11's signature requirement applied to motions and other papers. This was, correctly enough, deleted as redundant because Rule 11 applies by its own plain language, see Advisory Committee Note to the 2007 amendments, whether or not it is intended to be a "matter of form in pleadings." This leaves Rule 10, titled "Form of Pleadings."

Which parts of Rule 10 can sensibly apply to motions and other papers?

(a) The "other matters" cannot be the caption requirement of Rule 10(a), since captions are expressly mentioned in Rule 7(b)(2) and hence cannot be matters "other" than captions.

(b) The "other matters" could conceivably involve paragraph numbering under Rule 10(b), but only to accomplish a trivial result. To explain:

(1) The first sentence of Rule 10(b) requires that "claims" and "defenses" appear in numbered paragraphs that describe "a single set of circumstances." Claims and defenses are asserted in pleadings, not in motions or other papers – and those documents need not limit their paragraphs to allegations involving "circumstances." In practice, numbered paragraphs are used only for pleadings, not other documents.

(2) The third sentence of Rule 10(b) also speaks of the presentation of "claims" and "defenses," which would not apply to papers other than pleadings.

(3) The second sentence of Rule 10(b) allows a later pleading to refer to a paragraph number in an earlier pleading. This idea could be incorporated without violence into Rule 7(b)(2) – a motion or other paper might refer by number to a paragraph in an earlier pleading. But it hardly seems necessary to create a vague puzzle in Rule 7(b)(2) if its only purpose is to authorize this innocuous practice that no one would otherwise challenge.

(c) The "other matters" could conceivably involve adoption by reference under Rule 10(c), but also in limited ways that serve little purpose while also inviting confusion. To explain:

(1) The first sentence of Rule 10(c) says that a "statement" in a pleading may be "adopted by reference" in "any other pleading or motion." Since this sentence already allows adoption by reference in a *motion*, the only point behind incorporating it into Rule 7(b)(2) would be to allow adoption by reference in *papers* that are neither pleadings nor motions. If for some reason it is important to expressly authorize this, the clearer method would be to add the words "or paper" in the second sentence of Rule 10(c), and not to conceal it as the answer to a vagueness puzzle posed in Rule 7(b)(2).

(2) The second sentence of Rule 10(c) – treating an instrument attached as an exhibit as part of the pleadings – is important when specifying the record for motions to dismiss for failure to state a claim under Rule 12(b)(6) and motions on the pleadings under Rule 12(c). There is no comparable significance in saying that instruments attached to motions or other papers become "part" of those papers "for all purposes." Instruments attached to a motion or a declaration may be "materials" considered on summary judgment, see Rule 56(c), and may be "matters outside the pleadings" that force conversion of an improperly designated motion into a summary judgment motion, see Rule 12(d). In either case, it does not matter whether we say the exhibit is "part of" the paper to which it is attached. All that matters is that it is not part of a pleading – which counsels against muddying the waters by implying in Rule 7(b)(2) that the rule regarding adoption of instruments in pleadings also applies to non-pleadings.

Loyola Law School
Loyola Marymount University
Los Angeles

In short, the only meaningful work done by the phrase "other matters of form in pleadings" is to expressly authorize certain innocuous forms of cross-reference. Retaining the current vague language invites an inquiry that is not worth the effort and may even risk confusion when read in conjunction with Rule 12(d).

***

I recognize that the problems noted in this letter are quite technical. In practice, litigants and counsel simply ignore the problematic language, if they notice it at all. The proposed changes are nonetheless warranted for two main reasons. First, the Rules should not contain insoluble paradoxes – at least when they are so easily repaired. If nothing else, as a teacher of Civil Procedure, I find it awkward to instruct students that the best thing to do with a rule is to ignore what it actually says. Second, the amendments would remedy problems that unintentionally became more difficult to resolve after Form 1 was abrogated in 2015.

Please let me know if I can provide any more information regarding this proposal. Thank you for your consideration.

Sincerely,

Aaron H. Caplan

PROPOSED AMENDMENTS TO RULE 7

(a) *Pleadings*. Only these pleadings are allowed:

(1) a complaint;
(2) an answer to a complaint;
(3) an answer to a counterclaim designated as a counterclaim;
(4) an answer to a crossclaim;
(5) a third-party complaint;
(6) an answer to a third-party complaint; and
(7) if the court orders one, a reply to an answer.

(b) *Motions and Other Papers.*

(1) *In General.* A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;
(B) state with particularity the grounds for seeking the order; and
(C) state the relief sought.

(2) *Form*. The caption requirement of Rule 10(a) applies ~~The rules governing captions and other matters of form in pleadings apply~~ to motions and other papers.

PROPOSED ADVISORY COMMITTEE NOTE

Rule 7(b)(2) previously required that "the rules governing captions and other matters of form in pleadings" apply to motions and other papers, but most provisions of Rule 10 (titled "Form in Pleadings") cannot actually apply to papers other than pleadings. The amendment therefore eliminates the indefinite term "other matters." Associated revisions are made to Rule 10(a) to ensure that its caption may be used on motions and other papers.

Loyola Law School
Loyola Marymount University
Los Angeles

PROPOSED AMENDMENTS TO RULE 10

(a) *Caption; Names of Parties.* Every pleading must have a caption with the court's name, a title of the action, a file number, and a name of the paper, arranged to resemble the form appended to this Rule 10 ~~Rule 7(a) designation~~. The title of the complaint must name all the parties; the title of other pleadings, after naming the first party on each side, may refer generally to other parties.

(b) *Paragraphs; Separate Statements.* A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense.

(c) *Adoption by Reference; Exhibits.* A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.

Form of a Caption

[Court's Name]
United States District Court for the _____ District of _____.

[Title of the Action]	*[File Number]*
A B, Plaintiff	
v.	*[Name of Paper]*
C D, Defendant.	
v.	
E F, Third-Party Defendant *[Use if Needed]*	

PROPOSED ADVISORY COMMITTEE NOTE

Rule 10(a) sets forth the requirement of a caption on pleadings, but Rule 7(b)(2) calls for the same caption to be used for motions and other court papers. To ensure that a caption of the type described in Rule 10(a) may also be used on other papers, the revision replaces the archaic term "Rule 7(a) designation" with the more flexible and comprehensible term "name of the paper." Because the first sentence of Rule 10(a) does not indicate the visual layout of a caption, the Rule includes a form that may be used for pleadings (including third-party complaints under Rule 14), motions, and other papers.

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MDL Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
March 10, 2020

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

Judge Dow introduced the call with the observation that the main objective was to consider in some detail whether rules on settlement review and appointment of leadership counsel —— could hold promise that would justify pursuing the possibility. To an extent, this set of questions is embedded in the broader consideration of rules for MDL cases. And it presents at least some direct parallels, such as the question of scope. Of all the topics considered by the subcommittee so far, this one may be the most challenging.

Judge Dow, Prof. Marcus, and Prof. Cooper had circulated a memo before the call examining the background of these topics and offering some thoughts about how they might be addressed in a new rule provision. Prof. Marcus introduced a variety of issues that bear on questions that would likely arise in drafting if this effort were undertaken:

> Scope: As with the question of scope for a possible rule on appealability of interlocutory orders or the vetting/census question, there would be a problem in determining when any rule on these topics should apply. The reality is that appointment of leadership counsel has a very long history; according to a 1958 Second Circuit decision it had been recognized in the state courts in New York in the 19th century. It appears that the appointment process has occurred in instances in which a relatively small number of cases have been combined (*e.g.*, a dozen). It also appears that the kinds of cases in which the appointment of leadership counsel has occurred includes many sorts of claims. Examples include securities fraud, antitrust and others in addition to "mass tort" cases. This sort of appointment long antedated the passage of the Multidistrict Litigation Act, and can occur without any MDL transfer (*e.g.*, with "related cases" all filed in one district).
>
> Recently, a major focus of concerns voiced about leadership counsel and global settlement deals has been the possibility of self-dealing by leadership counsel, possibly without adequate consideration of the interests of the claimants or of

the interests of other counsel (sometimes called IRPAs — individually represented plaintiff's attorneys).

These factors bear on when any such rule should apply, and where it should be located. In terms of location, it might be that something in Rule 42 (on consolidation of cases) is the most appropriate place if one wants to have a rule that applies outside the MDL setting. If one limits such a rule to the MDL setting, there is the additional question whether it should apply to all MDL cases, or only some ("mass tort") cases. There is also the question whether such a rule would apply only after an MDL proceeding grew to having more than a specified number of cases or claimants. Though there might be arguments for other provisions under consideration (*e.g.*, "vetting") to apply even in a single action with 1,000 plaintiffs (something that has occurred and prompted *Lone Pine* orders), at least in those situations there seems to be no need to appoint leadership counsel because all the plaintiffs have already retained the lawyer or lawyers who filed the multi-plaintiff suit.

All in all, then, the question of scope could prove challenging in relation to these topics.

Standards for appointment: Section 10.224 of the *Manual for Complex Litigation (4th)* recommends a number of considerations the court should address in appointing leadership counsel. It also urges the judge to become actively involved because "[f]ew decisions by the court in complex litigation are as difficult and sensitive as the appointment of designated counsel. There is often intense competition for appointment."

Rule 23(g) (added in 2003) sets forth criteria for appointment of class counsel in class actions. There is considerable parallelism between what it says and what the *Manual* advises. But to the extent they are not the same, it may be that delicate questions could emerge about what standards to embrace.

Those questions could become pressing in MDL proceedings that include class actions. Experience under the PSLRA, which has "lead plaintiff" provisions that can be viewed as different from what Rule 23 says, or at least to limit the court's latitude in selecting leadership counsel, suggests the possible difficulties.

Interim lead counsel: Assuming one adopts a rule addressing the appointment of leadership counsel, there is the question of what happens until that appointment is made. Rule 23(g) provides for "interim class counsel," in significant measure to make it clear that the court may designate a person to act on behalf of the putative class, particularly in relation to possible pre-certification settlement. That same concern could, of course, arise when MDL proceedings include proposed

class actions.

As noted again below, ordinarily claimants in an MDL have their own attorneys (the IRPAs mentioned above), so that they have professional advice about whether to accept a settlement proposal. (This factor also bears on whether there is a role for the court to play, at least in regard to proposed "global" settlements.) So an interim appointment role in regard to negotiating a settlement seems less important in this setting.

At the same time, there may be significant value in designating an attorney or team of attorneys to take a management lead during the pre-appointment organizational period. So some such feature may be a valuable part of any rule.

Duty of lead counsel: Rule 23(g)(4) provides that class counsel owe their primary duty to the class, not their individual clients. The committee note accompanying that amendment recognized that this obligation "may be different from the customary obligations of counsel to individual clients." Among other things, the note adds that the class representative does not have an unfettered right to "fire" class counsel, something that is the right of individual clients who grow dissatisfied with their lawyers.

In the MDL setting, one complication is that some claimants have retainer agreements with lead counsel while others do not. Presumably those clients could "fire" their lawyer, although the effect of that action on status as a leadership lawyer under the court's order might be unclear. Recent scholarship has not focused on this question, but instead has urged that careful and specific appointment orders can greatly reduce the risk of serious conflict of interest problems later on (particularly at the settlement stage).

More aggressive yet might be the possibility that appointment as lead counsel might mean that, at least for some purposes, lead counsel "represents" claimants with whom lead counsel does not have a retainer agreement. If the appointment order designates lead counsel as the only attorney authorized to act for the claimants in regard to important matters (motions, discovery, selection of bellwether cases, settlement negotiations), that could lead to arguments that lead counsel could be liable to claimants for malpractice in performing these duties. Such malpractice claims have been made against class counsel by unnamed members of the class.

At the same time, one might reflect on whether or how the appointment of a leadership structure (and attendant limitations on the freedom of action of other lawyers) affects the obligations of non-leadership counsel. Could an IRPA forbidden to act (absent authorization from lead counsel) in regard to motions also be found to have committed malpractice

due to lead counsel's handling of motions or other work?

The creation of a common benefit fund (discussed below) might be seen as creating at least a financial link between lead counsel and the clients of IRPAs. Should this be a one-way arrangement?

Common benefit funds: Common benefit funds have been in use in MDL proceedings for decades. Ordinarily they are funded by orders that direct all counsel to deposit a percentage of their attorney fees into the fund, and authorize the court to award money in the fund to leadership counsel. Objectors (who may feel they are being "taxed" to pay for the work of leadership counsel) have challenged the courts' authority to order the creating of such funds. Those challenges have generally been rejected.

A rule about such orders could thus be regarded as "recognizing" what the courts have long been doing. It might be argued that such rule-based recognition would promote more frequent use of such orders, or perhaps expand the authority to enter then. Given the importance of such arrangements to managing these major pieces of litigation, there should be secure authority for adopting a rule on this subject, but defining its contours might present some challenges.

Capping the fees provided in retainer agreements: Besides entering orders creating common benefit funds, courts have also sometimes entered orders capping the fees non-leadership counsel could charge their clients. The idea behind this effort connects with the idea behind the common benefit fund orders —— that the work done by leadership counsel confers benefits on all claimants in the litigation. Such orders may also be linked to the authority of the court to guard against "excessive" fees charged by lawyers. Some regard reduction of their fees as warranted by the idea that they are "free riders" in the litigation.

It is not clear, however, that this sort of judicial activity occurs as frequently as common benefit orders, and a rule might encourage broader use of such orders capping fees of non-leadership counsel. But non-leadership counsel may invest significant energy into monitoring the litigation and providing a significant benefit to their clients by counseling them about developments in the case and their options going forward. At least in individual cases, one might debate the value of fee-capping orders, particularly if the lawyer subject to the cap were also required to contribute part of the remaining fee to the common benefit fund.

Judicial settlement review: One significant motivation for considering rulemaking regarding appointment and compensation of leadership counsel is to provide a platform for also involving the court in overseeing "global" settlements of MDL

proceedings. Some concerns have been raised that on occasion leadership counsel may not sufficiently represent claimants' interests, or at least may not sufficiently press the interests of some claimants (*e.g.*, those who are represented by non-leadership lawyers).

Although those MDL settlements can be likened to class-action settlements that bind unnamed members of the class only if approved by the court, there are significant differences. Most or all claimants in MDL proceedings have their own lawyers to represent and advise them about whether to accept any proffered settlement. Individual claimants in MDL proceedings remain free to refuse to settle. They are also free (as are unnamed members of the class) to reach individual settlements outside the class-action proceeding.

Providing for judicial "review" of this process could be premised on an appointment order authorizing leadership counsel to negotiate "global" settlement terms and, perhaps, forbidding other counsel to do so (though free to negotiate settlements for the clients with whom they have retainer agreements). But it is not clear what judicial "approval" would mean in this setting. With class actions, there is an objection process and objectors may appeal if the settlement is approved over their objections. It is difficult to envision how a court's order "approving" or "disapproving" a global MDL settlement would be subject to review on appeal.

A first reaction to this introduction was that to date there has been no strong support from the participants in various conferences attended by subcommittee members for such rulemaking, particularly as to settlement review. There may be some support for adopting rules or "best practices" for appointment of leadership counsel, but thus far it has seemed that the bar and bench don't want a rule about settlement oversight by the court.

The focus on rules regarding appointment of leadership counsel seems largely motivated, however, by the goal of addressing settlement review by rule. Indeed, the subcommittee early on decided not to pursue rules on appointment of leadership counsel. This initiative is thus a change in direction, and may be taking on more than the subcommittee wants to take on.

The first response was that it's right that the subcommittee's initial conclusion was not to move forward on rules regarding appointment of counsel. Since that early choice, however, we've learned more about concerns regarding settlement terms and the link between settlement and appointment of leadership counsel. The thrust of this new information has been that it is important for the judge to think about settlement negotiation at the outset and to build provisions about it into the appointment order. Those orders should recognize that the leadership appointment creates a sort of "de facto" attorney-client relationship between the appointed lawyers and claimants who are not their direct clients.

And there are examples in some recent litigations of appointment orders to take an admirable proactive stance on these issues.

Another reaction was that, as a matter of rulemaking, one could take a simplified "streamlined" approach to any rule, or try to build in detailed provisions about how these issues should be handled.

A lawyer member of the subcommittee expressed concern about the breadth and scope of the topics raised in this discussion. This sort of rulemaking might have retrograde consequences. For example, possible criteria for selection of leadership counsel might lead to leadership made up entirely of "a bunch of white men." In fact, lawyers and judges are now responding to the need for greater diversity in leadership appointments. But to introduce notions like "best qualified" might seem to mean that only those with 35 years of experience could be named to these positions. Certainly there is a need for large cases to have adequate leadership, but it would be very difficult to do a proper job of codifying the overall objective of this selection process.

The interface with professional responsibility directives is very complicated and difficult. Some judges say that once leadership counsel are named the other attorneys must stand down. But those lawyers (sometimes called IRPAs) have the client relationships. Can leadership counsel really be expected to have something resembling an attorney-client relationship with those claimants who have retainer agreements with non-leadership attorneys?

Another lawyer member agreed with these concerns. It is dangerous for a rule to proclaim that the "best" lawyer (in the judge's view) should be chosen by the court to represent everyone. Nonetheless, codified guidance could be useful and not constrain ongoing moves to diversify leadership ranks. Much academic work supports looking hard at these matters.

Another lawyer member expressed the same concerns as the first lawyer member, about undercutting ongoing efforts to diversify leadership. Can the court supplant the attorney-client relationship between IRPAs and their clients? True, in connection with negotiation of "global" settlements there can be an enormous problem. There is surely value in having leadership counsel coordinating things. But the criteria should be open. Perhaps anything on this subject is best included only in a *Manual*, not in the rules themselves.

Another lawyer member voiced support for the view that a set of principles or guidelines for selection of leadership counsel would be helpful to judges.

These lawyer comments drew the reaction that there is a wide range of judicial attitudes about how best to choose leadership counsel. We already have the *Manual for Complex Litigation*. In

addition, judicial education, including judicial education sessions put on by the Panel, provides guidance. We do not want to put a thumb on the scales in a harmful way.

That prompted a question: Is the *Manual* limited to MDLs? A general answer was that it is not; it originated before § 1407 was passed, with a focus on "protracted" litigation, and the antecedent document came out around 1960. But it was also noted that § 22 of the *Manual*, on mass torts, does refer to MDL treatment.

Things have changed since the early days of MDL practice, a lawyer observed. "Most of my cases are MDLs." In each of these cases there have been protocols for dealing with the issues discussed here. Lawyers like that. It is hard to imagine that an MDL transferee judge nowadays would be unaware that courts can and do devise diverse solutions to the problems before them. We must be careful not to think that things are so broken as to call for aggressive rulemaking.

A judicial participant acknowledged that provisions of the *Manual* (*e.g.*, §§ 22.62 and 10.221) do provide guidance now. But more guidance would be helpful, particularly for judges taking on their first MDL assignment. True, the Panel makes available very informative examples of orders and other materials from other MDL proceedings to educate judges just beginning this process. But a lot of judges new to the process probably have little or no familiarity with these sorts of problems. A rule might provide them with very helpful directions, as well as providing lawyers who are not "insiders" with guidance their prior experience in other sorts of cases has not provided.

This discussion prompted one participant to "take a step back to question 1 —— is there really a need for rule guidance in addition to the *Manual* and the Panel's educational efforts?" In particular, is there a need for judicial guidance regarding early attention to the question of settlement authority for leadership counsel and settlement supervision by the court?

One reaction was that the frequent involvement of Rule 23 in larger MDLs, which include class actions, provides something of a framework for these issues. But consideration of class certification may be deferred until late in the proceedings, and at least some academic work suggests that the key need for guidance arises much closer to the outset of the combined litigation. It was also observed that the fact there is no specific rule provision regarding early involvement does not mean that word is not getting out. This sort of early attention may be going on already.

Another reaction was "I'm concerned more about the non-class action MDL without any clear lines of authority." For a newly-appointed transferee judge, the question is "Where do you go for guidance on handling these problems?" One concern illustrated by recent work including the Lewis & Clark symposium is that the really serious problems come up well into the cases when settlement

comes into view. But the initial appointment orders have not been framed in such a way as to deal well with those problems.

It seems that the current attitude of the lawyers most experienced with MDL proceedings is that they know what they are doing. For the judge, the question is often whether to take action, particularly up front, or not. Consider the issue of the "census," which we have already discussed several times. That is not in any rule. Though it seems to show some promise, it may not pan out. But one thing it might supply is useful information a judge could use in selecting leadership counsel.

There is surely not a groundswell of frustration within the bench and bar, but there is a nagging sense of unspoken need. One way of putting the question is whether some provisions in the rules would provide value for those MDLs that do not involve class actions, or perhaps even for those that do include class actions during the early stages of the MDL proceeding.

Another judicial participant agreed that there can be issues like whether a lawyer can be asked to drop or "abandon" a client who rejects a "global" settlement. Is there a risk that there will be a conflict of interest between the lawyers and the claimants? But is this a real problem, or something that came up only in one or two high-profile cases?

A lawyer member responded "I've not seen pressure to drop clients. But I have seen lawyers put pressure on clients with different sorts of claims. That's merely an anecdotal experience, however."

Another lawyer member reported detecting a tension about differential pressure on clients.

These comments prompted the observation that this pressure happens at the end, and is not brought to the fore at the outset when leadership appointments are made.

A lawyer member reported sensing that there is indeed tension about how to address these matters. But we must keep in mind that these claimants did not choose to be bundled together into an MDL. Sometimes they have tried very hard to avoid that outcome. What can be done to protect them? Should they have a right to object, like unnamed class members under Rule 23? Should they be given a right to opt out, as under Rule 23(b)(3)? Don't they have an absolute right to refuse to settle?

There are, after all, different ways to approach both the timing and content of settlements. Sometimes there are partial settlements. Would those properly be supervised by the judge and run by leadership counsel? If a given IRPA has an "inventory" of cases and reaches a settlement with the defendant on behalf of all of those clients, does the MDL transferee judge have a role to play?

This discussion prompted a return to the starting question whether there was a need for any rulemaking on these subjects. Suppose there were a very "boiled down" rule provision with few specifics. Could that be useful? Perhaps that could provide guidance that any settlement under the auspices of the MDL proceeding should be "fair, reasonable, and adequate" and treat all similarly situated claimants equally. That's not a lot of guidance, and seems not to attempt to provide the judge with formal authority to "review" the settlement, much less to "disapprove" it.

One reaction that might explain the fact that judges with long MDL experience have not warmed to the idea of a rule is that most of them feel they already have authority, perhaps "inherent," to act on these matters. Whether the Supreme Court would entirely embrace that notion is not clear. But at least among those judges there seems to be no clamor for a rule. Perhaps the concern is that a rule might constrain the authority they feel they already wield.

That drew the further reaction that individual judicial differences might loom large here. "Suppose Judge X believes there is no authority to appoint leadership counsel, make provisions for due consideration of the interests of all in the settlement negotiations, and no role for the court to play in supervising the settlement process to guard the interests of all claimants. Does it matter that Judge Y feels entirely comfortable taking on these roles? Would a rule be useful to those in the position of Judge X? If it did not require them to use this authority, would a rule really make much difference?"

A lawyer member reacted: "That is the right question." But there are real risks of starting down the slippery slope here. There is no perfect answer for the management of these difficult issues.

A judicial participant observed that even some very experienced judges say that it would be helpful to have some clarification on their authority to deal with these problems. But it may be premature to have some sort of uniform rule.

Another judicial participant noted that the divergence in attitudes toward judicial supervision of settlement in MDL proceedings may mirror those same judges' varying attitudes toward settlement promotion in all sorts of cases. Rule 16 permits judges to take an active role in prompting settlement in all their cases, perhaps to some extent taking responsibility for the content of the settlements. But that rule does not compel judges to do so. And they do different things. True, MDLs are very distinctive sorts of litigations, but judges are not necessarily going to change their stripes when assigned one of them.

Another judicial participant noted that in bigger cases, there may be more judicial responsibility. In particular, given the significant risk of unfairness, or the perception of unfairness,

due to the disparity of authority between leadership counsel and the other lawyers, there is a need to ensure both fairness and the appearance of fairness.

"Ordinary" individual cases really are different, it was urged. True, the judge can take leadership on these issues even in those cases under the current rules, but it may be important to signal that in large MDL proceedings a more active role is authorized and should be considered. Some judges may act more aggressively than others, but as with class actions there may be a justification for explicit recognition of the distinctive nature of this form of litigation. As noted earlier, many claimants may not have opted to be part of the MDL. Perhaps the judicial system should signal to the judge that the (possibly involuntary) involvement of these claimants calls for consideration of more active judicial oversight and careful attention from the outset.

Another judicial participant said this was the "fundamental question" —— do we need a rule? Would something in a manual be sufficient? Is the excellent educational effort of the Panel for newly-appointed transferee judges the best source? This judge is on the fence on these questions. "Do we have authority to do these things? Should we? That is the linchpin of this discussion."

A reaction was: "Inherent authority is an amorphous concept. Some judges seem to be a lot more comfortable with a rule than running with inherent authority." Putting some of these things into a rule would provide comfort to those less comfortable with running with inherent authority. It would also alert lawyers not steeped in MDL practice to what to expect may come up in that sort of litigation. But cutting against that, it was observed, is the possibility that providing by rule for something that many courts have been doing for a long time can raise serious questions about how far that authority extends. On that score, the Rule 23 Subcommittee's experience a few years ago with the possibility of a rule recognizing that in class action settlements some *cy pres* provisions are permissible drew forceful opposition. Putting things judges have been doing for years into the rules can be a dicey proposition.

Returning to the issue of settlement review, it was noted that in the class action setting the set of problems being discussed here has called for rule amendments. First, in 2003 some provisions were added to Rule 23(e). Then in 2018, a great deal of additional detail was added to that rule in order to respond to issues that had arisen. At least one part of that detail addressed a problem that one could say resulted in part from the right to object that the 2003 amendments recognized (coupled with the Supreme Court's 2002 Devlin v. Scardeletti decision recognizing that objectors may appeal settlement approval) —— the "bad faith" objector who tries to exploit the right to object to blackmail class counsel into making a payoff to free up the settlement funds for the class (and for the payment of class counsel's attorney fee). "Bad faith" objectors were not entirely unforeseen during the 2003 amendment

cycle, but that version of the rule contributed to the rise of this behavior. That might be an illustration of unforeseen consequences of rule amendments that we should have on our minds.

One reaction was that the 2018 class-action amendments were much more clearly necessary than the ideas now under discussion regarding MDLs. This participant is comfortable saying that those provisions were needed for class actions, but not similarly comfortable taking the same position for MDLs on the topics presently under discussion. This argues for a rule, if there is a rule, with a less defined standard.

It was acknowledged that MDLs are not the same as class actions, but noted also that in large MDLs the judge is the only participant with a neutral perspective. It certainly can happen that a given MDL includes a widely diverse group of claimants; there is no requirement that common issues predominate. At the same time, the reality of some MDL proceedings is that this judicial efficiency measure can (and reportedly sometimes does) override individual claimant preferences and interests. It may be a "free ride" for some claimants, but it may also be a ride they did not choose to take.

An attorney member noted that several of these issues have come up during other discussions of possible MDL rules. Not all MDLs are the same. For example the JUUL litigation includes many individual claims, several class actions, and governmental actions. We must be careful; proceeding down this route might even lead judges to give MDL organization priority over class actions (where we have rule-based structures to deal with many of these issues).

And there are ongoing innovation efforts. For example, consider Judge Polster's "negotiation class" in the opioid litigation. A challenge to that certification order is pending before the Sixth Circuit. But it does seem that carefully considered appointment orders can provide considerable value in dealing with these issues. That probably can happen only when judges are alert to these "future" issues at the time they are making the initial appointments. It is not clear that most transferee judges are alert to these issues at that critical time. And the emergence of new ideas —— for example the use of a "census" to inform appointment decisions —— means that any rule we consider now must be open-ended enough to accommodate future developments.

The call concluded with the hope that the full Advisory Committee could share its reaction to these issues during the April 1 meeting. To that end, the agenda report should be expanded to introduce the issues even though notes of this call would not be available in time for inclusion in the agenda book.