# MEMORANDUM

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

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

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** January 6, 2020

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## Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on October 29, 2019, and at the same time held a hearing on the proposal to amend Rule 7.1 that was published last August. Draft minutes of the meeting are attached at Tab B.

The Committee has no action items to report. The report presents only information items.

Part I includes several information items that remain on the Committee agenda for ongoing work. The first two reflect the work of the Social Security Disability Review Subcommittee and the Multidistrict Litigation Subcommittee.

Further ongoing subjects include two matters addressed in the Civil Rules report to the Standing Committee last June: (1) service by the U.S. Marshals Service for an *in forma pauperis* plaintiff; and (2) the effect of consolidating originally independent actions on finality for appeal.

A new subject that will carry forward on the Civil Rules agenda is reconsideration of the deadline for electronic filing. This subject is being considered by a joint committee representing the Appellate, Bankruptcy, Civil, and Criminal Rules Committees.

Another new subject added to the agenda is whether to amend Rule 12(a)(2) and possibly (3) to include recognition of statutes that set different filing times. Rule 12(a)(1) includes such an exception.

Part II briefly describes other topics that were considered and removed from the agenda.

## I. Information Items

### A. Social Security Review Actions

*Introduction*

The Social Security Review Subcommittee was appointed to consider a proposal that Enabling Act rules should be adopted to govern district court review of Social Security Administration decisions under 28 U.S.C. § 405(g). A brief reminder of the origins of this project is provided below.

The subcommittee and committee believe that the time has come to confront, if not to entirely resolve, the question whether this project should be pursued to the point of polishing proposed rule text for publication. The subcommittee has worked diligently for two years, gathering information from many sources. Regular conversations have been had with representatives of the Social Security Administration, the National Organization of Social Security Claimants Representatives, and the American Association for Justice. A meeting with representatives of those groups and of the Administrative Conference of the United States was held at the beginning of the work, and a similar meeting was held last June. The Department of Justice has been consulted and has provided its views. Advice has been gathered from representative magistrate judges, and further advice is likely to be sought from them. Further insight is provided by experience in districts that have local rules similar to the subcommittee drafts.

All of this work has led the subcommittee to believe that it has learned about as much as can presently be learned from experts who are closely engaged with social security review actions. Current rules drafts can be refined further and polished, but the core is likely to remain. Before undertaking that work, it is important to engage in a searching discussion of the challenges that confront any proposal to adopt Enabling Act rules that focus on a specific area of substantive law. The one word most often used to express these questions is found in the tradition that the rules must be transsubstantive. The subcommittee and committee have grappled repeatedly with the competing considerations that bear on these questions in the specific context

of § 405(g) actions. Without reaching any final determination, the Committee has directed the subcommittee to carry on with its work, looking both at a new rule or rules to be incorporated directly into the body of the Civil Rules and at similar provisions framed as a new set of Supplemental Rules.

This report seeks further discussion and advice on the transsubstantivity question. The attached drafts illustrate alternative approaches to framing a new rule. One is framed as a new Civil Rule 71.2. The other is framed as a new set of Supplemental Rules for 42 U.S.C. § 405(g) Review Actions. Discussion of these drafts will be helpful if time allows, but the initial focus should be on transsubstantivity.

The next section provides a reminder of the origins of this project. The following section attempts to develop the general issues posed by transsubstantivity through exploring the issues specific to § 405(g) social security review actions.

This project serves modest ambitions. The goal is to determine whether uniform national rules can be developed to meet the hopes of the Administrative Conference of the United States and SSA for improved district-court procedures. Improved procedures in individual review actions might, by reducing burdens on SSA's legal staff, achieve some quite modest opportunities to improve SSA's administrative procedures. But no one believes that a better judicial review process will have any significant effect on the problems that beset administrative review of individual claims. The volume of claims that reach the administrative law judge stage is staggering. The corps of administrative law judges is designed to handle a far smaller number of claims. One consequence is that the rate of judicial remands for further administrative proceedings, although greatly variable, runs from a bottom range that seems high to a top range that is truly troubling. Amelioration of these problems must be sought elsewhere, not in the Civil Rules. That said, whatever prospect there may be that improved district court procedures could reduce the burden on SSA attorneys, the subcommittee's work has confirmed that the Civil Rules may not provide the most effective framework for what is essentially appellate review of SSA decisions.

*The Background*

The background that led to development of draft rules for § 405(g) social security review cases can be summarized as follows:

At the end of 2016 the Administrative Conference of the United States recommended that "the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review" under § 405(g). The recommendation grew out of a detailed study of district-court practices, Jonah Gelbach & David Marcus, *A Study of Social Security Litigation in the Federal Courts* (report to the Administrative Conference)(July 28, 2016). The study showed wide variations in practice, and suggested that

some local practices may not be as effective as others.

SSA has strongly supported the suggestion that uniform national rules should be adopted.

The recommendation that the Judicial Conference develop rules was assigned to the Civil Rules Advisory Committee.

The draft rule reflects 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.

The appellate character of Social Security review actions ordinarily displaces most of the Civil Rules and affects the operation of others. The draft rule reflects this belief. Little purpose is served by detailed pleading of the arguments that the record lacks substantial evidence to support the Commissioner's decision, or that the decision is wrong as a matter of law. Those arguments are more efficiently and effectively developed in briefs. So too summary judgment, although often used as a convenient vehicle for framing the arguments, may prove misleading. The administrative record provides the basis for decision, not the procedures of Rule 56(c). If the Commissioner's decision meets the substantial evidence threshold, summary judgment is granted even though the decision could go either way on the administrative record. And discovery is almost never involved.

Drafting a potential rule, however, is complicated by the experience that in a small fraction of § 405(g) cases there may be an occasion for discovery. It is even possible that a class action may be framed that rests in part on § 405(g). Beyond those rare cases, a great many of the Civil Rules remain important to govern such matters as filing, notices, docketing, motions, and so on.

These competing considerations account for the basic applicability provision that introduces draft Rule 71.2: "These rules govern * * *." The Civil Rules apply, "except that in an action that presents only an individual claim these procedures apply * * *." This scope provision is critical. The simplified, appeal-like procedures that follow will be all that is required for efficient disposition of the vast majority of § 405(g) cases that present only a challenge to the Commissioner's final decision on the administrative record. The small number of cases that go beyond this limit are governed by the general Civil Rules without regard to the special Social Security review provisions. The scope provision in draft Supplemental Rule 1 does the same job, in terms that may be easier to follow.

A simplified complaint satisfies Rule 8(a), although a claimant who wishes to plead in greater detail may do so. The administrative record and any Rule 8(c) affirmative defenses constitute the answer. Rule 8(b) does not apply, relieving the Commissioner of the obligation to respond to the allegations in the complaint, although here too the Commissioner is free to do so. Service on the Commissioner is made by the court by transmitting a notice of electronic filing, a practice that has been adopted in some districts with great success. Motion practice is similar to general motion practice; many earlier drafts included separate provisions for motions to remand, particularly "voluntary remands," but in the end they seemed to accomplish nothing more than to recite the three separate remand provisions found in sentences four and six of § 405(g).

In many ways the central feature of the draft rule is the subdivision (d) provision for presenting the case through the briefs. That is how an appeal is effectively presented. Several drafts required the claimant to file a motion for relief along with the opening brief, as a formal way of framing the case and as a useful docket event. The current drafts omit the motion requirement as unnecessary, relying on the brief alone to frame and explain the request for relief.

It may be useful to note two proposals that were considered and eventually abandoned. One would have set page limits for the briefs. The other would have ventured into the thicket of motions for attorney fees. Page limits could be set readily enough, but it may be better to leave that matter to local practice. The attorney-fee issues are complex, and there is a risk that rule text might trespass beyond procedure into the realm of substance.

*Transsubstantivity Concerns*

The subcommittee does not believe that further work will significantly improve draft Rule 71.2, either in overall approach or in detailed implementation. The alternative Supplemental Rules draft will likely benefit from additional style work, but the substance is meant to be the same as Rule 71.2. That assumption sets the foundation for exploring the advantages of establishing a uniform national practice for § 405(g) review cases in one form or the other. The advantages must be weighed against the risks of adopting a rule (or rules)for a single substantive subject.

Uniform national procedures are inherently important. Uniformity is the central purpose of the Rules Enabling Act. Uniformity is why local rules must be consistent with national rules.

The Administrative Conference and SSA believe that additional practical reasons make it important to establish a nationally uniform core procedure for § 405(g) review actions. At least 62 districts have local rules for social security review actions. Standing orders add to the variety, and individual judges may have individual practices. This diversity of practices imposes substantial costs on SSA, which points out that many lawyer years could be freed up by saving even an average of one hour of SSA lawyer time in the 17,000 to 18,000 § 405(g) cases brought to the district courts every year.

The costs imposed by local practices are not limited to the need to remain current on a wide range of diverse practices. Added costs arise from local practices that seem unproductive. Nine districts, for example, require the claimant and SSA to produce a joint statement of facts, a practice said to require a great deal of time and to yield little or no benefit for the parties. As noted above, Rule 56 is often used to establish the framework for presenting the case for decision. This practice can be beneficial if it is used to produce competing designations of the parts of the administrative record that support the parties' positions, much as designations of the record are required in an appellate brief. But it can lead to confusion if other parts of Rule 56 are invoked, and would lead to fundamental error if the summary-judgment standard for decision were to displace the § 405(g) substantive evidence standard.

The arguments for a uniform national rule advanced by the Administrative Conference and SSA deserve careful attention.

The counter arguments begin with a direct challenge to the need for uniformity in the Civil Rules generally. The national rules are supplemented across the country by local rules, standing orders, individual docket practices, and the like. A lawyer practicing across districts must become familiar with the local practices and adhere to them. Wide differences in local practices may reflect significant differences in local conditions. Claimants' representatives make this point specifically for social security review cases, and add a further argument that claimants are better served by adhering to practices that please local judges. A judge who must discard favored practices may be less efficient when forced to operate under a new national practice. And local practices are hardy things — whether viewed as flowers or weeds, a new national rule may trim them but will not eradicate them. Even with a uniform national rule, there will undoubtedly be variations in local practice by rules or standing orders.

The entrenched tradition of transsubstantivity presents a more significant challenge to using the Rules Enabling Act to establish a uniform national rule that applies only to social security review actions. Section 2072(a) of Title 28 provides: "The Supreme Court shall have the power to prescribe *general* rules of practice and procedure * * * for cases in the United States district courts * * *." Section 2072(b) admonishes: "Such rules shall not abridge, enlarge or modify any substantive right." Does a social-security-only rule qualify as a "general" rule? Would it create an uncontrollable risk of abridging, enlarging, or modifying substantive rights created by the Social Security Act?

Earlier discussions have looked for examples of substance-specific rules. Perhaps the clearest example is Supplemental Rule G, which "governs a forfeiture action in rem arising from a federal statute." Rule 71.1 applies to "proceedings to condemn real and personal property by eminent domain." Rule 5.2 establishes limits on remote access to court files in social security and immigration proceedings. These two Civil Rules, however, are narrow. Rule 5.2 does no more than recognize the particular risks to privacy from electronic access to court records that include intense amounts of personal individual information. Rule 71.1 qualifies the general rules only in

specific and limited ways, and applies to condemnation actions under any statute that brings the action to the district court. Supplemental Rules are established for admiralty and maritime cases, § 2254 proceedings, and § 2255 proceedings. Like Supplemental Rule G, these rules govern broadly, but all of them invoke the Civil Rules at least in part.

None of these examples conclusively answer concerns about the substance-specific character of a social security review rule. The present draft, and any other draft that seems likely to respond to the proponents' arguments, is more intensely focused on a single substantive statute than any of the analogies, with the possible exception of Supplemental Rule G. That focus intensifies abstract concerns about the limits of a "general" rule of practice and procedure.

Practical interests add to doubts about developing a substance-specific rule. 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.

At least one more concern gives pause. The competing interests affected by a narrow substance-specific rule may be more clearly drawn than the interests affected by transsubstantive rules. Any 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. Many claimants in fact have opposed successive drafts because they perceive that a rule would advance SSA interests. Indeed, at the outset this project was urged in large part to address inefficiencies that impact SSA. And it may be wondered how far it is appropriate to address through rulemaking SSA needs that arise from inadequate staffing that results from inadequate funding.

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 areas 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. Resistance can be bolstered by relying on the distinction between private interest groups seeking private advantage and an important governmental institution that seeks better procedures for all parties. And the Committees are constituted to resist such pressures, but informed resistance takes time away from other projects.

The tradition of transsubstantivity, bolstered by these concerns, has great force. But the pragmatic concerns supporting a social-security review rule remain. On this view, the general

Civil Rules have been continually revised to address problems presented by a small subset of troublesome cases. The general run of federal cases may not be well served by general rules shaped to accommodate the cases with the highest monetary or public policy values, the deepest level of aggressive advocacy, the most sweeping opportunities for weapons of mass discovery, and so on. The pressures that arise from specific categories of litigation might better be addressed by specific sets of rules, if only wisdom enough can be gained.

These tensions have been recognized from the beginning of the subcommittee's mission. A more broadly transsubstantive approach is possible, looking to a new rule that would apply to all administrative review actions in the district courts. That would, however, be a new and very broad undertaking. The subcommittee has not explored this alternative to the point of seeking detailed information on the varieties and total number of all administrative review actions. Many of them are brought under the Administrative Procedure Act, but even those involve a wide range of underlying substantive statutes. Several concerns have counseled hesitation. The sheer variety of agencies, substantive law, and administrative procedure presents far more diverse needs than do single-claimant social security actions for what is in effect appellate review on a completed administrative record. Nor has any other specific substantive area been identified that produces anything that remotely approaches the sheer volume of § 405(g) cases. Concerns about transsubstantivity would not be assuaged by expanding this project to encompass all actions for administrative review in a district court, or even a carefully curated set of these actions. Either form of § 405(g) rules — Civil Rule 71.2 or Supplemental Rules — is modest. Either addresses a category of cases that lie at the extreme end of the spectrum that blends appellate procedure with more general litigation procedure.

Concerns about adopting substance-specific rules may bear on the choice between lodging § 405(g) review in the Civil Rules or in a new set of supplemental rules. The earliest drafts were framed as a set of supplemental rules. The subcommittee later chose to locate its draft within the Civil Rules for at least two reasons. First, the general rules continue to govern all but a few of the ways in which § 405(g) cases progress through the district courts. Second, only a few — although significant — departures are made. The special rules displace formal service of summons and complaint on the Commissioner, establish reduced thresholds for pleading, address some details of motion practice, and establish an essentially appellate procedure for submitting the case for decision on the briefs. It was feared that requiring cross-reference from supplemental rules to the main body of Civil Rules might impose unnecessary complications. Rule 71.1 provides a reassuring model. These practical advantages initially overcame the uncertain arguments whether supplemental rules or a new Civil Rule are more likely to invite proposals for additional substance-specific rules. But more recent committee and subcommittee deliberations suggested that the Supplemental Rules format could facilitate clearer exposition, particularly for the all-important scope provision. The Committee has not had an opportunity to review the Supplemental Rules draft, which emerged from subcommittee work after the October 2019 committee meeting, but the subcommittee draft is a good illustration of the possible advantages of this format.

Further discussion of transsubstantivity at the October 2019 meeting is reflected at pages 3-11 of the draft minutes [pages 337-345 of this agenda book]. The discussion reflects the elusiveness of the concepts that come into play and compete for judgment. Disagreements remain about the advantages that might be gained by any § 405(g) review rule. The Administrative Conference and SSA continue to be strong advocates. Organizations that speak for claimants' representatives report reservations, partly by doubting the need for national uniformity and partly by expressing comfort in a status quo that enables different judges to adopt congenial particular procedures. Judges that have offered advice recognize that the general Civil Rules do not work well in this setting, and that the rule drafts reflect the approaches that many have crafted to adapt the general rules to the needs of § 405(g) review. The Department of Justice has propounded a model local rule that is closely similar to the rule drafts, but fears that lodging § 405(g) review provisions in national rules will encourage private interest groups to press for other substance-specific rules. Primarily for that reason, DOJ does not support separate rules for social security review cases.

The advantages to be gained by nationally uniform § 405(g) review procedures, however certain or uncertain, must be balanced against the reasons for reluctance to adopt any substance-specific rules. The committee was not confident about evaluating either side of this equation at the October 2019 meeting. The difficulty of these evaluations provides the reasons for seeking further guidance now. The subcommittee has debated the same concerns in two conference calls after the October discussion and continues to believe that discussion in the Standing Committee will help in reaching a recommendation whether to pursue this project to the point of recommending rules for publication. The rules drafts have advanced to a point that supports thorough exploration of the concerns that pit the opportunity to improve practice in an important area against the fear that starting to open the field to substance-specific rules will bring pressures to open broader vistas of special-interest rules. This April, the Advisory Committee should be in a position to decide on a recommendation, whether to discontinue work on social-security review rules or to recommend a proposed rule or supplemental rules for publication. It will benefit from further discussion of the transsubstantivity concerns by the Standing Committee.

## SUPPLEMENTAL RULES FOR 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 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) 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]. The plaintiff need not serve a summons and complaint under [Federal Rule of] Civil [Procedure] Rule 4.

### RULE 4. ANSWER; MOTIONS; TIME

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

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

(c) A motion under Civil Rule 12 must be made within 60 days after notice of the

action is given under Rule 3.

(d) 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. An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III). Most actions under § 405(g) are brought by an individual. But the plaintiff may be a representative or someone whose claim derives from a worker.

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, 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. 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.

**ALTERNATIVE: CIVIL RULE 71.2**

**Rule 71.2. Review of Social Security Decisions [Under 42 U.S.C.A. § 405(g)]**

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, except that in an action that presents only an individual claim these procedures apply:

(a) COMPLAINT. The complaint satisfies Rule 8(a) if it:

(1) States that the action is brought under § 405(g) and identifies the final decision to be reviewed;

(2) States:

(A) 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

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

(3) Identifies the type of benefits claimed.

(b) 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]. The plaintiff need not serve a summons and complaint under Rule 4.

(c) ANSWER; MOTIONS; TIME.

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 71.2(b).

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

(3) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 71.2(b).

(4) Unless the court sets a different time, serving a motion under Rule 71.2(c)(3) alters the time to answer as provided by Rule 12(a)(4).

(d) BRIEFING.

(1) *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 71.2(c)(3), whichever is later. The brief must support arguments of fact by citations to particular parts of the record.

(2) *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.

(3) *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) are generally governed by the Civil Rules. This new Rule 71.2, however, establishes a simplified procedure that recognizes the essentially appellate character of actions that seek only review of claims of an individual on a single administrative record. An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g). See[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III). Most actions under § 405(g) are brought by an individual. But the plaintiff may be a representative or someone whose claim derives from a worker.

All actions for review under § 405(g) are governed by all the Civil Rules. Application of the Civil Rules is modified only by applying Rule 71.2 to the matters it covers in an action brought by a single plaintiff for relief on a single administrative record.

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 Rule 71.2 and are governed by the other Civil Rules alone.

Rules 71.2(a) through (d) establish a uniform procedure for pleading and serving the complaint in an action to which they apply; for answering and making motions under Rule 12(b); and for presenting the action for decision through briefs. Rule 71.2 supersedes the general Civil Rules in only a few ways. The Rule 71.2(d) procedure for presenting the action for decision displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record. But for the most part, there is no conflict between Rule 71.2 and the general rules. Rule 9(a)(1)(B) is an example — a plaintiff suing in a representative capacity need not plead authority to sue in a representative capacity. And a plaintiff remains free to plead more than the elements listed in Rule 71.2 (a), while the Commissioner may choose to respond to the plaintiff's allegations even though Rule 71.2(c)(2) provides that Rule 8(b) does not apply.

The relationship between Rule 71.2 and the general Civil Rules rests on Section 405(g), which provides for review of a final decision "by a civil action." Rule 3 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. The elements specified in Rule 71.2(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under § 405(g). Failure to plead all the matters described in Rule 71.2(a) should be cured by leave to amend, not dismissal. A plaintiff who wishes to plead more than Rule 71.2(a) provides is free to do so.

Rule 71.2(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices, 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 Rule 4.

Rule 71.2(c)(2) builds 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 Rule 8(c). 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 71.2(b). The time to file a motion under Rule 12 is also set at 60 days after notice of the action is given under Rule 71.2(b). If a timely motion is made under Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different time.

Rule 71.2(d) addresses the procedure for bringing on for decision a § 405(g) review action that is governed by Rule 71.2. The plaintiff serves a brief that 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. The Commissioner responds in like form. A reply brief is allowed.

Rule 71.2(d)(1)-(3) sets 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 71.2(c)(3) 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.

## B. MDL Subcommittee

Since the Standing Committee's last meeting, the MDL Subcommittee has continued to explore and gather information about the issues it has been considering. Besides subcommittee conference calls, this activity has included attendance by members of the subcommittee at various events focused on these issues.[1] As it has throughout the subcommittee's work, the Judicial Panel on Multidistrict Litigation has been very supportive and helpful.

In addition, the subcommittee has received an extensive research memorandum from the Rules Law Clerk on experience under 28 U.S.C. § 1292(b) in MDL proceedings, as well as some advice from Emery Lee of the FJC on data regarding such appellate review.

As before, this work is ongoing. Originally, the subcommittee's focus included a number of topics that have since been moved off the "front burner."[2] 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 litigation. 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 litigation. The full Advisory Committee approved that recommendation.

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[1] These events have included the following:

American Association for Justice annual convention, San Diego, CA, July 27, 2019 — special session addressing issues under study by subcommittee.

UC Berkeley Law program on Ethics in Litigation Funding, Berkeley, CA, Sept. 10, 2019.

Emory Law Institute for Complex Litigation and Mass Claims conference on interlocutory appeal in MDL proceedings, Washington, D.C., Oct. 1, 2019.

ABA 25th Annual National Institute on Class Actions, Oct. 17-18, Nashville, TN. Subcommittee representatives were on a panel entitled "'Top of the Charts': Potential MDL Rule Changes and Their Effect on Your Practice."

[2] Examples include adding specific references to "master complaints" in the rules; adopting a rule requiring that each plaintiff pay an individual filing fee; modifying Rule 20 to forbid joinder of multiple plaintiffs in situations where joinder might now be authorized; expanding initial disclosure requirements in certain MDL proceedings; authorizing MDL transferee courts to compel attendance at trial by party witnesses located beyond the subpoena power; and adopting particularized pleading requirements for certain claims asserted in MDL proceedings.

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 would remain under consideration. The Advisory Committee also approved of this recommendation.

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

(1) Early Vetting, PFS and DFS Requirements, and a "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.

One 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 with the arrival of a new Congress in January 2019, it lapsed.

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 proceedings, defendant fact sheets (DFS) were also required, often calling for defendants to provide information to the plaintiffs without the need for formal discovery.

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

The FJC research also showed that PFS and DFS requirements, while often having similarities from one MDL proceeding to another, were almost always tailored to the specific

MDL proceeding before the court. And that tailoring often took considerable time to complete. Beyond that, some viewed the PFS and DFS requirements in some MDL proceedings as excessive and overly demanding. These concerns made the prospect of drafting a rule for all or certain MDL proceedings exceedingly challenging.

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

As these discussions proceeded, the views of the participants seemed to evolve. It might even be that the subcommittee's attention served as a small catalyst to this evolution. In any event, eventually the focus shifted somewhat. In place of reliance on PFS/DFS practice, the more promising idea came to be known as a "census," an effort to gain some basic details on the claims presented — *e.g.*, evidence of exposure to the product at issue — so as to permit an initial assessment. 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. In October, Judge Orrick (N.D. Cal.) 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. For the present, then, the subcommittee is awaiting further information about how this new method works. Assuming it has promise, it may be that it is not really suitable to inclusion in a rule but rather is a management technique on which the Judicial Panel could offer advice and instruction to transferee judges.

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

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 these sorts of "cross-cutting" issues, they contended, there was inequality of treatment: a victory by defendants would often result in a final judgment that would permit plaintiffs to appeal, while a victory by plaintiffs would not permit defendants to take an immediate appeal because the litigation would continue.

Opponents of rule-based expansion of interlocutory review in MDL proceedings emphasized that there are already multiple routes to appellate review, particularly under 28 U.S.C. § 1292(b), via mandamus and, sometimes, pursuant to Rule 54(b). Expanding review would lead to a broad increase in appeals and produce major delays without any significant benefit, particularly when the order was 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) that 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 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). 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 district judge, in denying certification, has done so 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 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:

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

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

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

(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.

As reflected in the Advisory Committee report to the Standing Committee for its June 2019 meeting, during the May 2019 Emory event in Boston, the case for expanded review was not convincingly made. Subsequently, on October 1, 2019, Emory 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.

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

[3] Prof. Steven Sachs, a member of the Appellate Rules Advisory Committee, has made an intriguing suggestion that a rule might provide that the district judge could indicate in a § 1292(b) certification that immediate review would only "materially advance the ultimate termination of the litigation" (in the statute's current words) if the court of appeals handled the case on an "expedited" basis. This might support a rule that either 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. Any such change might be limited to MDL proceedings. The MDL Subcommittee has begun to consider this idea.

these existing routes to interlocutory review fail in MDL litigation, or that MDL litigation is so different from other litigation that it justifies a special appealability rule.

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 certain whether 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. It notes that a joint subcommittee of the Civil and Appellate Advisory Committees is examining the possibility of recommending a rule change in response to the Court's decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018). In that case, the Court held that when cases are consolidated for trial, judgment in one but not the other is final for purposes of appeal even though there might be prudential reasons for deferring appellate review until entry of a final judgment in the other consolidated case. In *Gelboim v. Bank of America*, 135 S.Ct. 897 (2015), the Court earlier applied the same rule in an MDL proceeding in which one of many cases subject to the MDL transfer reached final judgment before any of the cases had been tried. Justice Ginsburg, writing for the Court in that 2015 case, recognized that sometimes a "merger" of the consolidated cases might defer appealability. Absent such a "merger" (which did not occur in the MDL proceeding before the Court), each case in the MDL proceeding was separate for purposes of the final judgment rule.

The reason for mentioning the *Hall v. Hall* Subcommittee's work is that it has been considering whether a rule revision would be appropriate to defer appealability, somewhat the obverse of the issue before the MDL Subcommittee, which has been urged to provide additional avenues for interlocutory review even though final judgment has not been entered in any of the consolidated actions. Judge Rosenberg, a member of the MDL Subcommittee, is Chair of the *Hall v. Hall* Subcommittee.

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

For the present, then, the subcommittee is not yet prepared to propose to develop rule-amendment drafts dealing with appointment or compensation of leadership counsel or settlement review. But these questions remain open for further study.

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 N.D. 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.

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.

### C. Rule 4(c)(3): Service by the U.S. Marshals Service

At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised questions about the meaning of the Civil Rule 4(c)(3) provisions for service of process by a United States marshal in *in forma pauperis* cases. 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.

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 an 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 ambiguity in Rule 4(c)(3) may be an artifact of the 2007 Style Rules. 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. 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 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.

**D. Final Judgment Appeals after Rule 42(a) Consolidation**

A joint subcommittee of the Appellate and Civil Rules Committees is exploring the questions of appeal finality that arise when a district court consolidates two or more originally independent actions and eventually enters a judgment that disposes of all claims among all parties to what began life as a separate action. In *Hall v. Hall*, 138 S.Ct. 1118 (2018), the Court ruled that consolidation does not merge the originally separate actions for purposes of § 1291 final-judgment appeal. An appeal may, and apparently must, be taken or lost upon complete disposition of an originally independent action. At the same time, the Court suggested that the Rules Enabling Act provides the appropriate means to address any problems that might arise from its decision.

The subcommittee has begun its work. The immediate focus is on empirical work that Dr. Emery Lee is undertaking at the Federal Judicial Center. The work will seek to gather as much

information as possible about actual Rule 42(a) consolidation practices, including distinctions between consolidation "for all purposes" and less complete consolidations. The next step will be to sort out orders that leave continuing proceedings open in other cases caught up in the consolidation while completely disposing of all parts of at least one originally independent action. The *Hall v. Hall* questions will come next: How often are appeals taken at the time designated? How often are appeals delayed until after complete disposition of all parts of the consolidated proceedings? If appeals are delayed, how often is the delay penalized by dismissal, and how often is it rewarded by casual or benign oversight?

The FJC study will initially consider actions filed in 2015, 2016, and 2017 that have reached final disposition. That period will enable comparison of appeals under the four different approaches taken in the circuit courts of appeals before *Hall v. Hall* adopted one of those approaches, although many of the cases will have reached final disposition after the Court's ruling. It may well prove important to expand the period to include actions filed in 2018, 2019, and 2020, although it will take some time to accumulate final dispositions in those actions.

The possibility remains that sophisticated docket studies will not yield a satisfactory foundation for considering possible rules amendments to establish a new framework for appeals after consolidation. The subcommittee, however, will await further development of the research before deciding whether to take up the inquiry.

### E. E-filing Deadlines: Rule 6(a)(4)

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 Federal Judicial Center 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.

### F. Rule 12(a): Filing Times and Statutes

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). 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, * * *." This amendment likely will be proposed.

The 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, an amendment of Rule 12(a)(3) will be proposed 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. Yet the amendment might be not only unnecessary but a source of confusion for litigants who go about searching for possible statutory exceptions. This question remains under consideration.

## II. Matters Removed from the Agenda

The committee determined to remove several "mailbox" suggestions from its agenda. Brief descriptions follow:

### A. Rules 4 and 5

This proposal (19-CV-N) was submitted by a pro se litigant whose suggestions seem to be that Rule 4(c)(3) should be amended to give a cross-reference to statutes governing service by a marshal; Rule 4(a)(1)(E) should be amended to refer to such local practices as one deferring the Rule 12(a) time to respond until after an Initial Phone Status Conference; and Rule 5(b) should be amended to direct that the clerk provide a party who makes a paper filing with a copy of the filing that shows the number designating it when the clerk enters it in the electronic record.

Discussion centered on the frequency of pro se appearances, the association of pro se filings with *in forma pauperis* status, and the difficulties encountered by pro se parties. The committee concluded that these suggestions do not warrant rules amendments.

### B. *In Forma Pauperis* Standards

This proposal (19-CV-Q) by Sai, a pro se litigant who has provided thoughtful suggestions in the past, begins with the observation that standards to qualify for *in forma pauperis* status vary widely from one district to another. Uniform standards are urged, primarily by way of adopting the standards used by the Legal Services Corporation, supplemented by automatic qualification for recipients of SSI, SNAP, TNAF, or Medicaid benefits. Sai also urges provisions describing the duty to update changing information. Sai further finds many ambiguities in the Administrative Office forms that courts may use to gather information bearing on i.f.p. status, and then argues that some of the requested information is irrelevant, invades the privacy of persons other than the litigant, and at times violates constitutional norms.

Committee discussion reflected sympathy for uniform standards, but doubts whether the wide range of information that may be relevant in making decisions unguided by the i.f.p. statute can be captured in a workable formula. Delegation of this responsibility to standards created by others for different purposes is not attractive. But the questions Sai raises about the Administrative Office forms were commended to the AO for further consideration.

### C. Calculating Filing Deadlines

In this proposal (19-CV-R), Sai points to the difficulties frequently encountered by pro se litigants in attempting to calculate filing deadlines, and further observes that lawyers often face uncertainty and expend much effort and even anguish in attempts to identify clear deadlines. His proposed solution rests on the assumption that "[t]he court knows what the times are, [and] has the authority to define them conclusively."

Building on this premise, Sai proposes an elaborate rule that would require courts to give all parties immediate notice of a calculated time certain for every applicable date or time specified by court rules or order. The notice should include whether and how the time may be modified, and "whether the event is optional or specified." The obligation is cumulative — the most recent order must include the full calendar, "listing all available, pending, or issued events, and their respective deadlines." And "[a]ll filers shall be entitled to rely on the court's computed times."

One adjustment would be necessary to fit the provision on party reliance into the rule that some time provisions established by statute are mandatory and jurisdictional.

The committee was sympathetic to the challenges that may be encountered in calculating filing deadlines. But deadlines are necessary to achieve the goals of Rule 1. All of the deadlines in all the sets of rules were considered and many were revised during the Time Computation Project ten years ago. No particular deadline is addressed by this proposal.

The premise that courts know all deadlines, and routinely calculate them with unerring accuracy, may be open to some doubt. Great burdens would be imposed by an obligation to continually inform all parties of all deadlines after each event that triggers a new deadline or affects a current deadline.

An alternative might be found in relaxing the requirement in Rule 6(b) that requires good cause for extending a time to act. Special sympathy may be felt for pro se parties. But committee discussion showed agreement that courts take pro se status into account in administering the good-cause test.

### D. Expert Witness Fees in Discovery: Rule 26(b)(4)(E)

Suggestion 19-CV-T, submitted by retired Judge Mark Bennett, transmits an article by Professor Danielle 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) provides:

> (E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:
>
> (i) pay the expert a reasonable fee for the time spent in responding to discovery under Rule 26(b)(4)(A) * * *.

Professor Shelton identifies a number of detailed issues that have provoked apparently inconsistent approaches. Complex questions arise from time spent in preparing for a deposition: can the time be separated from time spent preparing a report or preparing for trial? Should offsets be recognized if preparation for a deposition reduces the time needed to prepare for trial? What standards should be used in determining the reasonableness of preparation time? Can the expert charge a higher rate for time spent in the actual deposition? Should the expert be allowed to charge a daily fee, even if the deposition is brief or cancelled? Among the more pedestrian issues are those related to travel to the site of a deposition and expenses for accommodations and food.

Professor Shelton's proposed resolution of these questions is demonstrated by part of the text of her proposed rule:

> (i) "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.

Many other issues are addressed in her proposal, including the time for submitting and paying claims for reimbursement, and interest after the due date.

Establishing flat rules of the sort proposed may be questioned on the ground that different answers are appropriate in different circumstances. Finding a good mix of discretion with specific rules would be a difficult task.

Discussion of the difficulty of preparing a good rule found all of the practicing lawyers agreeing that these questions are always worked out, not litigated. The judges agreed.

The committee removed this proposal from the agenda.

### E. Rule 26: ESI Production and Cost-Shifting

This proposal (19-CV-V) includes two topics aimed at elaborating the 2015 proportional discovery amendments.

The first would add this provision to Rule 26:

> The court may require a party to disclose details of its application of these Rules to its production of electronically stored information relevant to the case.

The purpose is to permit discovery of the choices a responding party made in determining that its responses to discovery of electronically stored information were proportional to the needs of the case. It connects to a topic discussed in the committee note to the 2015 amendments. The committee note observed that it is not meaningful to assign to either party a burden to show whether a request or response is proportional to the needs of the case as measured by the criteria in the rule. The requesting party is in the better position to explain why information is relevant, while the responding party is in the better position to explain the burdens of complying.

Committee discussion suggested that it is too early to attempt to refine the 2015 proportionality amendment. Four or five more years of experience will show whether refinements are desirable. This proposal was removed from the agenda.

The second proposal is to add this provision:

> In order to ensure proportionality, the Court may order the cost of discovery be shifted from one party to another party.

Discussion centered on the 2015 amendment that added to Rule 26(c)(1)(B) explicit recognition that a protective order may specify terms for the allocation of expenses for disclosure or discovery. The committee note observed that this authority had already been recognized, but urged that cost-shifting should not become a common practice. Again, recent attention to these issues persuaded the committee that the time has not come for renewed consideration.

### F. Rule 68: Clear Offers

Retired Judge Mark Bennett submitted this proposal (19-CV-S) by transmitting another article by his colleague, Professor 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. 864-937 (2007).

The article, now thirteen years old, explores the dangers that unclear terms raise for both a party receiving a Rule 68 offer of judgment and the party making the offer. The party receiving

the offer may, after accepting, be surprised to discover that a stated sum is interpreted to include costs and recoverable fees as well as damages. Or a party rejecting the offer may be surprised to discover that a judgment that seemed to better the offer fell short because the offer did not include costs and recoverable fees. The party making the offer may encounter similar problems. The suggested solution is to permit only two forms of offer. One, a "damage only" offer, leaves any matters of costs or fees for determination by the court and excludes them from any comparison of offer and judgment. The other is a "lump sum" offer that must be made in the exact language provided by an amended Rule 68.

Clear offers are desirable. It may be possible to encourage greater clarity by revising Rule 68, perhaps on the terms proposed by Professor Shelton.

The committee chose, however, to remove this proposal from the agenda. Rule 68 proposals have a long history, going back to a proposal published in 1982 that was followed by a much-revised proposal published in 1983, only to have the 1983 proposal fail without further action. Another serious study was undertaken in 1994, this time to conclude without publishing the elaborate draft that had been developed to address a wide variety of perceived difficulties with Rule 68 as it stands. Since then, Rule 68 has been the subject of many "mail box" proposals. The most common feature of these proposals is to make Rule 68 more effective by increasing the consequences of failing to win a judgment better than a rejected offer. But many other questions are raised, often beginning with the argument that fairness requires that a party making a claim should be entitled to make an offer. Since a Rule 68 costs sanction would be redundant if the defendant suffered a judgment greater than a rejected offer, shifting attorney fees is commonly proposed as the sanction. Another common suggestion is that it can be reasonable to reject an offer that in fact proved better than the judgment, so that some margin of difference should be required to support sanctions.

Still more fundamental questions can be raised. One asks why Rule 68 needs to be revised if the goal is to increase the frequency of settlements. Few cases make it all the way to trial. The response is that an enhanced Rule 68 might encourage earlier settlements in cases that now settle later, often after costly discovery. And the reply is that settlements reached after discovery are more likely to be fair.

Still other questions go to Supreme Court decisions that rely on the "plain meaning" of Rule 68. One is that the Rule 68 denial of post-rejected-offer costs cuts off the right to statutory attorney fees if the statute characterizes fees as "costs," but not otherwise. The other is that a defendant who makes an offer for a substantial amount and then wins a take-nothing judgment is not entitled to sanctions because the offeree has not "obtain[ed]" a judgment.

The committee concluded that although there might be something to be gained by a project that focuses narrowly on encouraging clearer Rule 68 offers, undertaking even that project could not avoid reexamining Rule 68 as a whole. Some participants might seize the

occasion to argue for outright abrogation.

### G. "Snap Removal": Rule 4(d)

This proposal (19-CV-W) advances a novel Civil Rule approach to problems perceived in judicial interpretations of the provision that limits removal of state-court diversity actions, 28 U.S.C. § 1441(b)(2).

Section 1441(b)(2) 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." It is common to explain the "and served" element by observing that a plaintiff might be tempted to defeat removal by naming a local defendant without any intention of actually proceeding against that defendant. Joined, not served, and then ignored.

The practice addressed by the proposal, referred to as "snap removal," arises when defendants remove before any local defendant has been served. This practice is facilitated by rules in some states that force a delay between filing the action and making service — a non-local defendant who learns of the action can remove before anyone is served. And, it is said, entities that are frequently sued have begun to monitor state court dockets to facilitate removal before the removing defendant or anyone else has been served. At least two circuit courts of appeals have concluded that such removal is authorized by the plain language of the statute, and that the result is not so untoward as to justify departure from the plain language.

The proposed remedy would add a complex new paragraph to the waiver-of-service provisions of Rule 4(d). The proposal relies on fictitious "deemed" elements to allow a plaintiff to force remand after a "snap" removal by serving a local defendant within 30 days of removal. Or at least that seems to be the intended reading; the proposed language is not easy to track.

The committee concluded that the proposal is essentially aimed at amending § 1441(b)(2). That is not suitable work for the Civil Rules. The committee was informed that the Federal-State Jurisdiction Committee has this proposal on its agenda. It will be removed from the Civil Rules agenda.