ADVISORY COMMITTEE
ON
CIVIL RULES

October 5, 2021

AGENDA
Meeting of the Advisory Committee on Civil Rules
October 5, 2021

OPENING BUSINESS

ACTION ITEMS

INFORMATION ITEMS

Subcommittee Reports

Matters Carried Forward

New Proposals

RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure
(Standing Committee)

Chair	Reporter
Honorable John D. Bates United States District Court Washington, DC	Professor Catherine T. Struve University of Pennsylvania Law School Philadelphia, PA

Advisory Committee on Appellate Rules

Chair	Reporter
Honorable Jay S. Bybee United States Court of Appeals Las Vegas, NV	Professor Edward Hartnett Seton Hall University School of Law Newark, NJ

Advisory Committee on Bankruptcy Rules

Chair	Reporter	Associate Reporter
Honorable Dennis R. Dow United States Bankruptcy Court Kansas City, MO	Professor S. Elizabeth Gibson University of North Carolina at Chapel Hill Chapel Hill, NC	Professor Laura B. Bartell Wayne State University Law School Detroit, MI

Advisory Committee on Civil Rules

Chair	Reporter
Honorable Robert M. Dow, Jr. United States District Court Chicago, IL	Professor Edward H. Cooper University of Michigan Law School Ann Arbor, MI
	Associate Reporter
	Professor Richard L. Marcus University of California San Francisco, CA

Advisory Committee on Criminal Rules

Chair	Reporter
Honorable Raymond M. Kethledge United States Court of Appeals Ann Arbor, MI	Professor Sara Sun Beale Duke Law School Durham, NC
	Associate Reporter
	Professor Nancy J. King Vanderbilt University Law School Nashville, TN

Advisory Committee on Evidence Rules

Chair	Reporter
Honorable Patrick J. Schiltz United States District Court Minneapolis, MN	Professor Daniel J. Capra Fordham University School of Law New York, NY

ADVISORY COMMITTEE ON CIVIL RULES

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Honorable Catherine P. McEwen
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Tampa, FL

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Susan Y. Soong, Esq.
Clerk
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Liaison for the Advisory Committee on Bankruptcy Rules	Hon. William J. Kayatta, Jr. *(Standing)*
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. *(Standing)* Hon. Catherine P. McEwen *(Bankruptcy)*
Liaison for the Advisory Committee on Criminal Rules	Hon. Jesse M. Furman *(Standing)*
Liaisons for the Advisory Committee on Evidence Rules	Hon. Carolyn B. Kuhl *(Standing)* Hon. Sara Lioi *(Civil)*

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TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 22, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 22, 2021. The following members were in attendance:

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

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

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

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

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Rules Committee Staff Acting Chief Counsel; Bridget Healy and Scott Myers, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); and Dr. Tim Reagan, Senior Research Associate at the FJC. Rebecca A. Womeldorf, the former Secretary to the Standing Committee, attended briefly at the start of the meeting.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Deputy Attorney General Lisa O. Monaco. Andrew Goldsmith was also present on behalf of the DOJ.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He expressed hope that next January's meeting could be in person and began by reviewing the technical procedures by which this virtual meeting would operate. He welcomed new ex officio Standing Committee member Deputy Attorney General Lisa O. Monaco, though she was not available to join the meeting, and thanked the other DOJ representatives joining on her behalf. He also acknowledged and thanked Daniel Girard and Professor Bill Kelley, both completing their service on the Standing Committee.

Judge Bates next acknowledged Rebecca Womeldorf, former Secretary to the Standing Committee. She departed the Administrative Office in January of this year to become the Reporter of Decisions of the U.S. Supreme Court. Judge Bates thanked Ms. Womeldorf for her years of tremendous service to the rules committees and her friendship. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the January 5, 2021 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments currently proceeding through each stage of the Rules Enabling Act (REA) process and referred members to the tracking chart beginning on page 53 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2020. It also sets out proposed amendments (to the Appellate and Bankruptcy Rules) that were recently adopted by the Supreme Court and transmitted to Congress; these will go into effect on December 1, 2021, provided Congress takes no action to the contrary. The chart also includes rules at earlier stages of the REA process.

JOINT COMMITTEE BUSINESS

Emergency Rules Project Pursuant to the CARES Act

Judge Bates introduced this agenda item, included in the agenda book beginning at page 77. The emergency rules project has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He extended his thanks and admiration to everyone who worked on these issues. In particular, he acknowledged Professor Daniel Capra's instrumental role in guiding the drafting of the proposed amendments and promoting uniformity among them.

Section 15002(b)(6) of the CARES Act directed the Judicial Conference and the Supreme Court to consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In January 2021, the Committee reviewed draft rules from each advisory committee, with the exception of the Advisory Committee on Evidence Rules, which had determined that no emergency rule was necessary. The Standing

Committee offered feedback at that point, focusing primarily on broader issues. During their Spring 2021 meetings, the advisory committees considered this feedback and revised their proposed amendments accordingly. The advisory committees now sought permission to publish the resulting proposals for public comment in August 2021. Any emergency rules approved for publication would be on track to take effect in December 2023 (if approved at each stage of the REA process and if Congress were to take no contrary action).

Professor Struve echoed Judge Bates's thanks to Professor Capra and all the participants in the emergency-rules project. She invited Professor Capra to frame the discussion of issues for the Standing Committee to consider. Professor Capra reminded the Committee members that uniformity issues had been discussed in detail during the January 2021 meeting of the Standing Committee. The advisory committees, he reported, had taken the Standing Committee's feedback to heart when finalizing their proposals at their spring meetings. As to most of the issues discussed at the January meeting, the advisory committees had achieved a uniform approach.

One such issue was who should declare a rules emergency. Should only the Judicial Conference be able to do this, or might any other bodies also be authorized to do so? The advisory committees understood the members of the Standing Committee to be in general agreement that it would be best if only the Judicial Conference had the power to declare emergencies. All four proposed emergency rules are now consistent on this point.

The definition of a rules emergency was also discussed at the January meeting. With one exception, the advisory committees' proposals now use the same definitional language. The proposals all state that a rules emergency may be declared when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to" a court, "substantially impair the court's ability to perform its functions in compliance with these rules." The proposed emergency Criminal Rule adds a requirement that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The understanding of the Advisory Committee on Criminal Rules was that the Standing Committee was comfortable with this remaining difference given the constitutionally-based interests and protections uniquely implicated by the Criminal Rules. With the goal of uniformity in mind, each of the other three advisory committees developing emergency rules had considered adding this "no feasible alternative" language to their own proposals; however, each of those advisory committees ultimately determined this was unnecessary.

Another issue discussed in January was the relatively open-ended nature of the draft Appellate Rule. The Advisory Committee on Appellate Rules thought this would be appropriate because Appellate Rule 2 was already very flexible and allowed the suspension of almost any rule in any particular case. There was some concern among members of the Standing Committee that, to offset this open-ended rule, more procedural protections might be useful. The Advisory Committee responded by revising its proposal to include safeguards that track those adopted by the other advisory committees.

The termination of rules emergencies was also discussed. This issue involves whether the rules should mandate that the Judicial Conference terminate an emergency declaration when the emergency condition no longer exists. The advisory committees agreed that it would be

inappropriate to impose such an obligation on the Judicial Conference and that termination would likely occur toward the end of the emergency period anyway, such that it would be useful to accord the Judicial Conference discretion to simply let the declaration's original term run its course.

The advisory committees also discussed whether there should be a provision in the emergency rules to account for the possibility that, during certain types of emergencies, the Judicial Conference itself might not be able to communicate, meet, or declare an emergency. The advisory committees did not think it was necessary to include such a provision because it would take extreme if not catastrophic circumstances to trigger this provision and, under such circumstances, a rules emergency is unlikely to be a priority. The courts would probably want to have plans in place for these kinds of circumstances, but the rules of procedure did not seem like the appropriate place for them, nor were the rules committees in the best position to work them out.

Finally, the advisory committees had discussed what Professor Capra termed a "soft landing" provision—a provision addressing what should happen when a proceeding that began under an emergency rule was still ongoing when a rules emergency terminated. The advisory committees had addressed this issue in different ways. Proposed Criminal Rule 62 would allow a proceeding already underway to be completed under the emergency procedures (if resuming compliance with the ordinary rules would be infeasible or unjust) so long as the defendant consented, while proposed Bankruptcy Rule 9038 and Civil Rule 87 deal with the "soft landing" issue on more of a rule-by-rule basis.

One provision that remained nonuniform was the provision laying out what the Judicial Conference's rules emergency declaration would contain. The proposed Bankruptcy and Criminal Rules provide that the Judicial Conference declaration must state any restrictions on the provisions (set out in these emergency rules) that would otherwise go into effect, while the proposed Civil Rule provides that the declaration must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." Professor Capra described this as a "half-full / half-empty" distinction.

Professor Capra thanked the Standing Committee members for the valuable input they provided at their January meeting and he observed that the proposals were in a good place with regard to uniformity. Most provisions were uniform and the reasons for any remaining points of divergence had been well explained. Judge Bates invited questions or comments on Professor Capra's presentation regarding uniformity. There were none.

Judge Bates next invited Judge Kethledge and Professors Beale and King to present proposed Criminal Rule 62. Judge Kethledge thanked Judge Dever, the chair of the Rule 62 Subcommittee, as well as the reporters, Judge Bates, and Judge Furman for their input on the proposed rule. He began by describing the Advisory Committee's process. The Subcommittee held a miniconference at which it heard from practitioners and judges describing their experiences during the COVID-19 emergency and prior emergencies. Judge Dever also surveyed chief district judges for their input. Judge Kethledge noted an overarching principle that had guided the drafting effort: The Subcommittee and Advisory Committee are stewards of the values protected by the Criminal Rules—protections historically rooted in Anglo-American law. The paramount concern

is not efficiency but, rather, accuracy. Accordingly, proposed Criminal Rule 62 authorizes departures from normal procedures only when absolutely necessary. The "no feasible alternative measures" requirement contained in the proposed rule reflected that approach. Proposed Rule 62 takes a graduated approach to remote proceedings, with higher thresholds for holding more important proceedings by videoconference or other remote technology. Concerns about the importance of in-person proceedings reach their apex with respect to pleas and sentencings.

Judge Kethledge pointed out that many of the recent changes to the proposed rule responded to helpful feedback from members of the Standing Committee. Proposed Rule 62(e)(4), for example, has been revised to make clear that its requirements (for conducting proceedings telephonically) apply whenever any one or more of the participants will be participating by audio only. Thus if one or more of the participants in a videoconference proceeding lose their video connection, and Rule 62(e)(4)'s requirements are met, the proceeding can continue as a videoconference in which those specific participants participate by audio only. Professors Beale and King added that the committee was grateful to Professor Kimble and his style-consultant colleagues and to Julie Wilson for helping finalize late-breaking changes to the proposed rule. Judge Kethledge and Professor Beale noted that some minor changes to the proposed rule—indicated in brackets in the copy of the draft rule and committee note at pages 161, 170, and 174-75 of the agenda book—had been made after the Advisory Committee's spring meeting and therefore had not been approved by the full committee; but those changes had the endorsement of Judges Kethledge and Dever and the reporters.

Judge Bates suggested that the reporters open discussion of proposed Rule 62 by highlighting two changes that were made after publication of the agenda book. Professor King explained the first, located in paragraph (e)(3), found on page 159 line 101 in the agenda book. In the agenda book's version, Rule 62(e)(3)'s requirements for the use of videoconferencing for felony pleas and sentencings incorporated by reference the requirements of Rules 62(e)(2)(A) and (B) (which apply to the use of videoconferencing at other, less crucial proceedings). Judge Bates had pointed out that it was not necessary to incorporate by reference Rule 62(e)(2)(A)'s requirement, because Rule 62(e)(3)(A)'s requirement is more stringent. The suggestion, which the reporters and chair endorsed, was that line 101 be revised to read "the requirement in (2)(B)," eliminating the reference to (2)(A).

Another change not reflected in the agenda book was in the committee note on page 166 line 274. This too was in response to a suggestion by Judge Bates, this time concerning Rule 62's "soft landing" provision. As noted previously, the "soft landing" provision addresses what happens if there is an ongoing proceeding that has not finished when the declaration terminates. The committee note to Rule 62(c), as approved by the Advisory Committee, explained that the termination of an emergency declaration generally ends the authority to depart from the ordinary requirements of the Criminal Rules but "does not terminate … the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3)." Judge Bates had suggested that it would be helpful to explain how this statement in the committee note (shown at lines 271-74 at page 166 of the agenda book) related to the text of proposed Rule 62. To provide that explanation, the chair and reporters proposed to augment the relevant sentence in the committee note so that it would read: "It does not terminate, however, the court's authority to complete an ongoing trial with alternate jurors who have been impaneled under (d)(3), because the

proceeding authorized by (d)(3) is the completed impanelment." This explanation reflected the consensus view at the spring Advisory Committee meeting.

Judge Kethledge suggested that the Standing Committee discuss the proposed rule section-by-section. Judge Bates agreed. There were no comments on subdivisions (a) through (c), which lay out the emergency declaration and termination provisions that Professor Capra had already summarized, and which are largely consistent with those employed in the other proposed emergency rules. Discussion then moved to subdivision (d), which details authorized departures from the rules following a declaration.

A judge member expressed strong support for the proposed Rule overall. This member suggested a change to the committee note's discussion concerning Rule 62(d)(1). Rule 62(d)(1) states that when "conditions substantially impair the public's in-person attendance at a public proceeding, the court must provide reasonable alternative access" which should be "contemporaneous if feasible." The Rule text focuses on the timing of the access. The proposed committee note, at page 167, lines 312-15, instead focused on the form of access, stating with respect to videoconference proceedings that an audio feed could be provided to the public "if access to the video transmission is not feasible." This language in the note indicated a preference—for video instead of audio access—that was not grounded in the text of the proposed rule. Instead, the rule states that contemporaneous access—whether audio or video—is preferable to asynchronous transmission such as a transcript released after the proceeding. And the committee note's suggestion that video access should be provided to the public if "feasible" seemed to raise an undue barrier for courts—such as this member's court—that (due to bandwidth and other concerns) had been providing the public with audio-only access to video proceedings. It could be hard to make a finding that public video access was not "feasible"—would that require considering whether switching to a different electronic platform would permit public video access? The member suggested deleting this sentence from the committee note. Professor Beale explained that this was just one example and the Advisory Committee was not wedded to it. Judge Kethledge agreed that this example could be misunderstood. He thought there would not be much harm in striking that sentence from the committee note. Judge Bates also agreed, noting that his court had also been providing the public with audio-only access to video proceedings.

A second judge member suggested that, even if the Note's language about "feasibility" should be deleted, it could be useful for the Note to discuss the possibility of using audio to provide the public with "reasonable alternative access." The first judge endorsed the Rule's feasibility language concerning the timing of access: public access should be contemporaneous if that is feasible. A third judge member warned that requiring a feasibility analysis could suggest that courts should engage in "heroics" to try to provide contemporaneous video access to the public. An emergency rule will only apply in unusual circumstances. It is not helpful for the rules to require judges operating under such circumstances to devote extensive attention to information technology issues. The idea is to protect the rights of the defendant while acknowledging the rights of the public and to reconcile those in a timely fashion. This judge urged the deletion of any words that could introduce new points of dispute.

Professor Struve wondered whether a way to keep the thought about audio transmission as an option would be to insert a reference to it around line 300, as an example of a reasonable form

of access. She suggested a sentence reading: "Under appropriate circumstances, the reasonable alternative could be audio access to a video proceeding." The judge who first raised this issue agreed that this would be a better place for this example, as did Judge Bates. This would allow the deletion of the sentence at lines 312–15 that had been critiqued.

Discussion then moved to subdivision (e), which addresses the use of videoconferencing and teleconferencing after the declaration of a rules emergency. A judge member asked, in light of the decision to strike the reference to subparagraph (2)(A) from paragraph (e)(3), whether it would make sense to repeat in paragraph (e)(3) the requirements laid out in subparagraph (2)(B), the remaining cross-referenced provision. Judge Bates noted that the cross-reference only referred back ten lines or so and would thus be easy enough to follow. Professor Kimble noted that, when possible, it is better to avoid unnecessary cross-references, but that it always depends on how much language would need to be repeated and on the distance from the original language. Professor Kimble thought that the cross-reference was reasonable here.

A judge member wanted to make Committee members aware of caselaw interpreting Rule 43(c)(1)(B)'s provision that a noncapital defendant who has pleaded guilty "waives the right to be present … when the defendant is voluntarily absent during sentencing." In 2012—before the pandemic or the CARES Act—the Second Circuit had addressed the circumstances under which, pursuant to Criminal Rule 43(c)(1)(B), a defendant could consent to the substitution of video participation for presence in person. *See United States v. Salim*, 690 F.3d 115 (2d Cir. 2012). The Second Circuit had said that consent for purposes of Rule 43(c)(1)(B) can be made through counsel, though it must be knowing and voluntary. *Salim*'s requirements, this member stated, are nowhere near as stringent as those in proposed Rule 62(e)(3). The judge wondered whether the Second Circuit would adhere to *Salim*, in the non-emergency context, if Rule 62 were to be adopted. But the member did not think that this was a reason not to proceed with the rule as drafted.

Another judge member thanked the Advisory Committee for the proposed rule, which this member characterized as excellent. This judge had a question about subparagraph (e)(3)(B), which (as set out in the agenda book) provided that a felony plea or sentencing proceeding could not be conducted by videoconference unless "the defendant, after consulting with counsel, requests in writing that the proceeding be conducted by videoconferencing." The phrase "requests in writing" had replaced "consents in writing" in an earlier draft. The committee note explained that this change was intended to provide an additional safeguard, and suggested that a judge might want to hold a colloquy with the defendant to confirm actual consent. The judge wanted to know whether the Advisory Committee intended that the court must make a finding that there is consent, as opposed to simply treating the written request as necessarily demonstrating consent. A written request is not the same as actual consent because it is always possible that a defendant could be confused or feel pressured. This judge did not think that subparagraph (e)(3)(B) was sufficiently clear about requiring a finding that would guarantee actual consent. Subparagraph (e)(2)(C), by comparison, suggested the need for a finding in a much clearer way. The judge suggested referencing the "requirements in (2)(B) and (C)" on line 101 as one possible way of clarifying the need for a finding.

Professor King asked whether the insertion of the words "and consents" after "in writing" in (e)(3)(B) on line 111 would suffice to clarify the point. The judge member responded that such

a change would ensure that there is a writing in the record that evinces consent; but that change by itself would not make clear that the judge should verify that the *defendant* (as distinct from the defendant's lawyer) was actually consenting. The member asked whether consultation was required on the record for a consent to videoconferencing at other types of proceedings under paragraph (e)(2). Professor King responded that Rule 62(e)(2)(C) does not require a finding on the record (with respect to that Rule's requirement that the defendant consents after consulting with counsel). Judge Bates noted that he had been considering a similar suggestion to Professor King's, that lines 110-11 might require that a defendant "consent by requesting in writing." But he was not sure whether that addressed the concern. The committee note might have to be changed as well.

Another judge member asked how subparagraph (e)(2)(C)—requiring that a defendant "consents after consulting with counsel"—would work for defendants who had refused counsel and were proceeding pro se. Judge Bates noted that consultation with counsel is required under both (e)(2) and (e)(3). Professor Beale responded that the Advisory Committee had not discussed this question, but that she assumed that consultation requirements would not apply for a defendant who had waived the right to counsel. Proposed Rule 62(d)(2) provides that "the court may sign for" a pro se defendant "if the defendant consents on the record," but no specific cross-reference to that provision appears in the (e)(2) and (e)(3) consultation provisions. The judge noted that "an adequate opportunity to consult"—used in (e)(2)(B)—might be a better formulation for (e)(2)(C) than "consulting."

A practitioner member noted that there were different consultation or consent requirements in the different subsections of (e) and wondered how much protection would be lost if (e)(2)(C) just said "the defendant consents." This might resolve the pro se defendant issue. In (e)(3)(B) the word "consent" could be added somewhere. And (e)(4)(C) simply requires that "the defendant consents." This would level out the articulation in all three provisions. Professor Beale stated that this was one possible way to resolve the issue. As an alternative, she expressed support for revising (e)(2)(C) to say "after the opportunity to consult." A defendant who has waived representation clearly has had an opportunity to consult with counsel.

The judge who had raised the concern about the writing and consent issue in the first place suggested a solution that involved substituting "consent in writing" for "request in writing." Professor King then explained that the Advisory Committee had intended to create an added protection by requiring a request from the defendant, rather than just consent. The idea has to come from the defendant, not from any outside pressure. To maintain the Advisory Committee's policy choice, "consent in writing" would need to be in addition to a written request, not a substitute for it.

As to the suggestion that the phrase "after consulting with counsel" be deleted from (e)(2)(C), Professor King pointed out that the videoconferencing and teleconferencing proceedings authorized by the CARES Act can only take place with the defendant's consent "after consultation with counsel." So Congress made a policy choice to require that consultation with counsel precede the consent. The Advisory Committee carried forward that policy choice. But inserting a reference to the "opportunity" to consult, Professor King suggested, would not be inconsistent with the Advisory Committee's intent.

Judge Kethledge noted that it was a judgment call whether to require the court to determine that the defendant actually has consulted with counsel with respect to consent to videoconferencing, or whether to require the court to find merely that the defendant generally had an opportunity to consult with counsel before and during the proceeding (leaving it to district judges in particular proceedings to determine how searching the inquiry should be with respect to consultation on the specific issue of consent to videoconferencing). Judge Kethledge acknowledged that the practitioner member's drafting suggestion would make the provisions under (e)(2)(C), (e)(3)(B), and (e)(4)(C) more uniform, but—Judge Kethledge suggested—spelling out a requirement concerning opportunity to consult with counsel seems worthwhile given the gravity of consenting to videoconferencing.

An appellate judge member followed up on Professor King's point that "request" was a higher requirement than consent. This member expressed support for requiring a request from the defendant; such a request is more likely to trigger a finding of waiver in the event that the defendant later tries (on appeal) to challenge the district court's use of videoconferencing.

Professor Capra reminded the members that at this stage the Standing Committee was only going to be voting on whether to send the rule out for public comment. He cautioned against too much drafting on the floor at this stage. These issues could always be kept in mind going forward.

An academic member expressed support for requiring only an opportunity to consult, and not actual consultation, with counsel; avoiding a requirement of actual consultation eliminates the risk that a defendant might later deny that the consultation occurred. A judge member stated that, if the rule refers to an "opportunity to consult," it should use the "adequate opportunity" language used in other provisions—lest someone draw an inference from the fact that different formulations are used in different places. This judge member pointed out, approvingly, that it was a policy choice by the Advisory Committee that subparagraph (e)(4)(C) not include the "opportunity" or "consultation" language. Subparagraph (e)(4)(C) omits those requirements because the idea is to allow the defendant to consent quickly and easily to continuing a proceeding if a participant loses video connection when a proceeding is already underway.

The judge who raised the writing and consent issue suggested revising paragraph (e)(3)(B) (at lines 109-13) to require that "the defendant, after consulting with counsel, requests in a writing signed by the defendant that the proceeding be conducted by videoconferencing." This would emphasize that a request is more than consent, while also ensuring that the defendant is actually consenting. Professor Beale and Judge Kethledge endorsed this suggestion because this was what the Advisory Committee had in mind. A judge member expressed concern that defendant signatures had been difficult to obtain during the pandemic, but Professor Beale noted that paragraph (d)(2) provides ways to comply with defendant-signature requirements when emergency conditions limit a defendant's ability to sign.

Judge Bates confirmed that Judge Kethledge and the reporters agreed with the change to line 111 (which they did), and said that the Standing Committee would proceed with considering the rule with that change. The rule being voted on would include the following changes:

- bracketed changes indicated in the agenda book at pages 161, 170, and 174-75

- changes to paragraph (e)(3) and committee note discussion of subdivision (c) that had been suggested by Judge Bates after publication of the agenda book but prior to today's meeting
- changes to subparagraph (e)(3)(B)
- changes to committee note discussion of paragraph (d)(1)

No change to lines 94-95 was made at this time. The reporters would note the potential issue for pro se defendants and the Advisory Committee would give it further consideration following the public comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Criminal Rule 62 for public comment with the above-summarized changes.**

The Civil Rules Advisory Committee presented its proposed rule next. Judge Robert Dow introduced it, thanking the subcommittee chairs and the reporters, and noting his appreciation for the input provided by the members of the Standing Committee at the January meeting. Both the Advisory Committee and its CARES Act Subcommittee agreed that the Civil Rules had performed very well during the pandemic and that civil proceedings had generally moved forward, with the exception that trials are backed up. Judge Dow said that the Advisory Committee was looking forward to receiving public comment and that it was still open to proceeding down any of three very different paths with regard to the emergency rule. One possibility was to proceed with the emergency rule (proposed Civil Rule 87) as currently drafted. Another possibility was to directly amend Civil Rules 4 (on service) and 6 (on time limits for postjudgment motions). Finally, given that the Civil Rules had proven adaptable, the Advisory Committee had not ruled out recommending against a civil emergency rule and leaving the Civil Rules unaltered.

Professor Cooper introduced the discussion of proposed Civil Rule 87. Rule 87 contains six emergency rules, five of which concern service of the summons and complaint. Rule 87(c)(1) (addressing alternate modes of service during an emergency) provides for service through "a method that is reasonably calculated to give notice." The Rule states that "[t]he court may order" such service in order to make clear that litigants need to obtain a court order rather than taking it on themselves to use the alternate mode of service and seek permission later. Proposed Rule 87(c)(1) builds in a "soft landing" provision, because the Advisory Committee concluded that each of the emergency Civil Rules should have its own "soft landing" provision. Rule 87(c)(1) provides that if the emergency declaration ends before service has been completed, the authorized method may still be used to complete service unless the court orders otherwise.

Rule 87(c)(2) softens Civil Rule 6(b)(2)'s ordinarily-impermeable barrier to extensions of time for motions under Civil Rules 50(b) and (d), 52(b), 59, and 60(b). Rule 87(c)(2) has been carefully integrated with the provisions of Appellate Rule 4(a)(4)(A) (concerning motions that re-start civil appeal time). The Appellate Rules Committee has worked in tandem with the Civil Rules Committee, and is proposing an amendment to Appellate Rule 4(a)(4)(A)(vi) that will mesh with proposed Civil Rule 87(c)(2). Rule 87(c)(2)(C) sets out a "soft landing" provision that addresses the timeliness of motions and appeals filed after an emergency declaration ends; it provides that

"[a]n act authorized by an order under" Rule 87(c)(2) "may be completed under the order after the emergency declaration ends."

The main remaining point of discontinuity with the other three proposed emergency rules was the fact—discussed earlier by Professor Capra—that proposed Rule 87(b)(1)(B) required the Judicial Conference to "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." This differs from proposed Criminal Rule 62(b)(1)(B), which directs that the emergency declaration "state any restrictions on the authority" granted in subsequent portions of Criminal Rule 62. The Criminal Rule's formulation would not work for Civil Rule 87(b)(1)(B), because it would not make sense to ask the Judicial Conference to cabin the district court's discretion with respect to methods of service, or to invite the Judicial Conference to alter the intricate structure set out in Civil Rule 87(c)(2). Instead, the Judicial Conference should consider which of the emergency Civil Rules to adopt. Professor Cooper concluded by reminding the Standing Committee members of Professor Capra's suggestion that it might be appropriate to allow disuniformity to remain for now in order to get public comment on the disuniformity itself.

Professor Marcus underscored the idea that Civil Rule 87 is dealing with very different issues than Criminal Rule 62. Rule 87(c)(1) authorizes a court to order additional manners of service in a given case. Trying to do something more global that did not require a court order had not been viewed as a good idea by the subcommittee.

A practitioner member supported publication of the rule. Given the design of each of the proposed emergency rules, this member acknowledged, achieving perfect uniformity is difficult. However, this member suggested that in a system where, for the first time, emergency rules are being introduced and the Judicial Conference is being tasked with declaring rules emergencies, there was something to say for establishing a consistent default rule along the lines set out in the proposed Bankruptcy and Criminal emergency rules—namely, that triggering the emergency triggers all the emergency rules. This would mean less work for the Judicial Conference, which would be able to activate all the emergency rules by declaring the emergency. But this could be discussed further following publication. Professor Cooper said that Civil Rule 87(b)(1)(B) envisioned substantially the same approach—namely, that all emergency provisions would be adopted in the emergency declaration unless the Judicial Conference affirmatively excepted one or more of them. But the member pointed out that Rule 87(b)(1)(B) requires explicit adoption of the emergency rules; what would happen if the Judicial Conference simply declared an emergency and said nothing else? Professor Capra agreed that if there is nothing in the declaration except the declaration itself, then nothing would happen under Rule 87. Professor Cooper suggested that the issue could be resolved if paragraph (b)(1) were revised to read: "[t]he declaration: (A) must designate the court or courts affected; (B) adopts all the emergency rules . . . unless it excepts one or more of them; and (C) must be limited to a stated period of no more than 90 days." Professor Capra suggested that it was unnecessary to resolve now, but also that it would be preferable to copy the language used in the other sets of rules.

A judge member agreed that more uniformity would be better but that it did not have to be addressed today. This member then asked two questions. First, why did the rule, in paragraph (c)(1), say that a "court may order service" through an alternative method instead of saying that a "court may authorize service?" Would it not be better to allow a party to change its mind and

decide that a standard method of service would be fine after all? A court order might lock a party into the alternative service method. Professor Marcus explained that the Advisory Committee used "order" rather than "authorization" because an "order" guarantees that the judge approves service by an identifiable means (a court order). The member asked whether the "order" would require that service must be by the alternative means, but Professor Marcus thought that surely the order would only add an additional means rather than ruling out standard methods. The member suggested revising (c)(1), at line 27, to say "[t]he court may by order authorize." Professor Cooper and Judge Dow approved of this change.

The member's second question also related to paragraph (c)(1). The member appreciated the point, in the proposed committee note, that courts should hesitate before modifying or rescinding an order issued under paragraph (c)(1) for fear that a party may already be in the process of serving its adversary. The member had previously thought it might be advisable to require good cause for modifying the order. After consideration, the member no longer thought a good cause standard was necessary, but the member wondered if it would be better if paragraph (c)(1), at page 125 lines 35-36, required that the court give the plaintiff notice and an opportunity to be heard before modifying or rescinding the order. Professor Cooper was neutral on this suggestion. Judge Dow did not see any downside to requiring notice and opportunity to be heard and thought that this was what most judges would do anyway. Professor Hartnett suggested omitting the word "plaintiff" because plaintiffs are not the only ones who serve summonses and complaints. Accordingly, lines 35-36 were revised to read "unless the court, after notice and an opportunity to be heard, modifies or rescinds the order."

A third change agreed upon was to delete (for style reasons) "authorized by the order" from line 33.

A judge member thought that the proposed rule addressed most of the Civil Rules that are integrated with Appellate Rule 4, which governs the time to file a notice of appeal. This judge noted, however, that proposed Civil Rule 87 did not seem to address Rules 54 and 58, each of which is also integrated with the Appellate Rules through Rule 59. (The member was referring to Civil Rule 58(e), which provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.") Professor Struve responded that the Advisory Committee was attempting to account for the Rule 6(b)(2) provision stating that courts cannot extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The proposed rule targeted those particular constraints. The judge member acknowledged that explanation, but argued that Rule 58(e) contains its own bar on extensions that could not be avoided if a litigant wanted to preserve the option of waiting to appeal. Professor Struve responded that the deadline in Rule 58(e) ("a timely motion … under Rule 54(d)(2)") was extendable under Rule 6(b)(1); Judge Bates and Professor Cooper agreed with this view. The member responded that he read Rule 58(e) to incorporate the time deadline in Civil Rule 59, not the Civil Rule 59 deadline as it might be extended under the emergency rule. After some further discussion, Professor Struve suggested that this issue be noted for further discussion following public comment. Judge Bates agreed that this suggestion could be discussed further during the comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Civil Rule 87 for public comment** with the three modifications (to Rule 87(c)(1)) described above.

Judge Dennis Dow introduced the proposed emergency Bankruptcy Rule, new Rule 9038. He thanked Professor Gibson for her excellent work in spearheading the drafting of the proposed rule and Professor Capra for his leadership and coordination of the project. Changes since January largely resulted from guidance the Standing Committee had provided at its January meeting. Rules 9038(a) and (b) generally track the approach taken in the other emergency rules, while Rule 9038(c) addresses issues specific to the Bankruptcy Rules. Professor Gibson noted one point of disuniformity—the use of "bankruptcy court" instead of "court" throughout the proposed rule. Bankruptcy Rule 9001 defines "court" as the judicial officer presiding over a given case, so while the Advisory Committee thought the risk of confusion was low, the decision was made to use "bankruptcy court" when referring to the institution rather than the individual. The only substantive change since January was to revise paragraph (c)(1) to allow a chief bankruptcy judge to alter deadlines on a division-wide basis as opposed to district-wide when a rules emergency is in effect. The thinking was that if an emergency only affected part of a district, then deadlines could be extended in only that area. The emergency rule was largely an expansion of Rule 9006(b) (which addresses extensions). When the bankruptcy emergency subcommittee surveyed the Bankruptcy Rules, they determined that Rule 9006(b) was arguably insufficient in some emergency situations because it did not allow extensions of all rules deadlines (for example, the deadline for holding meetings of creditors). The proposed emergency rule would allow greater flexibility. The Advisory Committee agreed to make its rule uniform with the other proposed emergency rules in providing that only the Judicial Conference would be authorized to declare a rules emergency.

Judge Bates had a question about Rule 9038(c). In subsection (c)(1) a chief bankruptcy judge is allowed to toll or extend time in a district or division and in (c)(2) a presiding judge can extend or toll time in a particular proceeding. Judge Bates's question concerned (c)(4)'s provision on "Further Extensions or Shortenings." He asked if that provision was intended to allow presiding judges to further modify deadlines regardless of who had modified them in the first place. Professor Gibson and Judge Dow said yes.

A judge member noted that the rule did not permit chief judges to adjust the deadline extensions authorized by their own prior orders. Professor Gibson agreed that chief judges could not do this, except in individual cases over which they are presiding. The idea was that the chief judge's extensions would be general. This member also asked what it meant to say that further extensions or shortenings could occur "only for good cause after notice and a hearing and only on the judge's own motion or on motion of a party in interest or the United States trustee." Would it be enough to refer simply to notice and an opportunity to be heard, rather than a hearing? And why spell out whose motion could trigger the adjustment? Professor Gibson and Judge Dow explained that under the Bankruptcy Code, "notice and a hearing" is a defined term and that it required only an opportunity to be heard. There would be no need to hold a hearing if one was not requested. The point of mentioning whose motion could trigger the adjustment was to establish that the court could adjust the deadlines *sua sponte*. Judge Dow said that without this language he did not think it would be clear that judges could initiate the process on their own. Judge Bates asked whether

this language was necessary. In the district courts, judges can always initiate these kinds of processes on their own. Professor Gibson thought there were some situations where parties had to file motions. Judge Dow explained that the language was there for clarity and to prevent litigants from arguing that a court lacked the power to act sua sponte. Professor Hartnett asked about the significance of saying that "only" these persons could move. Who else could possibly move other than the persons listed? Professor Gibson and Judge Dow agreed that words "and only" could probably be cut.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed new Bankruptcy Rule 9038 for public comment** with the sole modification of the words "and only" on line 63 being deleted.

Judge Bybee and Professor Hartnett introduced the Advisory Committee on Appellate Rules' proposed amendments to Appellate Rules 2 and 4. Judge Bybee thanked everyone for their input and expressed that the Advisory Committee was satisfied with the proposed amendments. Professor Hartnett explained that the Advisory Committee had made significant changes to proposed Appellate Rule 2 since January in order to achieve greater uniformity and to respond to the Standing Committee's suggestions. The power to declare an emergency now rested only with the Judicial Conference, and sunset and early termination provisions had been added. The Advisory Committee had retained its suggestion that the Appellate Rules include a broad suspension power. The proposed appellate emergency rule would be added to existing Appellate Rule 2, which authorizes the suspension of almost any rule in a given case.

Professor Hartnett explained that the proposed amendment to Rule 4 that accompanied the proposed emergency rule was not quite an emergency rule itself, but rather was a general amendment to Rule 4. The idea was to amend Rule 4 so that it would work appropriately if Emergency Civil Rule 6(b)(2) ever came into effect; but the proposed amendment would make no change at all to the functioning of Appellate Rule 4 in non-emergency situations. Under Appellate Rule 4(a)(4)(A), certain postjudgment motions made shortly after entry of judgment re-set the time to take a civil appeal, such that the appeal time does not begin to run until entry of the order disposing of the last such remaining motion. For most types of motion listed in Rule 4(a)(4)(A), the motion has such re-setting effect if the motion is filed "within the time allowed by" the Civil Rules. If Emergency Civil Rule 6(b)(2) were to come into effect and a court (under that Rule) extended the deadline for making such a postjudgment motion, that motion (when filed within the extended deadline) would be filed "within the time allowed by" the Civil Rules and thus would qualify for re-setting effect under Appellate Rule 4(a)(4)(A). But for Civil Rule 60(b) motions to have re-setting effect, Rule 4(a)(4)(A) sets an additional requirement: under Rule 4(a)(4)(A)(vi), a Rule 60 motion has re-setting effect only "if the motion is filed no later than 28 days after the judgment is entered." This text, left as is, would mean that in a situation where a court (under Emergency Civil Rule 6(b)(2)) extended the deadline for a Civil Rule 59 motion, the re-setting effect of a motion filed later than Day 28 after entry of judgment would depend on whether it was a Rule 59 or a Rule 60(b) motion. To avoid this discontinuity, the proposal amends Rule 4(a)(4)(A)(vi) to accord re-setting effect to a Civil Rule 60 motion filed "within the time allowed for filing a motion under Rule 59." That wording, Professor Hartnett pointed out, leaves Rule 4(a)(4)(A)(vi)'s effect unaltered in non-emergency situations, because under the ordinary Civil Rules the (non-extendable) deadline for a Rule 59 motion is 28 days.

Judge Bates solicited comments on the proposed amendments to Appellate Rules 2 and 4. No comments were offered.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved publication of proposed amendments to Appellate Rules 2 and 4 for public comment.**

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on April 30, 2021. The Advisory Committee presented three action items; in addition, it listed in the agenda book six information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 818.

Action Items

Publication of Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements). Judge Schiltz introduced this first action item: a proposed amendment to Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the other side may require admission of a completing portion of the statement in order to correct the misimpression. The proposed amendment is intended to resolve two issues with the rule.

First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. Suppose, for example, that a prosecutor introduces only part of a defendant's confession and the defendant wants to introduce a completing portion of the confession. The question becomes whether the prosecutor can object on grounds that the defendant is trying to introduce hearsay. Courts of appeals have taken three approaches to this question. Some exclude the completing portion altogether on grounds that it is hearsay, basically allowing the prosecution to mislead the jury. Some courts will admit the completing portion but will provide a limiting instruction that the completing portion can be used only for context and not for truth. This may confuse jurors. Other courts will allow a completing portion in with no instruction. The Advisory Committee unanimously agreed that Rule 106 should be amended to provide that the completing portion must be admissible over a hearsay objection. In other words, the judge cannot exclude the completing portion on hearsay grounds, but may still exclude it for some other reason (Rule 403 grounds, for example) or may give a limiting instruction.

The second issue is that the current rule applies to written and recorded statements but not to unrecorded oral statements. This means that, unlike any other rule of evidence, the rule of completeness is dealt with by a combination of the Federal Rules of Evidence and the common law, with the common law governing in the area of unrecorded oral statements. Completeness issues often arise at trial. Judges and parties often have to address these issues on the fly, in situations where they may not have time to thoroughly research the common law. There are circuit splits in this area as well. Some circuits allow the completion of an unrecorded oral statement and

others do not. The Advisory Committee unanimously supported an amendment that would extend Rule 106 to all statements so that it fully supersedes the common law. The DOJ initially opposed amending Rule 106 but thanks to the hard work of Ms. Shapiro and Professor Capra, the Advisory Committee was able to propose language for the amendments and committee note that garnered the DOJ's support.

A practitioner member complimented the proposal. A judge member, likewise, expressed support for the proposal; this member asked about the inclusion of case citations in the committee notes. This member pointed out that another advisory committee, explaining its decision not to adopt a suggested change to a committee note, had stated that "as a matter of practice and style, committee notes do not normally include case citations, which may become outdated before the rule and note are amended." Professor Capra responded that the Standing Committee has never taken a position on case citations in committee notes. For a time there were certain members on the Standing Committee who believed that cases should never be cited in committee notes. The Evidence Rules Committee takes the view that case citations are permissible in committee notes, provided that they are employed judiciously. Here, the citations are useful because they note arguments, made by courts, that provide support for the rule.

Professor Coquillette said that case citations can be problematic when a case citation is used to justify a rule amendment. If the case in question is later overturned, one cannot at that point amend the committee note. If, however, the case is cited to illustrate how the rule works, there is less reason to think there is a problem. Professor Capra thought there was no risk in citing a case as a basis for a rule—if a case's reasoning is adopted by the rule and that case's holding becomes the new rule, then that case will not be overturned. Professor Coquillette decried this as circular reasoning, but Professor Capra disagreed. Professor Capra gave examples of prior committee notes to the Evidence Rules that cited cases. Judge Schiltz suggested that there was a difference between a note explaining that a rule amendment resolves a circuit split and a note explaining that a rule amendment was adopted because a case required the amendment. He thought the cases here were being used to illustrate the different approaches courts are taking as of the time of the amendment's adoption; such citations, he suggested, will not become outdated based on later events. Professor Capra agreed.

Professor Struve noted a diversity of opinion and past practice. She thought it was a good question but that since the rule was only going out for comment, it could be considered later rather than trying to fine-tune every citation at this meeting. Professor Capra stated that if there was going to be a policy never to include case citations in notes he would be willing to follow such a policy going forward, but he said such a policy should not be created without more careful consideration and should not be applied to this rule retroactively. Professor Beale noted that the Advisory Committee on Criminal Rules has not taken the position that case citations are never appropriate. Such citations, she suggested, can be employed judiciously and can provide relevant background about the history of a rule amendment. Multiple participants noted that this topic could be discussed among the reporters and at the Committee's January 2022 meeting.

Judge Bates observed that the committee note (on page 829 of the agenda book) states that the amendment to Rule 106 "brings all rule of completeness questions under one rule." He asked whether that was technically accurate, given Rule 410(b)(1) (which provides that "[t]he court may

admit a statement described in Rule 410(a)(3) or (4) . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together"). Professor Capra responded that Judge Bates's question was a good one and the Committee would consider that question going forward.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 106.**

Publication of Proposed Amendment to Rule 615 (Excluding Witnesses). Judge Schiltz introduced the proposed amendment to Rule 615, a "deceptively simple" rule providing, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typically brief orders that courts issue under Rule 615 simply physically exclude witnesses from the courtroom or whether they also prevent witnesses from learning about what happens in the courtroom during periods when they have been excluded. Some circuits hold that a Rule 615 order automatically bars parties from telling excluded witnesses what happened in the courtroom and automatically bars excluded witnesses from learning the same information on their own, even when the judge's order does not go into this detail. Other circuits view Rule 615 as strictly limited to excluding witnesses from being present in a courtroom, requiring that any further restrictions must be spelled out in the order. The Advisory Committee unanimously voted to amend the rule to explicitly authorize judges to enter further orders to prevent witnesses from learning about what happens in the courtroom while they are excluded. But, under the amended Rule, any such additional restrictions will have to be spelled out in the order; they will not be deemed implicit in an order that mentions no such restrictions. Judge Schiltz pointed out that, in response to a Standing Committee member's comment in January, the committee note had been revised (as shown on page 834 of the agenda book) to include the observation that a Rule 615 order excluding witnesses from the courtroom "includes exclusion of witnesses from a virtual trial."

Judge Schiltz then explained another issue resolved by the proposed amendment. Rule 615 says that a court cannot exclude parties from a courtroom, so a natural person who is a party cannot be excluded from a courtroom. If one of the parties is an entity, that party can have an officer or employee in the courtroom. But some courts allow entities to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. The Advisory Committee considered this difference in treatment to be unfair. The proposed amendment would make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. Like any party, though, if an entity-party can make a showing that additional representatives are necessary, then the judge has the discretion to allow more.

Judge Bates noted a typo in the proposed committee note (on page 835 of the agenda book, the word "one" was missing from "only <u>one</u> witness-agent is exempt at any one time"). A judge member expressed support for the amendment but asked a broader historical question about why the default was not for witnesses to be excluded from the courtroom unless they fall into one of the categories set out in current Rule 615. Why should exclusion require an order? Professor Capra thought this would be less practical as a default rule. Requiring an order helps ensure notice to participants, and violating a court order can trigger a finding of contempt. Judge Schiltz noted that

there is a background default rule of open courtrooms, and a departure from that should require an order.

A practitioner member asked about rephrasing part of the committee note at the bottom of page 834 to be more specific. The committee note observes that the Rule does not "bar[] a court from prohibiting counsel from disclosing trial testimony to a sequestered witness," but then goes on to say that "an order governing counsel's disclosure of trial testimony to prepare a witness raises difficult questions . . . and is best addressed by the court on a case-by-case basis." The member suggested that this passage seemed to spot issues without giving much guidance. Judge Schiltz explained that this is a nuanced issue that would be very difficult to treat in more detail. Professor Capra observed that the Advisory Committee had debated whether to mention the issue at all. The member expressed support for mentioning the issue in the committee note. The member pointed out that the language of proposed Rule 615(b)(1) suggests that a court can issue an order flatly prohibiting disclosure of trial testimony to excluded witnesses, full stop. So that raises the question of how that would apply to lawyers doing witness preparation, particularly in a criminal case. Professor Capra noted that the Advisory Committee would be open to considering revisions to the note language (so long as those revisions did not go into undue detail on the issue). Professor Coquillette expressed approval for the approach taken by the proposed committee note. This issue, he said, implicates difficult questions of professional responsibility (such as the scope of the duty of zealous representation)—questions that are regulated by state rules and state-court decisions. Going into any further detail would take the committee note's drafters into a real thicket.

An academic member asked what the standard would be for the issuance of an additional order (under proposed Rule 615(b)) preventing disclosure to or access by excluded witnesses. Professor Capra said there was no standard provided because the issue was highly discretionary. He saw it as similar to Rule 502(d), which provides no limitations on a court's discretion. Again, the rule could not be detailed enough to account explicitly for every situation that might come up. The member also asked why paragraph (a)(4), stating that a court cannot exclude "a person authorized by statute to be present," was necessary. The member expressed the view that the rules cannot authorize something inconsistent with a statute. Professor Capra explained that this provision had been added to the Rule in 1998 to account for legislation that limited the grounds on which a victim could be excluded from a criminal trial. Originally the 1998 proposal had been drafted to refer to that particular legislation, but (as a result of discussion in the Standing Committee) the provision as ultimately adopted refers generically to any statutory authorization to be present. The inclusion of this provision avoids the issue of supersession of a prior statute by a subsequent rule amendment (*see* 28 U.S.C. § 2072(b)).

Professor Bartell asked whether orders under Rule 615(b) require a party's request. Professor Capra noted that, like orders under Rule 615(a), an order under Rule 615(b) could be issued upon request or *sua sponte*. A judge member suggested that, after public comment, it may be worth making this explicit in (b) as it is in (a). Professor Capra did not think it made sense to try to make the language of Rules 615(a) and (b) parallel on this point. Orders under Rule 615(a), he pointed out, "must" be issued upon request whereas orders under Rule 615(b) are discretionary. Another judge member complimented the Advisory Committee's work and noted that the amendment addresses an issue that comes up all the time. Another judge member asked why 615(b) referenced additional orders and whether there was a reason that all Rule 615 issues could not be

addressed in a single order. Professor Capra and Judge Schiltz agreed there was no intent to require separate orders, and undertook to clarify the language after the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 615** (with the committee-note typo on page 835 corrected).

Publication of Proposed Amendment to Rule 702 (Testimony by Expert Witnesses). Rule 702 addresses the admission of expert testimony. Judge Schiltz described it as an important and controversial rule. Over the past four years, the Advisory Committee has thoroughly considered Rule 702. Ultimately, the Committee decided to amend it to address two issues.

The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702 such testimony must help the jury, must be based on sufficient facts, must be the product of a reliable method, and must represent a reliable application of that method to adequate facts. It is clear that a judge should not admit expert testimony without first finding by a preponderance of the evidence that each of these requirements of Rule 702 are met. The problem is that many judges have not been correctly applying Rule 702. They have treated the 702 requirements as if they go to weight rather than admissibility, and some have explicitly said that this is what they are doing even though it is not consistent with the text of Rule 702. For example, instead of asking whether an expert's opinion <u>is</u> based on sufficient data, some courts have asked whether the opinion <u>could be found by a reasonable juror to be</u> based on sufficient data. This is an entirely different question and sets a lower and incorrect standard.

The main reason for the confusion in the caselaw is that discerning the correct standard takes some digging. One starts with *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993), which directs that "the trial judge must determine at the outset, pursuant to Rule 104(a)," whether Rule 702's requirements are met. Rule 104(a) merely says that it's the judge who decides whether evidence is admissible; that Rule doesn't say what standard of proof the judge should apply. For the latter, one must turn to *Bourjaily v. United States*, 483 U.S. 171, 175 (1987), which directs that judges—in making admissibility determinations—should apply a preponderance-of-the-evidence standard. A lot of judges and litigants have had trouble connecting those dots. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that all the requirements of Rule 702 are met. This will not change the law at all but will clarify the Rule so that it is not misapplied so often.

The second issue to be addressed was the problem of overstatement—especially with respect to forensic expert testimony in criminal cases. That is, experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. All members of the Advisory Committee agreed that this was a problem, but they were sharply divided over whether an amendment was necessary to address it. The criminal defense bar felt strongly that the problem should be addressed by adding a new subsection to the rule explicitly prohibiting this kind of overstatement. The DOJ and some other committee members felt strongly that there should not be such an amendment; they argued that the problem with overstatement was poor lawyering. These members argued that Rule 702 already

provides the defense attorney with the grounds for objecting to, and the court with the basis for excluding, overstatements. Ultimately, an approach proposed by a judge member of the Standing Committee garnered support from all members of the Advisory Committee. That approach entails making a modest change to existing subsection (d) that is designed to help focus judges and parties on whether the opinion being expressed by an expert is overstated.

A judge member praised the proposed amendments to Rule 702 as beneficial and thoughtful. No other members had any comments on this proposal.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 702.**

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Advisory Committee on Bankruptcy Rules, which last met via videoconference on April 8, 2021. The Advisory Committee presented twelve action items (two of which were presented together); in addition, it listed in the agenda book four information items which were not discussed at the meeting. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 252.

Action Items

Final Approval of Restyled Rules Parts I and II. Professor Bartell introduced these restyled rules, Part I, or the 1000 series of Bankruptcy Rules, and Part II, the 2000 series of the Rules. The Advisory Committee had received extensive and very helpful comments on these revisions from the National Bankruptcy Conference. The Advisory Committee's responses to those comments are catalogued in the agenda book. The style consultants worked alongside the reporters and the subcommittee leading this project. Although the Advisory Committee was submitting these first two parts of the restyled rules for final approval, they asked that the Standing Committee not transmit them to the Judicial Conference at this time but instead wait until all the restyled Bankruptcy Rules have gone through the public comment process and can be submitted as a group. In addition, the Restyled Rules Parts I and II will need to be updated to account for amendments that have been made to those rules since the restyling process began, and the style consultants plan to conduct a final "top-to-bottom review" of all the Restyled Rules after the final comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the restyled Parts I and II for approval by the Judicial Conference** but not to transmit them to the Judicial Conference immediately.

Final Approval of Proposed Amendments Implementing the Small Business Reorganization Act of 2019 (SBRA or Act). Professor Gibson explained that after the SBRA was passed, the Advisory Committee promulgated interim rules to deal with several changes made to the Bankruptcy Code by the SBRA. The interim rules took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. The interim rules were published for comment last summer, along with the SBRA form amendments, as proposed final rules. There were no

comments. The Advisory Committee recommended final approval of the SBRA amendments and new Rule.

Professor Gibson noted that one of the affected Rules, Rule 1020, had also been amended on an interim basis to reflect certain statutory definitions that applied under the CARES Act. However, the version of Rule 1020 being submitted for final approval is the pre–CARES Act version. This is appropriate, Professor Gibson explained, because the relevant CARES Act statutory definitions are on track to expire by the time the SBRA amendments go into effect (the Advisory Committee will monitor for any extension of the sunset date for the relevant CARES Act provisions). Professor Struve complimented the members of the Advisory Committee, its reporters, and Judge Dow for their excellent work on these rules and on many others, often on short notice, over the past year.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the SBRA Rules—amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, and 3019, and new Rule 3017.2—for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3002(c)(6) (Filing Proof of Claim or Interest). Judge Dow explained that the proposed amendment to Rule 3002(c)(6) clarified and made uniform for domestic and international creditors the standard for extensions of time to file proofs of claim. No comments had been received on the proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 3002(c)(6) for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Judge Dow explained that this rule concerned filing and transmittal of papers to the United States trustee. The proposed amendments would permit transmittal to the United States trustee by filing with the court's electronic-filing system, and would eliminate the verification requirement for the proof of transmittal required for papers transmitted other than electronically. The United States trustee had been consulted during the drafting of the proposed amendment and consented to it. The only public comment on the proposal concerned some typographical issues, which had been corrected.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 5005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rule 7004(b)(3) or Rule 7004(h) may be made on officers or agents by use of their titles rather than their names. No public comments were submitted on the proposed amendment. Before giving final approval to the proposed amendment, the Advisory Committee had deleted a comma from the proposed rule text and, in the committee note, changed the word "Agent" to "Agent for Receiving Service of Process."

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 7004 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 8023 (Voluntary Dismissal). The proposed amendments would conform Rule 8023 to pending amendments to Appellate Rule 42(b). The amendments clarify that a court order is required for any action other than a simple voluntary dismissal of an appeal. No public comments were submitted on the proposed amendments, and the Advisory Committee had approved them as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 8023 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Official Form 122B (Chapter 11 Statement of Current Monthly Income). Judge Dow explained that this Form (which is used by a debtor in an individual Chapter 11 proceeding to provide information for the calculation of current monthly income) instructed that "an individual . . . filing for bankruptcy under Chapter 11" must fill out the form. The issue was that individuals filing under subchapter V of Chapter 11 do not need to make the calculation that Form 122B facilitates. The amendment therefore added "(other than under subchapter V)" to the end of the above-quoted instruction. No comments were submitted and the Advisory Committee approved the amendment as published.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Official Form 122B for approval by the Judicial Conference.**

Publication of Restyled Rules Parts III (3000 series), IV (4000 series), V (5000 series), and VI (6000 series). Professor Bartell expressed great satisfaction with the productive process of restyling the rules. These four parts are ready to go out for public comment. Unlike the procedure with Parts I and II, these proposed restyled rules would be accompanied by committee notes. The publication package would also include the committee note to Rule 1001 (which explains the restyling process and its goals). The Advisory Committee anticipates that the remaining three parts will be ready for public comment a year from now.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the restyled versions of Parts III, IV, V, and VI of the Bankruptcy Rules.**

Publication of Proposed Amendments to Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence) and New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim). Judge Dow introduced the proposed amendments to Rule 3002.1, which would substantially revise the existing rule. The rule addresses notices concerning claims

secured by a debtor's principal residence (such as notices of payment changes for mortgages), charges and expenses incurred in the course of the bankruptcy proceeding with respect to such claims, and the status of efforts to cure arrearages. The proposed amendments were suggested by the National Association of Chapter Thirteen Trustees and the American Bankruptcy Institute's Commission on Consumer Bankruptcy.

Professor Gibson explained that this is an important rule intended to deal with the situation of debtors filing Chapter 13 cases in order to save their homes. Often, these debtors would continue to make their monthly payments under the plan but then find out at the end of their bankruptcy case that they were behind on their mortgage either because they had not gotten accurate information about changes in the payment amount or because fees or other charges had been assessed without their knowledge. The purpose of the rule was to ensure that the trustee and debtor have the information they need to cure arrearages and stay up to date on the mortgage over the life of the plan.

Stylistic changes were made throughout the rule, and there were notable substantive changes. The amendments make two important changes in Rule 3002.1(b) (which deals with notices of changes in payment amount). New Rule 3002.1(b)(2) provides that if the notice of a mortgage payment increase is late, then the increase does not take effect until the debtor has at least 21 days' notice. New Rule 3002.1(b)(3) addresses home equity lines of credit. Dealing with notice of payment changes for HELOCs poses challenges because the payments may change by small amounts relatively frequently. New Rule 3002.1(b)(3) requires an annual notice of any over- or underpayment on a HELOC during the prior year (and an additional notice if the HELOC payment amount changes by more than $10 in a given month). Rule 3002.1(e) currently gives the debtor up to a year (after notice of postpetition fees and charges) in which to object. The amendment to Rule 3002.1(e) would authorize the court to shorten that one-year period (as might be appropriate toward the end of a Chapter 13 case). Proposed new Rule 3002.1(f) provides for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition defaults that may have occurred. The existing procedure used at the end of the case would be replaced with a motion-based procedure, under new Rule 3002.1(g), that would result in a binding order from the court (under new Rule 3002.1(h)) on the mortgage claim's status. Five new Official Bankruptcy Forms have been developed for use by the debtor, trustee, and mortgage claim creditor in complying with the provisions of the rule.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Rule 3002.1, and new Official Forms 410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, 410C13-10R.**

Publication of Proposed Amendment to Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy). This is the document filed by an individual to start a bankruptcy proceeding. Judge Dow explained that Official Form 101 requires the debtor to provide certain information, including, for the purpose of identification, names under which the debtor has done business in the past eight years. Judge Dow said that in answering that question, some debtors also reported the names of separate businesses such as corporations or LLCs in which they had some financial interest. The proposed amendment clarifies that legal entities separate from the debtor should not be listed.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendment to Official Form 101.**

Publication of Proposed Amendments to Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)). Judge Dow explained that the 309 forms are a series of forms used in different cases and by different kinds of debtors and entities; the forms provide notice of the filing of a bankruptcy case and of certain deadlines in the case. Two versions of the form, 309E1 and 309E2, are used in chapter 11 cases filed by individuals. The Advisory Committee received a suggestion from two bankruptcy judges noting that these two forms did not clearly distinguish the deadlines for objecting to the debtor's discharge and for objecting to the dischargeability of a particular claim. The proposed amendments reorganized the two forms' graphical structure as well as some of the language addressing the different deadlines.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication for public comment the proposed amendments to Official Forms 309E1 and 309E2.**

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which last met via videoconference on April 23, 2021. The Advisory Committee presented two action items. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 642.

Action Items

Final Approval of Proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g). Judge Dow introduced these new supplemental rules. The Advisory Committee received some public comments but not many. Two witnesses testified at a public hearing in January. The Advisory Committee was nearly unanimous in supporting these proposed rules. One member (the DOJ) opposed the proposed rules, but conceded that the rules were fair, reasonable, and balanced. Another member abstained (having been absent for the relevant discussion). All other members were strongly in favor. Judge Sara Lioi had done great work in chairing the subcommittee that prepared the proposed rules.

One obvious concern that has been raised about these rules has been that rules promulgated under the Rules Enabling Act process are ordinarily trans-substantive, whereas these rules address a particular subject area. A related concern was that any departure from trans-substantivity would make it harder to oppose promulgating specialized rules for other types of cases.

Judge Dow expressed that he had personally been on the fence about the creation of these rules for some time but had come to support them for a few reasons. First, Social-Security review actions are atypical because they are essentially appeals based on an administrative record. Second,

there are a great many of these cases. Third, magistrate judges viewed the proposed rules very favorably, and—at least in Judge Dow's district—magistrate judges handle most of these cases. District judges in districts where there has been a high volume of Social Security Review Actions also supported the rules. Fourth, the proposed supplemental rules would be helpful to pro se litigants. They had been clearly written and were as streamlined as they could possibly be. Finally, some districts have good local rules in this area, but many do not, and those districts without such rules would benefit from a fair, balanced, and comprehensible set of rules.

Professor Cooper summarized the changes that had been made in response to public comment. Supplemental Rule 2(b)(1)(A) now requires the complaint to include not the last four digits of the Social Security number but instead "any identifying designation provided by the Commissioner with the final decision"; a conforming change was made to the committee note. Supplemental Rule 6's language was clarified. The committee note now observes that the rules' scope encompasses instances where multiple people will share in an award from a claim based on one person's wage record.

Professor Cooper highlighted an issue concerning the drafting of Rule 3. That Rule dispenses with Civil Rule 4's provisions for service of summons and the complaint. Instead, the Rule mandates transmittal of a notice of electronic filing to the U.S. Attorney's Office for the relevant district and "to the appropriate office within the Social Security Administrations' Office of General Counsel." The quoted language was crafted by the Social Security Administration. It will be applied by the district clerk, who will know which office is the "appropriate office."

Professor Cooper observed that this project was originally proposed by the Administrative Conference of the United States and was supported by the Social Security Administration. The supplemental rules as now presented for final approval are greatly pared down compared with prior drafts. They are designed to serve public, not private, interests. As to the concern that private interests might in future invoke this example as support for the adoption of further substance-specific rules—Professor Cooper conceded that this was not a phantom concern. But, he suggested, the rulemaking process could withstand any incremental weakening of the trans-substantivity norm that might result from the adoption of these rules.

Professor Coquillette complimented the Advisory Committee on its work on these rules, which he saw as the rare appropriate exception to the general principle of trans-substantivity in the rules. He suggested that departure from that principle was justified here for three reasons: (1) the rules are set out as a separate set of supplemental rules; (2) the rules address matters of significant public interest and will assist pro se litigants; and (3) the rules were crafted with significant input from the Social Security Administration. Judge Bates also expressed support for the proposed new rules. He had chaired the Advisory Committee throughout much of the process. Judge Bates suggested that the committee note, on page 686 at lines 93-94, be updated to reflect the change in the proposed text of Supplemental Rule 6 (from "after the court disposes of all motions" to "after entry of an order disposing of the last remaining motion"). Professor Cooper endorsed the change.

A judge member expressed some concern that the supplemental rules might limit judges' ability to handle matters on a case-by-case basis. This judge thought that magistrate judges in particular liked being able to handle pro se cases, for example, in somewhat different ways. The

judge recognized, however, that constraining the discretion of judges and increasing consistency were, in many ways, the goals of the new supplemental rules. The judge thought the benefits did probably outweigh the costs. The judge then raised a few additional points, addressed below. The discussion has been reorganized here for clarity.

First, the judge asked whether the committee note language at page 685 lines 60-61 ("Notice to the Commissioner is sent to the appropriate regional office") should mirror the language in Supplemental Rule 3 itself (referencing notice being sent "to the appropriate office within the Social Security Administration's Office of General Counsel"). Judge Bates asked if deleting the word "regional" would be enough, and the judge indicated that this would be an improvement. It was agreed upon.

Additionally, the judge pointed out, electronic notice often raises troublesome technical issues (to what email is the notice sent? Can it be opened more than once?). The judge expressed the expectation that such issues would be resolved by the technical system designer and thus need not concern the Standing Committee.

Concerning Supplemental Rule 2(b)(1)(A), the judge was worried that no one would know what "any identifying designation provided by the Commissioner" referred to. He acknowledged that this formulation was preferable to requiring inclusion of parts of social security numbers. But it would be better to say specifically what the new identifier would be—maybe through a technical amendment in the near future—than to risk confusing litigants, particularly pro se litigants. Professor Struve thought that the idea of this language was to remain flexible and accommodating to the extent that practices change. She asked whether it would make sense to say something like "including any designation identified by the Commissioner in the final decision as a Rule 2(b)(1)(A) identifier." This would put the onus on the Commissioner to highlight the identifier, which would help pro se litigants. Professor Cooper pointed out that the Appeals Council, not the Commissioner, would be putting out the final decision. This was why the language used was "provided by the Commissioner." Later, Judge Dow expressed that he could not think of a better way of phrasing this and that the current language was the best of the options considered throughout the process. Judge Dow pointed out that if the rule was approved, the Commission would know that this was their opportunity to work out an identifying designation. Everyone knew that this was a problem that needed to be solved. Judge Dow wondered whether the language in that subparagraph could be developed along with the Commission and whether there could be flexibility to change the phrasing going forward. Judge Bates thought it would be difficult to keep the language flexible after the Standing Committee gave final approval and after the proposed rules were sent on to the Judicial Conference, Supreme Court, and Congress.

Finally, the same judge member pointed out that since the statute provides for venue not only in the judicial district in which the plaintiff resides, but also the judicial district where the plaintiff has a principal place of business, it seems odd that subparagraph 2(b)(1)(B) only asks about residence. Professor Cooper wanted to take time to confirm this venue point and to make sure it had not intentionally been left unmentioned for a particular reason. Professor Cooper proposed taking the rule as it was for now with the understanding that if a principal place of business was indeed relevant for the kinds of individual claims encompassed by the supplemental rules then it would be added to subparagraph 2(b)(1)(B). Professor Marcus added that

subparagraph 2(b)(1)(B) was only about what the complaint must state. That would not control venue so long as a statutory permission for venue existed elsewhere.

Another judge member raised a stylistic point regarding subparagraph 2(b)(1)(A), and suggested that the gerund "identifying" in line 8 sounded somewhat awkward. This judge also thought that subparagraph (A) was listing several things that a complaint must state and wondered whether it might be broken up into a few separate shorter subparagraphs. The judge had thought the rules committees were trying to move in the direction of breaking up lists into separate subheadings in this way. After some discussion it was decided that paragraph (b)(1) would read:

(1) The complaint must:
  (A) state that the action is brought under § 405(g);
  (B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;
  (C) state the name and the county of residence of the person for whom benefits are claimed;
  (D) name the person on whose wage record benefits are claimed; and
  (E) state the type of benefits claimed.

The judge who raised this point liked this suggestion and thought it helpfully provided a checklist for *pro se* litigants. A style consultant approved of this adjustment. Judge Dow agreed.

Judge Bates reviewed the changes that had been agreed upon. Supplemental Rule (2)(b)(1) would be reorganized as set out immediately above. Three changes would be made to the committee note: adjustments on page 685 at lines 51-52 to account for the revisions to subdivision (2)(b)(1); the deletion of the word "regional" on page 685 at line 61; and the change on page 686 at lines 93-94 identified by Judge Bates.

Upon motion, seconded by a member, and on a voice vote: **The Committee, with one member abstaining,[†] decided to recommend the proposed new Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) for approval by the Judicial Conference.**

Proposed Amendment to Rule 12(a)(4)(A) concerning time to file responsive pleadings. The proposed amendment would extend from fourteen days to sixty the presumptive time to serve a responsive pleading after a court decides or postpones a disposition on a Rule 12 motion in cases brought against a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Judge Dow explained that the DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to consult between local U.S. Attorney offices and main Justice or the Solicitor General.

Two major concerns had been raised at the Advisory Committee's April meeting. First, some thought the amendment might be overbroad and should be limited only to cases involving immunity defenses. Second, there was concern over whether the time period was too long. As

[†] Ms. Shapiro explained that the DOJ was abstaining for the reasons it had previously expressed.

Judge Dow saw it there were three types of cases. In some, it would be prejudicial to the plaintiff to extend the deadline because expedition is important. In others, the DOJ genuinely needs more time to decide whether to appeal. And sometimes the timing of the answer does not matter because discovery or settlement is proceeding regardless. Judge Dow said that he was persuaded during discussion that there are a lot more cases in the second category than in the first. If the default remained at fourteen days, there would be many motions by the government seeking extensions whereas if the default were sixty there would only be a few motions by plaintiffs seeking to expedite. Judge Dow noted that there had been a motion in the Advisory Committee meeting to limit the extended response time to cases in which there was an immunity defense, but that motion had failed by a vote of 9 to 6. The Advisory Committee decided by a vote of 10 to 5 to give final approval to the proposed amendment as published.

Professor Cooper explained that the proposal's substance was the same as that in the DOJ's initial proposal. He agreed that the minutes of the discussion accurately reflect the extensive discussion at the Advisory Committee meeting. There was some discussion of whether a number between fourteen and sixty might be appropriate. Professor Cooper noted that in the type of case addressed by Civil Rule 12(a)(3) and by the proposed amendment (i.e., a case in which a U.S. officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf), Appellate Rule 4(a)(1)(B)(iv) provides all parties with 60 days to take a civil appeal. There is some logic, he suggested, to according the same number of days for responding to a pleading as for the alternative of taking an appeal.

A judge member was sympathetic to Judge Dow's view that a sixty-day default rule would promote efficiency, but this member wondered whether thirty days might be a better choice. A frequent criticism of our system, this member noted, is that litigation gets delayed. Professor Cooper stated that, while the issue of the number of days had come up at the Advisory Committee's meeting, it had not been discussed extensively. The government often moves for an extension under the current rule and often receives it. Professor Cooper recalled that a number of the judges participating in the Advisory Committee's discussion thought the 60-day period made sense. Judge Bates thought the judge member's suggestion was valuable. He said it was important, however, not to increase the likelihood that the government would file protective notices of appeal. He wanted to make sure the DOJ had time to actually decide representational issues and appeal issues.

Another judge member thought that the gap between sixty days for the government and fourteen for everyone else was too much. It would look grossly unfair to give the government more than four times as much time. (By comparison, the 60-day appeal time for cases involving the government was double the usual appeal time.) The government gets only forty-five days to move for rehearing and that is a more significant decision. Given that the number of days was not substantially discussed at the advisory committee level, this member asked what justification the government had given for needing 60 days. The member suggested that 30 days might be more appropriate, and noted that the government had been managing under the current rule by making motions when necessary.

This judge later noted that the government typically got extra time because of the Solicitor General process and that many states also have solicitors general. Professor Cooper noted that states had previously suggested that their solicitors general needed extra time, but those arguments

had been countered by concerns over delay, and questions about how to draw the line between state governments and other organizations with cumbersome processes. A practitioner member expressed uncertainty as to whether states' litigation processes are as centralized as the federal government's.

Still another judge member suggested that forty days might be more appropriate. Other parties, after the disposition or postponement of disposition of a motion, get fourteen days to answer, which is two-thirds of the twenty-one-day limit initially set for them by Civil Rule 12(a)(1)(A)(i). Forty days is two-thirds of the sixty-day limit initially set for the government by Civil Rules 12(a)(2) and (3). Keeping the ratio the same would be fair. Judge Dow noted that the Advisory Committee had focused on the immunities issue and might not have given enough thought to the number of days. The first judge member who had spoken on this issue thought that moving things along was a good idea across the board.

Judge Bybee asked how this integrated with the Westfall Act. If the government has already made its decision under the Westfall Act (whether the employee's actions were within the scope of employment), why would the government need extra time at this stage? Judge Bates responded that though the official-capacity decision would already have been made, the government would still need time to determine how to respond to the judicial determination on immunity. Judge Dow agreed that the government had reported that its need for time at this stage usually concerned whether to appeal a decision on immunity.

Another judge member raised concerns about the committee note. Even though the rule is not limited to situations where an immunity defense is raised, the committee note gives the impression of privileging not just the government as such but the official immunity defense in particular. This member suggested that the proposed rule really looked like preferential treatment that had not been fully vetted and may not have been warranted.

Ms. Shapiro spoke next. She had not gotten a definitive response from the DOJ during this conversation. She believed that the sixty-day period had been suggested because that is the time period for the United States to answer a complaint or take a civil appeal. The government has a unique bureaucracy, and careful deliberation, consultation, and decision-making can take time. With that said, the DOJ would prefer forty or forty-five days to no extension of the period.

Judge Bates noted that any number higher than fourteen would constitute special treatment for the United States. He was reluctant to see the Standing Committee vote on a number without the Advisory Committee having given the issue full consideration. Judge Dow said he would be happy for the proposal to be remanded to the Advisory Committee and to obtain more information from the DOJ on the question of length. By consensus, the matter was returned to the Advisory Committee for further consideration.

Judge Dow added that proposed amendments to Civil Rules 15 and 72 had been approved for publication at the January meeting of the Standing Committee but that they had been held back from public comment until another more significant amendment or set of amendments was moving forward. Judge Bates agreed that now was the time to send them out for public comment alongside proposed new Civil Rule 87, the proposed emergency rule.

Information Items

Professor Marcus updated the Committee on two items. The agenda materials noted that the Discovery Subcommittee was considering possible rule amendments concerning privilege logs. With the help of the Rules Committee Support Office, an invitation for comments on this topic had been posted. Second, the Multidistrict Litigation Subcommittee was interested in a collection of issues regarding settlement review, appointment of leadership counsel, and common benefit funds. Yesterday, a thorough order on common benefit funds had been entered in the Roundup MDL, which Professor Marcus anticipated might raise the profile of this issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met via videoconference on May 11, 2021. The Advisory Committee presented one action item. The agenda book also included discussion of three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 747.

Action Item

Final Approval of Proposed Amendment to Rule 16 (Discovery and Inspection). Judge Kethledge introduced this proposed amendment, which clarifies the scope and timing of the parties' obligations to disclose expert testimony that they plan to use at trial. He explained that Criminal Rule 16 is a rule regularly on the Advisory Committee's agenda. The proposed amendment here reflected a delicate compromise supported by both the DOJ and the defense bar. Judge Kethledge thanked both groups and in particular singled out the DOJ representatives, Mr. Wroblewski, Mr. Goldsmith, and Ms. Shapiro, who had worked in such good faith on this amendment.

The Advisory Committee received six public comments. All were supportive of the concept of the proposal and all made suggestions directed at points that the Advisory Committee had carefully considered before publication. In the end, it was not persuaded by the suggestions, and some of the suggestions would upset the delicate compromise that had been worked out.

Since the proposed amendment was last presented to the Standing Committee, the Advisory Committee had made some clarifying changes. Professor King summarized these changes and they are explained in more detail at pages 753-54 of the agenda book. Professor Beale called the Standing Committee's attention to an additional administrative error on page 769 of the agenda book. The sentence spanning lines 219–21 ("The term 'publications' does not include internal government documents.") had not been accepted by the Advisory Committee. It therefore should not have appeared in the agenda book.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 16 for approval by the Judicial Conference**, with the sole change of the removal of the committee-note sentence identified by Professor Beale.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on April 7, 2021. The Advisory Committee presented three action items and one information item, and listed five additional information items in the agenda book. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 180.

Action Items

Final Approval of Proposed Amendment to Rule 25 (Filing and Service) concerning the Railroad Retirement Act. Judge Bybee presented a proposed amendment to Rule 25, which he described as a minor amendment that would extend the privacy protection now given to Social Security and immigration cases to Railroad Retirement Act cases. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 25 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Bybee noted that this proposed amendment had last been before the Committee in June 2020. Rule 42 deals with voluntary dismissals of appeals. At its June 2020 meeting, the Committee queried how the proposed amendment[‡] might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the proposed amendment to Rule 42 for approval by the Judicial Conference.**

Publication of Proposed Consolidation of Rule 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Bybee introduced this final action item. The proposal, on which the Advisory Committee had been working for some time, entailed comprehensive revision of two related rules. The Advisory Committee understood that there had been some confusion

[‡] The proposed amendment clarifies the language of Rule 42, including by restoring the pre-restyling requirement that the court of appeals "must" dismiss an appeal if all parties agree to the dismissal.

among practitioners in the courts of appeals as to how and when to seek panel rehearing and rehearing en banc. Procedures for these different types of rehearing were laid out in two different rules. The Advisory Committee was proposing to consolidate the practices into a single rule. This would involve abrogating Rule 35, currently the en banc rule, and folding it into a new Rule 40 addressing both petitions for rehearing and petitions for rehearing en banc. This would improve clarity and would particularly help pro se litigants. It would also clarify that rehearing en banc is not the preferred way of proceeding. This consolidation would not involve major substantive changes, with the exception that new Rule 40(d)(1) would clarify the deadline to petition for rehearing after a panel amends its decision. A new Rule 40(f) would also make clear that a petition for rehearing en banc does not limit the authority of the original three-judge panel to amend or order additional briefing. Conforming changes in other Appellate Rules were proposed alongside this change.

A practitioner member expressed support for the idea of combining Rules 35 and 40, and predicted that this would make the rules much more user-friendly. This member had two questions about the proposal. The first question was about an apparent inconsistency between two provisions carried over from the existing rules. In subparagraph (b)(2)(A), on page 217, the new rule stated that petitions for rehearing en banc must (as one of two alternative statements) state that the full court's consideration is "necessary to secure and maintain uniformity of the court's decisions." Subdivision (c), however, on page 218, said that the court ordinarily would not order rehearing en banc unless (as one of two alternatives) en banc consideration was "necessary to secure or maintain uniformity of the court's decisions." The member recognized that the difference in wording had been carried over from the existing rules, but suggested that, for the sake of consistency, both provisions should use the word "or." Judge Bates agreed and had been prepared to say the same thing.

The practitioner member's second question related to the existing history (i.e., prior committee notes) concerning Rule 35. When a rule is abrogated, the former rule's history is no longer readily available. Here, Rule 35 would be transferred rather than abrogated. The historical evolution of Rule 35 would remain relevant to the new Rule 40. Professor Hartnett noted that the committee notes for now-abrogated Civil Rule 84 are all readily available on the internet (at https://www.law.cornell.edu/rules/frcp/rule_84). Professor Capra recalled that, in 1997, Evidence Rules 803(24) and 804(b)(5) had been folded into Evidence Rule 807. He pointed out that, if you pull up Rule 804, it says that Rule 804(b)(5) was "[t]ransferred to Rule 807." Professor Capra stated that, in all the publications he was aware of, the legislative history of Rule 804(b)(5) is still there. Using a word like "transferred" might cue publishers that the former rule still existed and mattered. Later, another judge member looked at a Thomson-Reuters publication on hand in chambers and noted that it did include prior history even for transferred or abrogated rules. This member agreed that "transferred" would be a better term than "abrogated." Noting that the 1997 committee note to Evidence Rule 804(b)(5) explains why that provision was transferred to Rule 807, this member suggested that similar note language would be helpful to explain why Rule 35's contents were transferred to Rule 40. Professor Coquillette later stated that the Moore's Federal Practice treatise keeps the rules history in place, and Professor Marcus said that the Wright & Miller treatise does so as well.

Judge Bates asked whether the new, combined Rule 40 could not be titled simply "Petitions for Panel or En Banc Review" rather than (as in the current proposal) "Petition for Panel Rehearing; En Banc Determination." Professor Struve noted that the rule also covered initial hearings en banc. Judge Bates suggested "Petitions for Panel or En Banc Rehearing or for Initial Hearing En Banc."

A judge member who had worked with the subcommittee that developed this proposal liked the idea of saying "transferred" rather than "abrogated." This judge had two other comments. First, this judge thought it would be better to change "or" to "and" on page 218 (subdivision (c)(1)) to accord with the "and" on page 217 (subdivision (b)(2)(A)); the "and" in (b)(2)(A), this member noted, was carried forward from current Rule 35(b)(1)(A). Second, the title of the proposed new rule had been discussed extensively at many subcommittee meetings. The reason for the current title was that a litigant could still file a petition for only panel rehearing. The title the subcommittee settled on was intended to emphasize that these are different and separate types of petitions.

Professor Bartell pointed out that the text of proposed Rule 40 omitted existing Rule 35(a)'s authorization for a court of appeals on its own initiative to order initial hearing en banc. Judge Bybee and the judge member who had worked on the subcommittee both agreed that the Advisory Committee had not intended to take that out of the rule. The judge member suggested that a potential fix might include inserting the words "hear[] or" before "rehear[]" at appropriate places in proposed Rule 40(c).

Another judge member, weighing in on the "and" versus "or" discussion (concerning subdivisions (b)(2)(A) and (c)(1)) favored using "or" in both places because securing and maintaining are not the same thing. This member also asked whether paragraph (c)(1) ought to reference conflict with a decision of the Supreme Court as a basis on which the court might grant rehearing en banc since subparagraph (b)(2)(A) identifies this as one reason why a party might appropriately seek rehearing en banc. Professor Hartnett noted that the committee was trying to combine rules without changing much substance, and the same issue existed with respect to the current rule. He surmised that the current rule may have been drafted this way on the theory that it is very easy for a party who lost in the Court of Appeals to say that the decision is inconsistent with a Supreme Court decision. Judge Bates agreed it was strange for the rule to reference inconsistency with the Supreme Court in one place and not the other.

The same judge member also asked about the provision of subdivision (g) stating that a "petition [for initial hearing en banc] must be filed no later than the date when the appellee's brief is due." The judge understood that this might have been a carryover from the existing rule, and expressed uncertainty as to whether the scope of the current project extended to considering a change to this feature. Nonetheless, this member suggested, this due date seemed to fall very late in the process. Professor Hartnett agreed that this was a carryover from the existing rule.

Another judge member thought that although the Advisory Committee had not been focusing on the "legacy" rule language so much as on how to combine the rules, this was nonetheless a good opportunity to clean up the language of the rules. This judge pointed to a syntactical ambiguity in subparagraph (b)(2)(A). As a matter of syntax, it is not clear whether the statement that "the full court's consideration is therefore necessary to secure and maintain

uniformity of the court's decisions" must be included *both* in petitions identifying an intra-circuit conflict *and* in petitions identifying a conflict with a Supreme Court decision. Logically that statement should be required only where the petition relies on an intra-circuit conflict. Moreover, when the petition relies on an intra-circuit conflict, the clause about securing and maintaining uniformity is redundant because if there is an intra-circuit conflict then rehearing is always necessary to secure and maintain uniformity. It might be worth considering deleting or revising the clause about securing and maintaining uniformity.

Judge Bates asked whether the number of comments that had been put forward suggested that the proposed amendments ought to go back to the committee. Judge Bybee and Professor Hartnett noted that the Advisory Committee had specifically tried to consolidate the two rules without otherwise altering their content. Given the feedback from members of the Standing Committee that some of that existing content should be reconsidered, the Advisory Committee would welcome the opportunity to reconsider the proposal with that new goal in mind. Judge Bates observed that the Advisory Committee, in doing so, need not feel obliged to overhaul the entirety of the rules' substance, but also should not feel constrained to retain existing features that seem undesirable. By consensus, the proposal was remanded to the Advisory Committee.

Information Item

Amicus Disclosures. Judge Bybee invited input from the Standing Committee on the amicus-disclosure issue described in the agenda book beginning at page 193 (noting the introduction of proposed legislation that would institute a registration and disclosure system for amici curiae). A subcommittee of the Advisory Committee had been formed and would welcome any input from the Standing Committee on the issue. Judge Bates encouraged members of the Standing Committee with thoughts to reach out to Judge Bybee or Professor Hartnett.

OTHER COMMITTEE BUSINESS

Julie Wilson delivered a legislative report. The chart in the agenda book at page 864 summarized most of the relevant information, but there had been a few developments since the book was published. First, the Sunshine in the Courtroom Act of 2021 had been scheduled for markup later in the week. It would permit broadcasting of any court proceeding. This would conflict with Criminal Rule 53 and its prohibition on broadcasting and photographing criminal proceedings. The Director of the Administrative Office expressed opposition to the bill in her capacity as Secretary to the Judicial Conference. Second, the Juneteenth National Independence Day Act was enacted late last week. Technical amendments to time-counting rules would be required to account for this new federal holiday. Third, a prior version of the Justice in Forensic Algorithms Act of 2021, which was included on the chart, would have directly amended the Criminal Rules and would have added two new Evidence Rules. The latest version of the Act had dropped those provisions. However, if passed, Evidence Rule 702 would be affected. Professor Capra was aware of the Act and the Rules Committee Staff will continue to monitor.

Bridget Healy summarized the Standing Committee's strategic planning initiatives. Tab 8B in the agenda book contains a brief summary of the Judicial Conference's Strategic Plan for the Federal Judiciary, a list of the Standing Committee's initiatives, and a status report on each

initiative. A new initiative concerning the emergency rules had been added. Committee members were asked for any comments regarding the strategic initiatives and to submit any suggestions for long-range planning issues.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their patience and attention. The Committee will next meet on January 4, 2022. Judge Bates expressed the hope that the meeting would take place in person in Miami, Florida.

TAB 2

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 6-7

2. a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and .... pp. 9-13

   b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date ..... pp. 13-14

3. Approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 18-21

4. Approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law ..... pp. 23-25

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 22, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay S. Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow, Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Julie Wilson, Acting Chief Counsel, Rules Committee Staff; Bridget Healy and Scott Myers, Rules Committee Staff

Counsel; Kevin Crenny, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal Judicial Center (FJC).

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

In addition to its general business, including a review of the status of pending rule amendments in different stages of the Rules Enabling Act process and pending legislation affecting the rules, the Standing Committee received and responded to reports from the five advisory committees. The Committee also discussed the advisory committees' work on developing rules for emergencies as directed by the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020). Additionally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic and discussed an action item regarding judiciary strategic planning.

EMERGENCY RULES[1]

Section 15002(b)(6) of the CARES Act directs the Judicial Conference and the Supreme Court to consider rule amendments that address emergency measures that may be taken by the courts when the President declares a national emergency. The advisory committees immediately began to review their respective rules last spring in response to this directive and sought input from the bench, bar, and public organizations to help evaluate the need for rules to address emergency conditions. At its January 2021 meeting, the Standing Committee reviewed draft rules developed by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees in response

[1] The proposed rules and forms amendments approved for publication, including the proposed emergency rules, will be published no later than August 15, 2021 and available on the Proposed Amendments Published for Public Comment page on uscourts.gov.

to that directive. The Evidence Rules Committee concluded that there is no need for an emergency evidence rule.

In their initial review, the advisory committees concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to developing emergency rules that are uniform to the extent reasonably practicable given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. At its January 2021 meeting, the Standing Committee encouraged the advisory committees to continue seeking uniformity and made a number of suggestions to further that end. Since that meeting, the advisory committees have made progress toward this goal in a number of important respects including: (1) who declares an emergency; (2) the definition of a rules emergency; (3) limitations in the declaration; and (4) early termination of declarations.

The advisory committees' proposals initially diverged significantly on the question of who could declare a rules emergency. Each rule gave authority to the Judicial Conference to do so, but some of the draft emergency rules also allowed certain courts and judges to make the declaration. In light of feedback received from the Committee at its January meeting, all of the

proposed rules now provide the Judicial Conference with the sole authority to declare a rules emergency.

The basic definition of what constitutes a "rules emergency" is now uniform across all four emergency rules. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules."

Proposed new Criminal Rule 62 (Criminal Rules Emergency) additionally requires that "no feasible alternative measures would sufficiently address the impairment within a reasonable time." The other advisory committees saw no reason to impose this extra requirement in their own emergency rules given the strict standards set forth in the basic definition. The Committee approved divergence in this instance given the importance of the rights protected by the Criminal Rules that would be affected in a rules emergency.

The proposed bankruptcy, civil, and criminal emergency rules all allow the Judicial Conference to activate some or all of a predetermined set of emergency rules when a rules emergency has been declared. But the language of proposed new Civil Rule 87 (Civil Rules Emergency) differs from the other two. Proposed new Rule 87 states that the declaration of emergency must "adopt all the emergency rules in Rule 87(c) unless it excepts one or more of them." The proposed bankruptcy and criminal emergency rules provide that a declaration of emergency must "state any restrictions on the authority granted in" the relevant subpart(s) of the emergency rule in question. The Civil Rules Committee feared that authorizing the placement of "restrictions on" the emergency rule variations listed in Rule 87(c) could cause problems by suggesting that one of those emergency rules could be adopted subject to restrictions that might alter the functioning of that particular emergency rule. The Civil Rules Committee designed Rule 87 to authorize the Judicial Conference to adopt fewer than all of the emergency rules listed

in Rule 87(c), but not to authorize the Judicial Conference to place additional "restrictions on" the functioning of any specific emergency rule that it adopts. Emergency Rule 6(b)(2), in particular, is intricately crafted and must be adopted, or not, in toto. After discussion, the Committee supported publishing the rules with modestly divergent language on this point.

Each of the proposed emergency rules limits the term of the emergency declaration to 90 days. If the emergency is longer than 90 days, another declaration can be issued. Each rule also provides for termination of an emergency declaration when the rules emergency conditions no longer exist. Initially, there was disagreement about whether the rules should provide that the Judicial Conference "must" or "may" enter the termination order. This matter was discussed at the Committee's January meeting and referred back to the advisory committees. After further review, the advisory committees all agreed that the termination order should be discretionary.

While the four emergency rules are largely uniform with respect to the definition of a rules emergency, the declaration of the rules emergency, and the standard length of and procedure for early termination of a declaration, they exhibit some variations that flow from the particularities of a given rules set. For example, the Appellate Rules Committee concluded that existing Appellate Rule 2 (Suspension of Rules) already provides sufficient flexibility in a particular case to address emergency situations. Its proposed emergency rule – a new subdivision (b) to Rule 2 – expands that flexibility and allows a court of appeals to suspend most provisions of the Appellate Rules for all cases in all or part of a circuit when the Judicial Conference has declared a rules emergency. Proposed new Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) is primarily designed to allow for the extension of rules-based deadlines that cannot normally be extended. Proposed new Civil Rule 87 focuses on methods for service of process and deadlines for postjudgment motions. Proposed new Criminal Rule 62 would allow for specified departures from the existing rules with respect to public access to the courts,

methods of obtaining and verifying the defendant's signature or consent, the number of alternate jurors a court may impanel, and the uses of videoconferencing or teleconferencing in certain situations.

After making modest changes to the text and note of proposed Criminal Rule 62 and to the text of proposed Bankruptcy Rule 9038 and Civil Rule 87, the Standing Committee unanimously approved all of the proposed emergency rules for publication for public comment in August 2021. This schedule would put the emergency rules on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended for final approval proposed amendments to Rules 25 and 42.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(a)(5) concerning privacy protection was published for public comment in August 2020. It would extend to petitions for review under the Railroad Retirement Act the same restrictions on remote electronic access to electronic files that Civil Rule 5.2(c) imposes in immigration cases and Social Security review actions. While Railroad Retirement Act review proceedings are similar to Social Security review actions, the Railroad Retirement Act review petitions are filed directly in the courts of appeals instead of the district courts. The same limits on remote electronic access are appropriate for Railroad Retirement Act proceedings, so the proposed amendment to Rule 25(a)(5) applies the provisions in Civil Rule 5.2(c)(1) and (2) to such proceedings.

Rule 42 (Voluntary Dismissal)

The proposed amendment to Rule 42 was published for public comment in August 2019. At its June 2020 meeting, the Standing Committee queried how the proposed amendment might interact with local circuit rules that require evidence of a criminal defendant's consent to dismissal of an appeal. The Standing Committee withheld approval pending further study, and the Advisory Committee subsequently examined a number of local rules designed to ensure that a defendant has consented to dismissal. These local rules take a variety of approaches such as requiring a personally signed statement from the defendant or a statement from counsel about the defendant's knowledge and consent. The Advisory Committee added a new Rule 42(d) to the amendment to explicitly authorize such local rules.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 25 and 42 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 25 and 42, as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that a proposed amendment to Rule 2 be published for public comment in August 2021. The Advisory Committee also recommended for publication a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to be published with the emergency rules proposals. The Standing Committee unanimously approved the Advisory Committee's recommendations.

Rule 4(a)(4)(A) provides that a motion listed in the rule and filed "within the time allowed by" the Civil Rules re-sets the time to appeal a judgment in a civil case; specifically, it

re-sets the appeal time to run "from the entry of the order disposing of the last such remaining motion." The Civil Rules set a 28-day deadline for filing most of the motions listed in Rule 4(a)(4)(A), *see* Civil Rules 50(b), 52(b), and 59, but the deadline for a Civil Rule 60(b) motion varies depending on the motion's grounds. *See* Civil Rule 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). For this reason, Appellate Rule 4(a)(4)(A)(vi) does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those filed no later than 28 days after entry of judgment – a limit that matches the 28-day time period applicable to most of the other post-judgment motions listed in Appellate Rule 4(a)(4)(A).

Civil Rule 6(b)(2) prohibits extensions of the deadlines for motions "under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Proposed Emergency Civil Rule 6(b)(2) would lift this prohibition, creating the possibility that (during an emergency) a district court might extend the 28-day deadline for, inter alia, motions under Civil Rule 59. In that event, a Rule 59 motion could have re-setting effect even if filed more than 28 days after the entry of judgment – but if Appellate Rule 4(a)(4)(A) were to retain its current wording, a Rule 60(b) motion would have re-setting effect only if filed within 28 days after entry of judgment. Such a disjuncture would be undesirable, both because it could require courts to discern what is a Rule 59 motion and what is instead a Rule 60(b) motion, and because parties might be uncertain as to how the court would later categorize such a motion. To avoid this disjuncture and retain Rule 4(a)(4)(A)'s currently parallel treatment of both types of re-setting motions, the proposed amendment would revise Rule 4(a)(4)(A)(vi) by replacing the phrase "no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59." The proposed amendment would not make any change to the operation of Rule 4 in non-emergency situations.

Information Items

The Advisory Committee met by videoconference on April 7, 2021. In addition to the matters discussed above, agenda items included: (1) two suggestions related to Rule 29 (Brief of an Amicus Curiae), including study of potential standards for when an amicus brief triggers disqualification and a review of the disclosure requirements for organizations that file amicus briefs; (2) a suggestion regarding the criteria for granting in forma pauperis status and the disclosures directed by Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis); (3) a suggestion to revise Rule 4(a)(2)'s treatment of premature notices of appeal; and (4) the continued review of whether the time-counting rules' presumptive deadline for electronic filings should be moved earlier than midnight.

The Advisory Committee will reconsider proposed amendments it had approved for publication that would abrogate Rule 35 (En Banc Determination) and amend Rule 40 (Petition for Panel Rehearing) so as to consolidate in one amended Rule 40 all the provisions governing en banc hearing and rehearing and panel rehearing. The Advisory Committee, in crafting that proposal, had sought to accomplish this consolidation without altering the current substance of Rule 35. Discussion in the Standing Committee brought to light questions about how to implement the proposed consolidation as well as suggestions that additional aspects of current Rule 35 be scrutinized. Accordingly, the Standing Committee re-committed the proposal to the Advisory Committee for further consideration.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Form Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules recommended the following for final approval: (1) Restyled Parts I and II of the Bankruptcy Rules; (2) proposed amendments to 12 rules, and a proposed new rule, in response to the Small Business Reorganization Act of 2019

(SBRA), Pub. L. 116-54, 133 Stat. 1079 (Aug. 26, 2019), (Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, and new Rule 3017.2); (3) proposed amendments to four additional rules (Rules 3002(c)(6), 5005, 7004, and 8023); and (4) a proposed amendment to Official Form 122B in response to the SBRA. The proposed amendments were published for public comment in August 2020. As to all of these proposed amendments other than the Restyled Parts I and II of the Bankruptcy Rules, the Advisory Committee sought transmission to the Judicial Conference; the Restyled Rules, as noted below, will be held for later transmission.

Restyled Rules Parts I and II

Parts I and II of the Restyled Rules (the 1000 and 2000 series) received extensive comments. Many of the comments addressed specific word choices, and changes responding to those comments were incorporated into the versions that the Advisory Committee recommended for final approval. The Advisory Committee rejected other suggestions. For example, the National Bankruptcy Conference (NBC) objected to capitalizing of the words "Title," "Chapter," and "Subchapter" because those terms are not capitalized in the Bankruptcy Code. The Advisory Committee concluded that this change was purely stylistic and deferred to the Standing Committee's style consultants in retaining capitalization of those terms. The NBC also suggested that the Restyled Rules add a "specific rule of interpretation" or be accompanied by "a declarative statement in the Supreme Court order adopting the new rules" that would assert that the restyling process was not intended to make substantive changes, and that the Restyled Rules must be interpreted consistently with the current rules. The Advisory Committee disagreed with this suggestion and noted that none of the four prior restyling projects (Appellate, Civil, Criminal, and Evidence) included such a statement in the text of a rule or promulgating order. As was done in the prior restyling projects, the Advisory Committee has included a general committee note describing the restyling process. The note also emphasizes that restyling is not

intended to make substantive changes to the rules. Moreover, the committee note after each individual rule includes that following statement: "The language of Rule [ ] has been amended as part of the general restyling of the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only."

The Advisory Committee recommended that the Standing Committee approve the 1000 and 2000 series of Restyled Rules as submitted, but that it wait until the remainder of the Restyled Rules have been approved after publication in 2021 and 2022 before sending any of the rules to the Judicial Conference. The Advisory Committee anticipates a final review of the full set of Restyled Rules in 2023, after the upcoming publication periods end, to ensure that stylistic conventions are consistent throughout the full set, and to incorporate any non-styling changes that have been made to the rules while the restyling process has been ongoing. The Standing Committee agreed with this approach and approved the 1000 and 2000 series, subject to reconsideration once the Advisory Committee is ready to recommend approval and submission of the full set of Restyled Rules to the Judicial Conference in 2023.

The SBRA-related Rule Amendments

The interim rules that the Advisory Committee issued in response to the enactment of the Small Business Reorganization Act took effect as local rules or standing orders on February 19, 2020, the effective date of the Act. As part of the process of promulgating national rules governing cases under subchapter V of chapter 11, the amended and new rules were published for comment last summer, along with the SBRA-related form amendments.

The following rules were published for public comment:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits);
- Rule 1020 (Chapter 11 Reorganization Case for Small Business Debtors);
- Rule 2009 (Trustees for Estates When Joint Administration Ordered);

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

No comments were submitted on these SBRA-related rule amendments, and the Advisory Committee approved the rules as published.

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

Rule 3002(c)(6) (Filing Proof of Claim or Interest). The rule currently requires a court to apply different standards to a creditor request to extend the deadline to file a claim depending on whether the creditor's address is foreign or domestic. The proposed amendment would create a uniform standard. Regardless of whether a creditor's address is foreign or domestic, the court could grant an extension if it finds that the notice was insufficient under the circumstances to give that creditor a reasonable time to file a proof of claim. There were no comments, and the Advisory Committee approved the proposed amendment as published.

Rule 5005 (Filing and Transmittal of Papers). The proposed amendment would allow papers required to be transmitted to the United States trustee to be sent by filing with the court's electronic filing system, and would dispense with the requirement of proof of transmittal when the transmittal is made by that means. The amendment would also eliminate the requirement for

verification of the statement that provides proof of transmittal for papers transmitted other than through the court's electronic-filing system. The only comment submitted noted an error in the redlining of the published version, but it recognized that the committee note clarified the intended language. With that error corrected, the Advisory Committee approved the proposed amendment.

Rule 7004 (Process; Service of Summons, Complaint). The amendment adds a new subdivision (i) to make clear that service under Rules 7004(b)(3) or (h) may be made on an officer, managing or general agent, or other agent by use of their titles rather than their names. Although no comments were submitted, the Advisory Committee deleted a comma from the text of the proposed amendment and modified the committee note slightly by changing the word "Agent" to "Agent for Receiving Service of Process." The Advisory Committee approved the proposed amendment as revised.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to the pending proposed amendment to Appellate Rule 42(b) (discussed earlier in this report). The amendment would clarify, inter alia, that a court order is required for any action other than a simple voluntary dismissal of an appeal. No comments were submitted, and the Advisory Committee approved the proposed amendment as published.

SBRA-related Amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income)

When the SBRA went into effect on February 19, 2020, the Advisory Committee issued nine Official Bankruptcy Forms addressing the statutory changes. Unlike the SBRA-related rule amendments, the SBRA-related form amendments were issued by the Advisory Committee under its delegated authority to make conforming and technical amendments to the Official Forms, subject to subsequent approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. Although the SBRA-related form amendments were

already final, they were published for comment along with the proposed rule amendments in order to ensure that the public had a thorough opportunity to review them. There were no comments and the Advisory Committee took no further action with respect to them.

In addition to the previously approved SBRA-related form amendments, a proposed amendment to Official Form 122B was published in order to correct an instruction embedded in the form. The instruction currently explains that the form is to be used by individuals filing for bankruptcy under Chapter 11. The form is not applicable under new subchapter V of chapter 11, however, so the instruction was modified as follows (new text emphasized): "You must file this form if you are an individual and are filing for bankruptcy under Chapter 11 *(other than under subchapter V)*." There were no comments and the Advisory Committee approved the form as published.

The Standing Committee unanimously approved the Advisory Committee's recommendations.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 1007, 1020, 2009, 2012, 2015, 3002, 3010, 3011, 3014, 3016, 3017.1, 3018, 3019, 5005, 7004, and 8023, and new Rule 3017.2, as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

b. Approve, effective December 1, 2021, the proposed amendment to Official Bankruptcy Form 122B, as set forth in Appendix B, for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Official Rules and Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to the Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules); Rule 3002.1; Official Form 101; Official Forms 309E1 and 309E2; and new Official Forms 410C13-1N,

410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R with a recommendation that they be published for public comment in August 2021. In addition, as discussed in the emergency rules section of this report, the Advisory Committee recommended approval for publication of proposed new Rule 9038 (Bankruptcy Rules Emergency). The Standing Committee unanimously approved the Advisory Committee's recommendations. The August 2021 publication package will also include proposed amendments to Rules 3011 and 8003, and Official Form 417A, which the Standing Committee approved for publication in January 2021 and which are discussed in the Standing Committee's March 2021 report.

Restyled Rules Parts III, IV, V, and VI

The Advisory Committee sought approval for publication of Restyled Rules Parts III, IV, V, and VI (the 3000, 4000, 5000, and 6000 series of Bankruptcy Rules). This is the second group of Restyled Rules recommended for publication. The first group of Restyled Rules, as noted above, received approval by the Standing Committee after publication and comment; and the Advisory Committee expects to present the final group of Restyled Rules for publication next year.

Rule 3002.1 (Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence)

The proposed amendment is intended to encourage a greater degree of compliance with the rule's provisions for determining the status of a mortgage claim at the end of a chapter 13 case. Notably, the existing notice procedure used at the end of the case would be replaced with a motion-based procedure that would result in a binding order from the court on the mortgage claim's status. The amended rule would also provide for a new midcase assessment of the mortgage claim's status in order to give the debtor an opportunity to cure any postpetition

defaults that may have occurred. The amended rule includes proposed stylistic changes throughout.

Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy)

Changes are made to lines 2 and 4 of the form to clarify that the requirement to report "other names you have used in the last 8 years … [including] *doing business as* names" is meant to elicit only names the debtor has personally used in doing business and not the names of separate entities such as an LLC or corporation in which the debtor may have a financial interest.

Official Forms 309E1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)) and 309E2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V))

The proposed amendments to line 7 of Official Form 309E1 and line 8 of Official Form 309E2 clarify the distinction between the deadline for objecting to discharge and the deadline for seeking to have a debt excepted from discharge.

New Official Forms 410C13-1N (Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-1R (Response to Trustee's Midcase Notice of the Status of the Mortgage Claim), 410C13-10C (Motion to Determine the Status of the Mortgage Claim (conduit)), 410C13-10NC (Motion to Determine the Status of the Mortgage Claim (nonconduit)), 410C13-10R (Response to Trustee's Motion to Determine the Status of the Mortgage Claim)

The proposed amendment to Rule 3002.1 discussed above calls for the use of five new Official Forms. Subdivisions (f) and (g) of the amended rule would require the notices, motions, and responses that a chapter 13 trustee and a holder of a mortgage claim must file to conform to the appropriate Official Forms.

The first form – Official Form 410C13-1N – would be used by a trustee to provide the notice required by Rule 3002.1(f)(1). This notice is filed midway through a chapter 13 case (18-24 months after the petition was filed), and it requires the trustee to report on the status of

payments to cure any prepetition arrearages and, if the trustee makes the ongoing postpetition mortgage payments, the amount and date of the next payment.

Within 21 days after service of the trustee's notice, the holder of the mortgage claim must file a response using the second form – Official Form 410C13-1R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any prepetition arrearage, and it must also provide information about the status of ongoing postpetition mortgage payments.

The proposed third and fourth forms – Official Forms 410C13-10C and 410C13-10NC – would implement Rule 3002.1(g)(1). One is used if the trustee made the ongoing postpetition mortgage payments from the debtor's plan payment (as a conduit), and the other is used if those payments were made by the debtor directly to the holder of the mortgage claim (nonconduit). This motion is filed at the end of a chapter 13 case when the debtor has completed all plan payments, and it seeks a court order determining the status of the mortgage claim.

As required by Rule 3002.1(g)(2), the holder of the mortgage claim must respond to the trustee's motion within 28 days after service, using the final proposed form – Official Form 410C13-10R. The claim holder must indicate whether it agrees with the trustee's statements about the cure of any arrearages and the payment of any postpetition fees, expenses, and charges. It must also provide information about the status of ongoing postpetition mortgage payments.

Information Items

The Advisory Committee met by videoconference on April 8, 2021. In addition to the recommendations discussed above, the meeting covered a number of other matters, including a suggestion by 45 law professors to streamline turnover procedures in light of *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021).

In its January 2021 decision in *City of Chicago v. Fulton*, the Supreme Court held that a creditor who continues to hold estate property acquired prior to a bankruptcy filing does not violate the automatic stay under § 362(a)(3). *City of Chicago*, 141 S. Ct. at 592. In so ruling, the Court found that a contrary reading of § 362(a)(3) would render superfluous § 542(a)'s provisions for the turnover of estate property. *Id.* at 591. In a concurring opinion, Justice Sotomayor noted that current procedures for turnover proceedings "can be quite slow" because they must be pursued by an adversary proceeding. She stated, however, that "[i]t is up to the Advisory Committee on Rules of Bankruptcy Procedure to consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned." *Id.* at 595.

Acting on Justice Sotomayor's suggestion, 45 law professors submitted a suggestion that would allow turnover proceedings to be initiated by motion rather than adversary proceeding, and the National Bankruptcy Conference has submitted a suggestion supportive of the law professors' position. A subcommittee of the Advisory Committee has begun consideration of the suggestions and is gathering information about local rules and procedures that already allow for turnover of certain estate property by motion.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the

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

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain

statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run

from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), as set forth in Appendix C, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 87 (Civil Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation. The August 2021 publication package will also include proposed amendments to Civil Rules 15 and 72 that were previously approved for publication in January 2021 (as set out in the Standing Committee's March 2021 report).

Information Items

The Advisory Committee met by videoconference on April 23, 2021. In addition to the action items discussed above, the Advisory Committee considered reports on the work of the Subcommittee on Multidistrict Litigation, including a March 2021 conference on issues regarding leadership counsel and judicial supervision of settlement, as well as the work of the

newly reactivated Discovery Subcommittee. The Advisory Committee also determined to keep on its study agenda suggestions to develop uniform *in forma pauperis* standards and procedures, and to amend Rule 9(b) (Pleading Special Matters – Fraud or Mistake; Conditions of Mind).

The Advisory Committee will reconsider a proposed amendment to Rule 12(a)(4)(A), the rule that governs the effect of a motion on the time to file responsive pleadings, following discussion and feedback provided at the Standing Committee meeting. The proposed amendment would have extended from 14 days to 60 days the presumptive time for the United States to serve a responsive pleading after a court denies or postpones a disposition on a Rule 12 motion "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The DOJ sought this change based on its need for time to consider taking an appeal, to decide on strategy and sometimes representation questions, and to provide for consultation between local U.S. Attorney offices and the DOJ or the Solicitor General. The Advisory Committee determined that extending the time to 60 days would be consistent with other time periods applicable to the United States (e.g., Rule 12(a)(3), which provides a 60-day time to answer in such cases, and Appellate Rule 4(a)(1)(B)(iv), which sets civil appeal time at 60 days).

The proposed amendment has not been without controversy. It was published for public comment in August 2020 and, of the three comments received, two expressed concern that the proposed amendment was imbalanced and would cause unwarranted delay; that plaintiffs in these actions often are involved in situations that call for significant police reforms; that the amendment would exacerbate existing problems with the qualified immunity doctrine; and that the proposal was overbroad in that it would accord the lengthened period in actions in which there is no immunity defense. Discussion at the Advisory Committee's April 2021 meeting focused on two major concerns. First, some thought the amendment might be overbroad and

should be limited only to immunity defenses; however, a motion to add this limitation failed. Second, there was concern over whether the 60-day time period was too long. Ultimately, however, the Advisory Committee approved the proposed amendment by a divided vote.

At its meeting, members of the Standing Committee expressed similar concerns about the 60-day time period being too long, especially given that the time period for other litigants is 14 days. After much discussion, the Standing Committee asked the Advisory Committee to obtain more information on factors that would justify lengthening the period and consider further the amount of time that those factors would justify.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules recommended for final approval a proposed amendment to Rule 16 (Discovery and Inspection). The proposal was published for public comment in August 2020.

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

With the aid of an extensive briefing presented by the DOJ to the Advisory Committee at its fall 2018 meeting and a May 2019 miniconference that brought together experienced defense attorneys, prosecutors, and DOJ representatives, the Advisory Committee concluded that the two core problems of greatest concern to practitioners are the lack of (1) adequate specificity regarding what information must be disclosed, and (2) an enforceable deadline for disclosure.

The proposed amendment addresses both problems by clarifying the scope and timing of the parties' obligations to disclose expert testimony they intend to present at trial. It is meant to facilitate trial preparation, allowing the parties a fair opportunity to prepare to cross-examine expert witnesses and secure opposing expert testimony if needed. Importantly, the proposed new provisions are reciprocal. Like the existing provisions, the amended paragraphs – (a)(1)(G) (government's disclosures) and (b)(1)(C) (defendant's disclosures) – generally mirror one another.

The proposed amendment limits the disclosure obligation to testimony the party will use in the party's case-in-chief and (as to the government) testimony the government will use to rebut testimony timely disclosed by the defense under (b)(1)(C). The amendment deletes the current Rule's reference to "a written summary of" testimony and instead requires "a complete statement of" the witness's opinions. Regarding timing, the proposed amendment does not set a specific deadline but instead specifies that the court, by order or local rule, must set a deadline for each party's disclosure "sufficiently before trial to provide a fair opportunity" for the opposing party to meet the evidence.

The Advisory Committee received six comments on the proposed amendment. Although all were generally supportive, they proposed various changes to the text and the committee note. The provisions regarding timing elicited the most feedback, with several commenters advocating that the rule should set default deadlines (though these commenters did not agree on what those default deadlines should be). The Advisory Committee considered these suggestions but remained convinced that the rule should permit courts and judges to tailor disclosure deadlines based on local practice, varying caseloads from district to district, and the circumstances of specific cases. Deadlines for disclosure must also be sensitive to the requirements of the Speedy Trial Act. And under existing Rule 16.1, the parties "must confer and try to agree on a timetable

and procedures for pretrial disclosure"; any resulting recommendations by the parties will inform the court's choice of deadlines.

Commenters also focused on the scope of required disclosures, with one commenter suggesting the deletion of the word "complete" from the phrase "a complete statement of all opinions" and another commenter proposing expansion of the disclosure obligation (for instance, to include transcripts of prior testimony) as well as expansion of the stages in the criminal process at which disclosure would be required. The Advisory Committee declined to delete the word "complete," which is key in order to address the noted problem under the existing rule of insufficient disclosures. As to the proposed expansion of the amendment, such a change would require republication (slowing the amendment process) and might endanger the laboriously obtained consensus that has enabled the proposed amendment to proceed.

After fully considering and discussing the public comments, the Advisory Committee decided against making any of the suggested changes to the proposal. It did, however, make several non-substantive clarifying changes.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 16 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Rule 16, as set forth in Appendix D, and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

As discussed in the emergency rules section of this report, the Advisory Committee recommended that proposed new Rule 62 (Criminal Rules Emergency) be published for public comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Information Items

The Advisory Committee met by videoconference on May 11, 2021. The meeting focused on approval for publication of proposed new Rule 62 as well as final approval of the proposed amendments to Rule 16. Both of these items are discussed above. The Advisory Committee also received a report from the Rule 6 Subcommittee and considered suggestions for new amendments to a number of rules, including Rules 11 and 16.

Rule 11 (Pleas)

The Advisory Committee has received a proposal to amend Rule 11 to allow a negotiated plea of not guilty by reason of insanity. Title 18 U.S.C. § 4242(b), enacted as part of the Insanity Defense Reform Act of 1984, provides a procedure by which a defendant may be found not guilty by reason of insanity; however, neither the plea nor the plea agreement provisions of Rule 11 expressly provide for pleas of not guilty by reason of insanity. Rule 11(a)(1) provides that "[a] defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere," and Rule 11(c)(1) provides a procedure for plea agreements "[i]f the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense." Initial research by the Rules Committee Staff found a number of instances in which a jury trial was avoided because both parties agreed on the appropriateness of a verdict of not guilty by reason of insanity. The procedure used in those instances was to hold a bench trial at which all the facts were stipulated in advance. This meets the statutory requirement of a verdict and does not use the Rule 11 plea procedure. The Advisory Committee determined to retain the suggestion on its study agenda in order to conduct further research on the use of the stipulated trial alternative.

Rule 16 (Discovery and Inspection)

The Advisory Committee considered two new suggestions to amend Rule 16 to require that judges inform prosecutors of their *Brady* obligations. Although the recently enacted Due

Process Protections Act, Pub. L. No. 116-182, 131 Stat. 894 (Oct. 21, 2020), requires individual districts to devise their own rules, the suggestions urge the Advisory Committee to develop a national standard. The Advisory Committee determined that it would not be appropriate to propose a national rule at this time, but placed the suggestions on its study agenda to follow the developments in the various circuits and districts, and to consider further whether the Advisory Committee has the authority to depart from the dispersion of decision making Congress specified in the Act.

Rule 6 (The Grand Jury)

In May 2020, the Advisory Committee formed a subcommittee to consider suggestions to amend Rule 6(e)'s provisions on grand jury secrecy. The formation of the subcommittee was prompted by two suggestions proposing the addition of an exception to the grand jury secrecy provisions to include materials of historical or public interest. Two additional suggestions have been submitted in light of recent appellate decisions holding that district courts lack inherent authority to disclose material not explicitly included in the exceptions listed in Rule 6(e)(2)(b). *See McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020); *Pitch v. United States*, 953 F.3d 1226 (11th Cir.) (en banc), *cert. denied*, 141 S. Ct. 624 (2020); *see also Department of Justice v. House Committee on the Judiciary*, No. 19-1328 (cert. granted July 2, 2020; case remanded with instructions to vacate the order below on mootness grounds, July 2, 2021) (presenting the question regarding the exclusivity of the Rule 6(e) exceptions). Additionally, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). 140 S. Ct. at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically

enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.*

The two most recent suggestions submitted in reaction to this line of cases include one from the DOJ suggesting an amendment to authorize the issuance of temporary non-disclosure orders to accompany grand jury subpoenas in appropriate circumstances. In the past, courts had issued such orders based on their inherent authority over grand jury proceedings; however, some district courts have stopped issuing delayed disclosure orders in light of *McKeever*. Second, two district judges have suggested an amendment that would explicitly permit courts to issue redacted judicial opinions when there is potential for disclosure of matters occurring before the grand jury.

In April, the subcommittee held a day-long virtual miniconference to gather more information about the proposals to amend Rule 6 to add exceptions to the secrecy provisions. The subcommittee obtained a wide range of views from academics, journalists, private practitioners (including some who had previously served as federal prosecutors but also represented private parties affected by grand jury proceedings), representatives from the DOJ, and the general counsel of the National Archives and Records Administration.

The Advisory Committee has also referred to the subcommittee a proposal to amend Rule 6 to expressly authorize forepersons to grant individual grand jurors temporary excuses to attend to personal matters. Forepersons have this authority in some, but not all, districts.

The Rule 6 Subcommittee plans to present its recommendations to the Advisory Committee at its fall meeting.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 106, 615, and 702 with a recommendation that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 106 (Remainder of or Related Writings or Recorded Statements)

The proposed amendment to Rule 106 would fix two problems with Rule 106, often referred to as the "rule of completeness." Rule 106 provides that if a party introduces all or part of a written or recorded statement in a way that is misleading, the opponent may require admission of a completing portion of the statement in order to correct the misimpression. The rule prevents juries from being misled by the selective introduction of portions of a written or recorded statement. The proposed amendment is intended to resolve two issues. First, courts disagree on whether the completing portion of the statement can be excluded under the hearsay rule. The proposed amendment clarifies that the completing portion is admissible over a hearsay objection. (The use to which the completing portion may be put – that is, whether it is admitted for its truth or only to prove that the completing portion of the statement was made – will be within the court's discretion.) Second, the current rule applies to written and recorded statements but not unrecorded oral statements leading many courts to allow for completion of such statements under another rule of evidence or under the common law. This is particularly problematic because Rule 106 issues often arise at trial when there may not be time for the court or the parties to stop and thoroughly research other evidence rules or the relevant common law. The proposed amendment would revise Rule 106 so that it would apply to all written or oral statements and would fully supersede the common law.

Rule 615 (Excluding Witnesses)

The proposed amendment to Rule 615 addresses two difficulties with the current rule. First, it addresses the scope of a Rule 615 exclusion order. Rule 615 currently provides, with certain exceptions, that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony." The court may also exclude witnesses on its own initiative. The circuits are split, however, on whether the typical simple and brief orders that courts issue under Rule 615 operate only to physically exclude witnesses from the courtroom, or whether they also prevent witnesses from learning about what happens in the courtroom while they are excluded. The proposed amendment would explicitly authorize judges to enter orders that go beyond a standard Rule 615 order to prevent witnesses from learning about what happens in the courtroom while they are excluded. This will clarify that any additional restrictions are not implicit in a standard Rule 615 order. The committee note observes that the rule, as amended, would apply to virtual trials as well as live ones.

Second, the proposed amendment clarifies the scope of the rule's exemption from exclusion for entity representatives. Under Rule 615, a court cannot exclude parties from a courtroom, and if one of the parties is an entity, that party can have an officer or employee in the courtroom. Some courts allow an entity-party to have multiple representatives in the courtroom without making any kind of showing that multiple representatives are necessary. In the interests of fairness, the Advisory Committee proposes to amend the rule to make clear that an entity-party can designate only one officer or employee to be exempt from exclusion as of right. As with any party, an entity-party can seek an additional exemption from exclusion by arguing that one or more additional representatives are "essential to presenting the party's claim or defense" under current Rule 615(c) (which would become Rule 615(a)(3)).

Rule 702 (Testimony by Expert Witnesses)

The proposed amendment to Rule 702 concerns the admission of expert testimony. Over the past several years the Advisory Committee has thoroughly considered Rule 702 and has determined that it should be amended to address two issues. The first issue concerns the standard a judge should apply in deciding whether expert testimony should be admitted. Under Rule 702, such testimony must be based on sufficient facts or data and must be the product of reliable principles and methods, and the expert must have "reliably applied the principles and methods to the facts of the case." A proper reading of the rule is that a judge should not admit expert testimony unless the judge first finds by a preponderance of the evidence that each of these requirements is met. The problem is that many judges have not been correctly applying Rule 702 and there is a lot of confusing or misleading language in court decisions, including appellate decisions. Many courts have treated these Rule 702 requirements as if they go merely to the testimony's weight rather than to its admissibility. For example, instead of asking whether an expert's opinion *is* based on sufficient data, some courts have asked whether *a reasonable jury could find* that the opinion is based on sufficient data. The Advisory Committee voted unanimously to amend Rule 702 to make it clear that expert testimony should not be admitted unless the judge first finds by a preponderance of the evidence that the expert is relying on sufficient facts or data, and employing a reliable methodology that is reliably applied. The amendment would not change the law but would clarify the rule so that it is not misapplied.

The second issue addressed by the proposed amendment to Rule 702 is that of overstatement – experts overstating the certainty of their conclusions beyond what can be supported by the underlying science or other methodology as properly applied to the facts. There had been significant disagreement among members of the Advisory Committee on this issue. The criminal defense bar felt strongly that the problem should be addressed by adding a new

subsection that explicitly prohibits this kind of overstatement. The DOJ opposed such an addition, pointing to its own internal processes aimed at preventing overstatement by its forensic experts and arguing that the problem with overstatement is caused by poor lawyering (i.e., failure to make available objections) rather than poor rules. The Advisory Committee reached a compromise position, which entails changing Rule 702(d)'s current requirement that "the expert has reliably applied the principles and methods to the facts of the case" to require that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." The committee note explains that this change to Rule 702(d) is designed to help focus judges and parties on whether the conclusions being expressed by an expert are overstated.

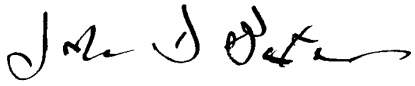
Information Items

The Advisory Committee met by videoconference on April 30, 2021. Discussion items included a possible new rule to set safeguards concerning juror questioning of witnesses and possible amendments to Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence) regarding the use of illustrative aids at trial; Rule 1006 (Summaries to Prove Content) to provide greater guidance to the courts on the admissibility and proper use of summary evidence under Rule 1006; Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay) regarding admissibility of statements offered against a successor-in-interest; and Rules 407 (Subsequent Remedial Measures), 613 (Witness's Prior Statement), 804 (Hearsay Exceptions; Declarant Unavailable), and 806 (Attacking and Supporting the Declarant) to address circuit splits. The Advisory Committee discussed, and decided not to pursue, possible amendments to Rule 611(a) (to address how courts have been using that rule) and to Article X of the Evidence Rules (to address the best evidence rule's application to recordings in a foreign language).

OTHER ITEMS

An additional action item before the Standing Committee was a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard, that the Committee refresh and report on its consideration of strategic initiatives. The Committee was also invited to suggest topics for discussion at future long-range planning meetings of Judicial Conference committee chairs. No members of the Committee suggested any changes to the proposed status report concerning the Committee's ongoing initiatives. Those initiatives include: (1) Evaluating the Rules Governing Disclosure Obligations in Criminal Cases; (2) Evaluating the Impact of Technological Advances; (3) Bankruptcy Rules Restyling; and (4) Examining Ways to Reduce Cost and Increase Efficiency in Civil Litigation. The proposed status report also includes the addition of one new initiative – the emergency rules project described above – which is linked to Strategy 5.1: Harness the Potential of Technology to Identify and Meet the Needs of Judiciary Users and the Public for Information, Service, and Access to the Courts. The Standing Committee did not identify any topics for discussion at future long-range planning meetings. This was communicated to Chief Judge Howard by letter dated July 13, 2021.

Respectfully submitted,



John D. Bates, Chair

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Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra, Jr.	Lisa O. Monaco
Frank M. Hull	Gene E.K. Pratter
William J. Kayatta, Jr.	Kosta Stojilkovic
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William K. Kelley	

TAB 3

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2021)

REA History:

- Transmitted to Supreme Court (Oct 2020)
- Approved by Judicial Conference (Sept 2020)
- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)

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

Revised August 24, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Approved by Standing Committee (June 2021 unless otherwise noted)

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

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

Revised August 24, 2021

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Approved by Standing Committee (June 2021 unless otherwise noted)

REA History:

- Published for public comment (Aug 2020-Feb 2021 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment. The proposed amendments to (a) and (b) were approved by the Standing Committee in Jan 2021, and approved by the Judicial Conference in Mar 2021. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to FRAP 26.1 (effective Dec 2019) and Bankruptcy Rule 8012 (effective Dec 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party.	AP 26.1 and BK 8012
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 2	Proposed amendment developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	BK 9038, CV 87, and CR 62
AP 4	The proposed amendment is designed to make Rule 4 operate with Civil Rule 6(b)(2) if that rule is ever in effect by adding a reference to Civil Rule 59 in subsection (a)(4)(A)(vi).	CV 87 (Emergency CV 6(b)(2))
BK 3002.1 and five new related Official Forms	The proposed rule amendment and the five related forms (410C13-1N, 410C13-1R, 410C13-10C, 410C13-10NC, and 410C13-10R) are designed to increase disclosure concerning the ongoing payment status of a debtor's mortgage and of claims secured by a debtor's home in chapter 13 case.	
BK 3011	Proposed new subdivision (b) would require courts to provide searchable access to unclaimed funds on local court websites	
BK 8003 and Official Form 417A	Proposed rule and form amendments are designed to conform to amendments to FRAP 3(c) clarifying that the designation of a particular interlocutory order in a notice of appeal does not prevent the appellate court from reviewing all orders that merged into the judgment, or appealable order or degree.	AP 3
BK 9038 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, CV 87, and CR 62
BK Restyled Rules (Parts III-VI)	The second set, approximately 1/3 of current Bankruptcy Rules, restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The first set of restyled rules (Parts I & II) were published in 2020, and the anticipated third set (Parts VII-IX) are expected to be published in 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
Official Form 101	Updates are made to lines 2 and 4 of the form to clarify how the debtor should report the names of related separate legal entities that are not filing the petition. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 101 will go into effect December 1, 2022.	
Official Forms 309E1 and 309E2	Form 309E1, line 7 and Form 309E2, line 8, are amended to clarify which deadline applies for filing complaints to deny the debtor a discharge and which applies for filing complaints seeking to except a particular debt from discharge. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Forms 309E1 and 309E2 will go into effect December 1, 2021.	
CV 15	The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. A literal reading of "A party may amend its pleading once as a matter of course within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (beginning on the twenty-second day after service of the pleading and extending to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	

Effective (no earlier than) December 1, 2023

Current Step in REA Process:

- Published for public comment (Aug 2021-Feb 2022)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 72	The proposed amendment would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).	
CV 87 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CR 62
CR 62 (New)	Proposed new rule developed in response to § 15002(b)(6) of the CARES Act, which directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency.	AP 2, BK 9038, and CV 87
EV 106	The proposed amendment would allow a completing statement to be admissible over a hearsay objection and cover unrecorded oral statements.	
EV 615	The proposed amendment limits an exclusion order to the exclusion of witnesses from the courtroom. A new subdivision would provide that the court has discretion to issue further orders to "(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony." Finally, the proposed amendment clarifies that the existing provision that allows an entity-party to designate "an officer or employee" to be exempt from exclusion is limited to one officer or employee.	
EV 702	The proposed amendment would amend Rule 702(d) to require the court to find that "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." In addition, the proposed amendment would explicitly add the preponderance of the evidence standard to Rule 702(b)-(d).	

TAB 4

Legislation that Directly or Effectively Amends the Federal Rules
117th Congress
(January 3, 2021 – January 3, 2023)

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2021	**H.R. 41** *Sponsor:* Biggs (R-AZ)	CV 23	**Bill Text:** https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf **Summary (authored by CRS):** This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
Injunctive Authority Clarification Act of 2021	**H.R. 43** *Sponsor:* Biggs (R-AZ)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf **Summary (authored by CRS):** This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit.	• 1/4/21: Introduced in House; referred to Judiciary Committee • 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet
PROTECT Asbestos Victims Act of 2021	**S. 574** *Sponsor:* Tillis (R-NC) *Co-sponsors:* Cornyn (R-TX) Grassley (R-IA)	BK	**Bill Text:** https://www.congress.gov/117/bills/s574/BILLS-117s574is.pdf **Summary:** Would amend 11 USC § 524(g) "to promote the investigation of fraudulent claims against [asbestosis trusts] …" and would allow outside parties to make information demands on the administrators of such trusts regarding payment to claimants. If enacted in its current form S. 574 may require an amendment to Rule 9035. The bill would give the United States Trustee a number of investigative powers with respect to asbestosis trusts set up under § 524 even in the districts in Alabama and North Caroline. Rule 9035 on the other hand, reflects the current law Bankruptcy Adminstrators take on US trustee functions in AL and NC and states that the UST has no authority in those districts.	• 3/3/2021: Introduced in Senate; referred to Judiciary Committee

Sunshine in the Courtroom Act of 2021	**S.818** *Sponsor:* Grassley (R-IA) *Co-sponsors*: Blumenthal (D-CT) Cornyn (R-TX) Durbin (D-IL) Klobuchar (D-MN) Leahy (D-VT) Markey (D-MA)	CR 53	**Bill Text:** https://www.congress.gov/117/bills/s818/BILLS-117s818is.pdf **Summary:** This is described as a bill "[t]o provide for media coverage of Federal court proceedings." The bill would allow presiding judges in the district courts and courts of appeals to "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge provides." The Judicial Conference would be tasked with promulgating guidelines. This would impact what is allowed under Federal Rule of Criminal Procedure 53 which says that "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."	• 3/18/21: Introduced in Senate; referred to Judiciary Committee • 6/24/21: Scheduled for mark-up; letter being prepared to express opposition by the Judicial Conference and the Rules Committees • 6/25/21: Ordered to be reported without amendment favorably by Judiciary Committee
Litigation Funding Transparency Act of 2021	**S. 840** *Sponsor:* Grassley (R-IA) *Co-sponsors:* Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC) **H.R. 2025** *Sponsor:* Issa (R-CA)		**Senate Bill Text (HR text not available):** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf **Summary:** Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action."	• 3/18/21: Introduced in Senate and House; referred to Judiciary Committees • 5/3/21: Letter received from Sen. Grassley and Rep. Issa • 5/10/21: Response letter sent to Sen. Grassley from Rep. Issa from Judge Bates

Justice in Forensic Algorithms Act of 2021	**H.R. 2438** *Sponsor:* Takano (D-CA) *Co-sponsor:* Evans (D-PA)	EV 702	**Bill Text:** https://www.congress.gov/117/bills/hr2438/BILLS-117hr2438ih.pdf **Summary:** A bill "[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings, provide for the establishment of Computational Forensic Algorithm Testing Standards and a Computational Forensic Algorithm Testing Program, and for other purposes." Section 2 of the bill contains the following two subdivisions that implicate Rules: "(b) PROTECTION OF TRADE SECRETS.— (1) There shall be no trade secret evidentiary privilege to withhold relevant evidence in criminal proceedings in the United States courts. (2) Nothing in this section may be construed to alter the standard operation of the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, as such rules would function in the absence of an evidentiary privilege." "(g) INADMISSIBILITY OF CERTAIN EVIDENCE.—In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software."	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology
Juneteenth National Independence Day Act	**S. 475**	AP 26; BK 9006; CV 6; CR 45	Established Juneteenth National Independence Day (June 19) as a legal public holiday	• 6/17/21: Became Public Law No: 117-17.

Bankruptcy Venue Reform Act of 2021	H.R. 4193 *Sponsor*: Lofgren (D-CA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 **Summary:** Modifies venue requirements relating to Bankruptcy proceedings.	• 6/28/21 Introduced in House, Referred to Judiciary Committee
Nondebtor Release Prohibition Act of 2021	S. 2497 *Sponsor*: Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/senate-bill/2497/text?r=195 **Summary:** Would prevent individuals who have not filed for bankruptcy from obtaining releases from lawsuits brought by private parties, states, and others in bankruptcy by: • Prohibiting the court from discharging, releasing, terminating or modifying the liability of and claim or cause of action against any entity other than the debtor or estate. • Prohibiting the court from permanently enjoining the commencement or continuation of any action with respect to an entity other than the debtor or estate.	• 7/28/21 Introduced in Senate, Referred to Judiciary Committee

TAB 5

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
APRIL 23, 2021

The Civil Rules Advisory Committee met by Teams teleconference on April 23, 2021. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Jennifer C. Boal; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge Joan N. Ericksen; Judge David C. Godbey; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Professor Daniel J. Capra participated as liaison to the CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Julie Wilson, Esq. and Kevin Crenny, Esq., represented the Administrative Office. Dr. Emery G. Lee, Dr. Tim Reagan, and Jason Cantone, Esq., represented the Federal Judicial Center.

Members of the public who joined the meeting are identified in the attached Teams attendance list.

Judge Dow opened the meeting with messages of thanks and welcome. He observed that there were around fifty participants and guests, a good attendance, but expressed a hope that the October meeting would be in person.

Judge Dow further noted that the meeting agenda is very full, but expected the Committee to do its best to get through all items. The work of the CARES Act Subcommittee has involved the parallel subcommittees for the Appellate, Bankruptcy, and Criminal Rules Committees, as well as all advisory committee reporters and Professors Capra and Struve as overall coordinating reporters. Their collective work "has been a marvelous thing to watch." He also thanked Julie Wilson and Brittany Bunting for all of the work that goes into preparing these meetings and that is done so well that we never see it.

The newest Committee members were introduced, repeating the introductions at the October meeting that anticipated their full-fledged arrival. Judge Godbey has already accepted appointment and begun work as chair of the Discovery Subcommittee. David Burman has agreed to serve on both the Discovery and MDL Subcommittees. Brian M. Boynton is serving as acting Assistant Attorney General for the Civil Division. And Judge McEwen is our new liaison from the Bankruptcy Rules Committee.

Two committee members, Judge Ericksen and Judge Morris, have

served two full terms, adding up to six years each, and are attending their final meeting today. They have contributed greatly in subcommittee and committee works, earning our enormous heartfelt gratitude and friendship.

Professor Capra "deserves a gold medal" for serving as ambassador plenipotentiary for CARES Act work. Judge Jordan and Judge Dow agree that watching his exchanges with the several reporters is like watching an Olympics ping-pong match with words.

Thanks also are due to the Federal Judicial Center, particularly Emery Lee and Tim Reagan, for tireless and expert work. Jerome Kalina, AO staff attorney for the Judicial Panel on Multidistrict Litigation, has facilitated the invaluable help the Panel has provided to the MDL Subcommittee. Finally, thanks are due to all those who make time to observe committee meetings.

Judge Dow turned to a report on the January Standing Committee meeting. The CARES Act drafts from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees consumed much of the discussion. The benefits of that discussion, and the further work of the advisory committees and Professor Capra, are reflected in the Rule 87 draft on today's agenda. Rule 7.1 was approved for adoption; because it missed the regular cycle, it will be presented to the Judicial Conference next September. Rules 15(a)(1) and 72(b)(1) were approved for publication when one or more added proposals combine to make a suitable package for seeking public comment. There also was valuable feedback on the work of the MDL Subcommittee.

The Rule 30(b)(6) amendments took effect on December 1, 2020. No new rules are on track to take effect on December 1, 2021. Rule 7.1 is in the pipeline to take effect on December 1, 2022. Depending on the outcome of today's deliberations and action by the Standing Committee, the Supplemental Rules for Social Security Cases and an amendment of Rule 12(a)(4) also could be headed toward an effective date of December 1, 2022.

Legislative Report

Julie Wilson provided the legislative update. The list of bills that would affect civil procedure is short because many bills expired at the end of the last Congress. Bills aiming to exclude "gig economy" claims from Rule 23 class actions and to limit the scope of injunctions to benefit only parties to the litigation repeat bills introduced in the last Congress. There has not yet been any movement on them. Senator Grassley has introduced S 818, a Sunshine in the Courtroom Act that would permit federal judges to allow cameras in the courtroom. This bill would have a particular impact on Criminal Rule 53, which prohibits photographs in the courtroom during proceedings or broadcasting proceedings. Similar bills were introduced in earlier

Congresses. The Administrative Office is working to reestablish closer ties on the Hill that will enable it to offer comments during the formative stages of potential legislation, often a more effective process than waiting until bills are pretty much formed.

October 2020 Minutes

The draft minutes for the October 16, 2020 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

CARES Act: Rule 87

Judge Dow introduced the CARES Act Subcommittee Report on draft Rule 87 by noting that the present purpose is to continue to develop a draft to recommend for publication alongside emergency rules proposals by the Appellate, Bankruptcy, and Criminal Rules Committees. Today's deliberations are framed to keep open the question whether, after public comment, to recommend adoption of a civil rule for rules emergencies, or instead to recommend revision of the civil rules themselves, or to conclude that experience during the pandemic has shown there is no need for new rules texts to meet emergency circumstances. This caution was repeated in the Subcommittee Report: in the end, the Subcommittee may recommend adding more emergency rules, or instead adapting what now are proposed as Emergency Rules 4 and 6(b)(2) by amendments to the regular rule texts, or simply abandoning all of these attempts. Much remains to be learned by further work and in the public comment process.

Judge Jordan delivered the Subcommittee report. He began by stating that the Subcommittee members have done extraordinary work, and thanking them for continuing devotion to the hard work. He also expressed thanks to the reporters for all the advisory committees. A full history of all the work is not needed for today's discussion. It suffices to note that there were many Subcommittee meetings, and a lot of work by the reporters, with guiding help and coordination by Professor Capra.

The Subcommittee began with independent reviews of all the rules by several people, looking for all those that might be strained by emergency circumstances. Special thanks are due to Subcommittee member Sellers for a painstaking review of all of the civil rules in a search for those that might present obstacles to effective procedure during an emergency. Long initial lists of potentially inflexible rule language were pared down, and pared down again. In addition to reviewing rules texts, as much information as possible was sought in actual experience with civil actions during the pandemic. Broad general experience has seemed to show that the rules have held up remarkably well. Their inherent flexibility and general reliance on judicial discretion have enabled courts and parties to function as

well as emergency circumstances permit without encountering impractical obstacles in rule language. Careful review of rule texts, rather than difficulties encountered in emergency practice, has provided the basis for proposing emergency rules. For now, the result is to recommend emergency provisions only for the methods of serving process under some subdivisions of Rule 4 and for extensions of the time for post-judgment motions otherwise prohibited by Rule 6(b)(2). It may be that barriers raised by other rules remain to be discovered. Publishing Rule 87 for comment will be a good way to gather additional information.

Strenuous efforts were made to achieve as much uniformity as possible with the other proposed emergency rules. The definition of a rules emergency is uniform across all of them, including Rule 87(a), with one departure in Criminal Rule 62(a) that adds a requirement that the Judicial Conference find that "no feasible alternative measures would sufficiently address the impairment [of the court's ability to perform its functions in compliance with these rules] within a reasonable time." The Appellate and Bankruptcy Rules Committees agree that this added provision is not useful in their emergency rules, and the Subcommittee agrees for the Civil Rules. The Criminal Rules emergency provisions address many matters made sensitive by tradition, constitutional protections, and the singular weight of criminal conviction. Adding language to ensure exhaustion of all available alternatives by the Judicial Conference is suitable for the Criminal Rules, but unnecessary and possibly confusing in the other rules.

Substantial uniformity also has been achieved in the provisions for declaring a rules emergency. Rule 87(b)(1)(B), however, departs from the Bankruptcy and Criminal Rules. The Bankruptcy provision tracks Criminal Rule 62(b)(1)(B): the Judicial Conference declaration "must * * * state any restrictions on the authority granted in (d) and (e)." Rule 87(b)(1)(B) is "must * * * adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them." Drafting history and, more importantly, the character of the emergency civil rules, underlie the difference. Earlier drafts of Rule 87 provided that the declaration of emergency should specify which of the emergency civil rules were included. This approach reflected the character and limited number of the emergency rules. The provisions for serving process in Emergency Rule 4 are designed to rely on circumstance-specific determinations of what means of service should be approved; there is no reason to "restrict" this authority. Instead, it may make sense to limit which of the Emergency Rule 4 subdivisions might be authorized. Emergency Rule 6(b)(2) is quite different, but includes intricately intertwined provisions for extending the time for post-judgment motions and integrating extensions with the provisions of Appellate Rule 4(a)(4)(A) for resetting appeal time. Any attempt to "restrict" this rule risks untoward consequences; it should be all on or all off. Inviting the Judicial Conference to select from this short menu of emergency rules is attractive. But that

approach was abandoned in the interest of uniformity -- the consensus was that the Judicial Conference should not be confronted with an approach that required it to "select out" particular provisions in the Bankruptcy and Criminal rules, but to affirmatively select which emergency civil rules to include. The result was rather awkward language focusing on making exceptions. There may be room to improve the language, but without embracing the inapposite concept of "restrictions." This is a point on which some differences in language are needed to reflect the different settings in which emergency rules would operate as well as differences in the character of the emergency rules themselves.

Discussion reiterated the view that there are real differences between the Criminal and Civil Rules settings. Emergency Rule 4 requires a court order for an alternative method of service. "Restricts" fits in the context of Criminal Rule 62, but not Civil Rule 87.

Another suggestion was that Emergency Rule 4 is framed as one rule, but has several parts because it addresses several subdivisions of Rule 4. The Judicial Conference might, for example, decide that alternative methods of service could be ordered on corporations covered by Rule 4(h)(1), but not on individuals covered by Rule 4(e). Should it be "adopt all or part of the emergency rules"?

A judge brought the discussion back to Rule 87(b)(1)(A).

Can a declaration cover a division rather than an entire district? It is easy to imagine a local emergency -- or to remember a courthouse bombing -- that affects only one division within a district. The intent has been to authorize a declaration for a division, recognizing, in line with Criminal Rule 62(a)(2), that the Judicial Conference would have to consider the possibility of operating under the regular rules by moving activities to another division within the district, obviating any need for emergency rules. This question has played a role in drafting the Bankruptcy emergency rules. It will be studied further, considering the possibility of added rule text or adding to the Committee Note.

A related question asked whether the rule text should provide an explicit procedure for informing the Judicial Conference of an emergency. A local emergency may not otherwise come to the Conference's attention. The response was that early drafts included a provision for informing the Conference, but the provision was thought unnecessary. Conference members are likely to be attuned to conditions within their circuits, even the district judges. And any judge who believes that emergency circumstances warrant a Conference declaration will be able to inform the Conference immediately, either by direct communication or through a local Conference member.

Rule 87(c) establishes two Emergency Civil Rules, although Emergency Rule 4 has several parts.

Emergency Rule 4 authorizes a court to order that service of summons and complaint be made "by a method that is reasonably calculated to give notice" on defendants addressed by some, but not all, subdivisions of Rule 4. Earlier drafts sought to ease the task of moving between Rule 4 and Emergency Rule 4 by copying the full text of Rule 4 into the corresponding emergency rule provision, adding authority to authorize service "by registered or certified mail or other reliable means that require a signed receipt." The full text approach was abandoned when Rule 4(i) was added to the list, generating an emergency rule of great length. Ongoing experience with postal service, moreover, prompted consideration of the prospect that some emergencies -- and most particularly an emergency with the postal service -- might require different alternative methods of service.

The current draft requires a court order to authorize service by an alternative method. The alternative must be "reasonably calculated to give notice." "Notice" means actual notice, but it was thought better to omit "actual" from rule text for fear of inviting inappropriate arguments, most particularly in cases that accomplished actual notice by means challenged as not reasonably calculated to do what in fact was done. Ordinarily the court order must be made in response not only to the circumstances of the particular emergency but also the circumstances of the particular case. As one example, a method of service reasonably calculated to give notice to a large and sophisticated corporation under Emergency Rule 4(h)(1) might not be reasonably calculated to give notice to a small and unsophisticated incorporated family business. The Committee Note, however, also reflects the prospect that some emergencies might justify a standing order that authorizes a particular method of service. When Rule 4 authorizes service by mail, for example, a breakdown of the postal service -- perhaps a strike -- Emergency Rule 4 might authorize a general order for service by designated commercial carriers with confirmation of delivery.

Emergency Rule 4 authorizes alternative methods of service only for Rules 4(e), (h)(1), (i), or (j)(2), or on a minor or incompetent person in a judicial district of the United States. The omissions all tie to Rule 4(f). Rule 4(f) governs service at a place not within any judicial district of the United States. It is incorporated in Rule 4(h)(2). Rule 4(j)(1) provides for service on a foreign state or its agency under the Foreign Sovereign Immunities Act. It seems better not to attempt to expand the extensive and at times flexible provisions for service abroad, in part because service of process is commonly viewed as a sovereign act that impinges on the sovereignty of the country where service is made. Similar concerns arise from Rule (4)(g), which lacks paragraph designations to support simple cross-reference. Instead, Rule 87(c)(1) refers to service "on a minor

or incompetent person in a judicial district of the United States," omitting the part of subdivision (g) that addresses service outside a judicial district of the United States.

The final sentence of Emergency Rule 4 provides a specific focus on what had been a general provision in earlier drafts of Rule 87(d). The question is what to do when a declaration of a rules emergency ends before completion of an act authorized by an order made under an emergency rule. The earlier provision borrowed the language of Rule 86(a)(2)(B) that governs the retroactive effect of a rule amendment by asking whether applying the new rule "would be infeasible or work an injustice." The analogy may help, but it is indefinite. And it seemed to apply without distinction between Emergency Rule 4 and Emergency Rule 6(b)(2). Reflection, however, showed that different tests should apply. For Emergency Rule 4, any of three alternatives may be desirable when an order authorizes service by a method not within Rule 4 and service is not completed when the declaration ends. It may be useful to allow service to be completed as authorized by the order, and perhaps important if the claim is governed by a limitations statute that requires actual service by a stated time. Or it may be useful to strike one of the alternative methods authorized by the order while leaving another to be completed. Or it may seem better to terminate the order, falling back on the ordinary methods authorized by Rule 4.

Emergency Rule 6(b)(2) is a quite different matter. The first part of it is simple enough. Rule 6(b)(2) raises an impermeable barrier: "A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Emergency Rule 6(b)(2) changes "must not" to "may." But it is carefully hedged about. The court can grant an extension only by acting under Rule 6(b)(1)(A), which requires good cause and that the court act, or a request be made, before the original time expires. For Rules 50, 52, and 59, the original time is 28 days from entry of judgment. Rule 60(b) is governed by a more complex time provision, which creates complications for integration with Appellate Rule 4(a)(4)(A)(vi), yet to be discussed. The extension is limited to "a period of not more than 30 days after entry of the order" granting an extension. Setting the limit to run from entry of the order enables the court to consider the matter carefully, but it is expected that ordinarily the needs for prompt disposition of post-judgment motions will encourage prompt decisions.

What remains is not so simple. Timely post-judgment motions reset appeal time under Appellate Rule 4(a)(4)(A). Emergency Rule 6.2(b) would not work if it did not reset appeal time, requiring a party either to surrender any opportunity to appeal or to make the post-judgment motion within the ordinary time unaltered by any extension. Earlier drafts, framed in the spirit of flexibility and purpose-oriented interpretation that characterize the Civil Rules,

relied on a simple provision that a motion filed within the period authorized by an extension has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60. That approach was accepted for a while on all sides. But then the appellate rules experts began to have doubts. The appeal times in Rule 4 that reflect statutory provisions are treated as mandatory and jurisdictional. There is no room for harmless error, no matter how innocent or how obscure the time calculations may be. Greater precision was sought. A series of detailed exchanges among Standing, Appellate, and Civil Rules reporters produced several revised drafts, exploring — and at times backtracking from — many variations. The draft in the original agenda materials was replaced by a more detailed version that breaks out three distinct sequences of events. Here too the task is relatively straightforward for motions under Rules 50, 52, or 59.

The first step in Emergency Rule 6(b)(2)(B) is to ensure that if a longer appeal time is available under the ordinary rules, that governs. An example would be a motion made by one party within the ordinary 28 days from entry of judgment, followed by a motion for an extension by another party. The court might deny an extension, or grant an extension and dispose of a timely motion filed within the extended period without yet disposing of the original motion. Appeal time would be reset to run for all parties from the later order disposing of the original motion.

Three variations are addressed by items (i), (ii), and (iii). Under (i), appeal time is reset to run from an order denying a motion for an extension. Under (ii), a motion authorized by the court and filed within the extended period is filed "within the time allowed by" the Federal Rules of Civil Procedure for purposes of Appellate Rule 4(a)(4)(A). Appeal time is reset to run from the last such remaining motion. Under (iii), a failure to file any authorized motion within the extended period resets appeal time to run from the expiration of the extended period. All of these variations fit neatly within the purposes of the emergency rule and Appellate Rule 4(a)(4)(A).

The complication that caused real difficulty arises from the time limits set by Rule 60(c)(1) for motions under Rule 60(b). Rule 60(c)(1) sets the basic limit for a Rule 60(b) motion at a reasonable time, but also imposes a cap of one year for motions under Rule 60(b)(1) (mistake, etc.), (2)(newly discovered evidence), and (3)(fraud or misrepresentation). These three subdivisions account for most Rule 60(b) motions. And they closely resemble grounds for relief that may be sought under Rules 52 and 59.

The first step is clear enough. What is a reasonable time for a Rule 60(b) motion should be calculated in light of emergency

circumstances that impede filing within what otherwise would be a reasonable time. The one-year cap, however, presents a problem. It is possible that an emergency could thwart filing a motion in a time that is reasonable in light of the emergency but runs beyond the one-year cap. Allowing an extension under Emergency Rule 6(b)(2) fits within the purpose of the emergency rule.

The next step is not quite so clear. Experience shows that motions for relief that could be sought under Rule 52 or 59 are at times captioned as Rule 60(b) motions. If the motion is filed within 28 days after entry of judgment and seeks relief available under those rules, it should have the same effect in resetting appeal time. That result has been accomplished by Appellate Rule 4(a)(4)(A)(vi), which resets appeal time on a motion "for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered." The same resetting effect should follow under the circumstances described in Emergency Rule 6(b)(2)(B)(i), (ii), and (iii).

Interpreting Appellate Rule 4(a)(4)(A)(vi) together with Emergency Rule 6(b)(2), however, has not seemed as easy as the evident purpose suggests. A close technical reading would insist that a motion filed more than 28 days after judgment, although timely because of an emergency extension, is not "filed no later than 28 days after the judgment is entered." Simply saying that a motion made within the time authorized by an emergency extension has the same effect as a timely motion does not do the job.

The Appellate Rules Committee has considered this difficulty, and has drafted a cure by a proposed amendment of Appellate Rule 4(a)(4)(A)(vi) to read: "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." The draft Committee Note for new (vi) states that "if a district court grants an extension of time to file a Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion."

With the help of the proposed appellate rule amendment, Emergency Rule 6(b)(2) is effectively integrated with the rules for resetting appeal time. This process has impressed participants with the conviction that Rule 4 is a delicate topic, even a mystery, but the work has succeeded with particular help from those with deep knowledge of the Appellate Rules.

Finally, the last sentence of Emergency Rule 6(b)(2) provides a different answer from Emergency Rule 4 for the effect of a declaration's end on an act authorized by an order under Rule 6(b)(2) but not completed when the declaration ends. The act, which may be either a motion or an appeal, may be completed under the order. If the order denies a timely motion for an extension, the time to appeal

runs from the order. If an extension is granted, a motion may be filed within the extended period. Appeal time starts to run from the order that disposes of the last remaining authorized motion. If no authorized motion is filed within the extended period, appeal time starts to run on expiration of the extended period. Any other approach would sacrifice opportunities for post-judgment relief or appeal that could have been preserved if no emergency rule motion had been made.

Discussion returned to Emergency Rule 4. It says "the court may order." Does that clearly require a court order, or does it leave room for a party to devise and use a novel method of service, preparing to argue that it was reasonably calculated to give notice of a challenge should be made? The Committee Note says that the rule authorizes the court to order service. The rule text itself focuses only on a court order, an approach used throughout the rules to describe acts that can be done only under a court order. It would be a brave or foolish lawyer who decided to act without an order. Still, thought will be given either to an explicit statement in the Committee Note or even to added rule text that authorizes an alternative method of service "only if authorized by court order" or some such words.

A motion to recommend Rule 87 for publication was adopted without dissent.

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

Judge Lioi delivered the Report of the Social Security Review Subcommittee.

The proposed Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) were published last August. They drew a comparatively modest number of comments. Two witnesses appeared for the public hearing. The comments and testimony led to useful improvements in the rules draft.

The more important improvement is deletion of the provisions that required that the complaint include the last four digits of relevant social security numbers. That requirement had met continued and vigorous opposition based on the fear of identity theft. But it was retained because the Social Security Administration maintained that this information was essential to enable it to accurately identify the proceeding and produce the record for review. So many claims are processed through to final administrative disposition that relying on the claimant's name alone does not enable prompt identification of all cases. The comments and testimony, however, revealed that, responding to the Social Security Number (SSN) Fraud Prevention Act of 2017, SSA has launched a system that attaches a 13-character alphanumeric designation, currently called a Beneficiary Notice Control Number, to each notice it sends to a claimant. This unique

number readily identifies the proceeding and record. SSA anticipates that this practice will be expanded to include all final dispositions before the proposed supplemental rules can become effective. Elimination of the last-four-digits requirement is accomplished by instead requiring that the complaint include "any identifying designation provided by the Commissioner with the final decision."

Rule 6 was improved to state more clearly that the time to file the plaintiff's brief is reset by the order disposing of the last remaining motion filed under Rule 4(c). Some changes were made in the Committee Note, including one that responds to a comment that it should say clearly that Rule 1 brings into the Supplemental Rules an action that presents a single claim based on the wage record of one person for an award to be shared by more than one person.

The Subcommittee agrees unanimously that this is a good set of rules. No further work is needed. The remaining question is whether to recommend adoption or to abandon the project because of doubts about the wisdom of adopting substance-specific rules.

These rules are neutral as between claimant and the Commissioner. A quick sketch may be useful for new committee members. Supplemental Rule 1 defines the scope of the rules to include actions 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. The Civil Rules also apply, except to the extent that they are inconsistent with the Supplemental Rules.

Supplemental Rule 2 authorizes a simple complaint that need state only that the action is brought against the Commissioner under § 405(g), identify the claimant and person on whose wage record benefits are sought, and identify the type of benefits claimed. The plaintiff is free, but not required, to add a short and plain statement of the grounds for relief.

Supplemental Rule 3 requires the court to notify the Commissioner of the action by transmitting a Notice of Electronic Filing to the Commissioner and to the United States Attorney for the district. This provision reflects a practice established in some districts now. The plaintiff need not serve a summons and complaint under Rule 4. This rule is vigorously supported by claimants as well as SSA.

Supplemental Rule 4 describes the answer and motions. The answer may be limited to the administrative record and any affirmative defenses. It states explicitly that Rule 8(b) does not apply -- the Commissioner is free to answer the allegations in the complaint, but need not.

Supplemental Rule 5 is in many ways the core of the rules. It provides that the action is presented for decision on the parties'

briefs. Supplemental Rules 2, 3, 4, and 5 taken together reflect the character of § 405(g) actions within the scope of Supplemental Rule 1. They are statutory actions for review on an administrative record, not suited for the civil rules that govern proceedings headed for trial.

Supplemental Rules 6, 7, and 8 set the times for submitting briefs. Thirty days are set for filing the plaintiff's brief, then for the Commissioner's brief. Fourteen days are set for a reply brief. The public comments and testimony almost universally urged that the times be set at 60 days, 60 days, and 21 days. Similar comments were made throughout the years the Subcommittee worked with claimants' groups and SSA. They urge that all sides need more time. Plaintiffs' attorneys may come to the case for the first time after the final administrative decision. Often they practice in small firms with heavy case loads. The administrative records may run to thousands of pages. SSA attorneys may be similarly overworked. When local rules set similarly short briefing schedules, extensions are routinely requested and routinely granted. These are good arguments. But these cases typically spend years in the administrative process. Claimants often are in urgent need. The Subcommittee concluded that it is better to set an expeditious briefing schedule that can be met in many cases, but still permits extensions when truly needed.

Despite unanimous agreement that these rules have been polished into a very good procedure for § 405(g) administrative review actions, the Subcommittee divided on the question whether to recommend adoption. Four of those who participated in the discussion, including all three judges, recommended adoption. Three others, however, remained uncertain, "on the fence," or even negative

Doubts about recommending adoption spring from concern about the principle of transsubstantivity that pervades the Rules Enabling Act. Section 2072(a) authorizes "general rules of practice and procedure." Do rules confined to § 405(g) review actions count as "general"? If these rules are adopted, will it be more difficult in the future to resist proposals for other special rules, motivated not by the general public interest but by narrow private interest, whether to the rules committees or in Congress? Some doubters also suggest that there is nothing distinctive about § 405(g) actions that merits special rules that generate these risks. To them, the general civil rules, together with local rules or standing orders, suffice. And claimants' representatives, even though they recognize that the rules have been refined into a good procedure, prefer to stick with the variety of disparate procedures that are familiar to judges.

These doubts are met, first, by the basic fact that these actions are appeals on a closed record. There is no occasion for discovery -- adding any claims that might support discovery takes an action outside the scope of the Supplemental Rules.

The rules also are neutral between the parties, claimants and Commissioner. They are good rules that will help claimants, the Commissioner, and courts. SSA strongly supports the rules, based on their deep experience with proceedings under the civil rules and divergent local practices. The Department of Justice is promoting a model local rule that is largely drawn from earlier drafts of the Supplemental Rules. The judges who commented support the proposed rules, including the chief judges of two of the three districts that have the greatest number of § 405(g) actions and have local rules closely similar to the proposed rules.

The proliferation of local rules shows that courts recognize the need to supplement the general rules.

Comments on the proposal entrench the prediction that these simple rules will provide important help to pro se plaintiffs.

The value of supplemental rules is further shown by the great number of these cases. The annual count has run between 17,000 and 18,000; the most recent annual figure is 19,454. The benefit of improved procedure in so many cases is important.

It also is significant that this project began with a proposal by the Administrative Conference of the United States, bolstered by a thorough study by two leading procedure scholars of procedures used in § 405(g) actions throughout the country.

Finally, it should be remembered that there are other substance-specific rules. Rule 71.1 for condemnation actions is prominent. The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions enjoy a strong history, but include the much more recent addition of Rule G, strongly urged by the Department of Justice, governing forfeiture actions in rem. The separate sets of rules for § 2254 and § 2255 proceedings are other prominent examples. Others can be found as well.

Discussion began with the observation that the public comments and testimony "were a real help."

A second observation was to point to the Appellate Rules. There is a general Rule 15 for petitions to review administrative action, but also a specific Rule 15.1 that applies only to the order of briefing and oral argument in enforcement or review proceedings with the National Labor Relations Board. Rules focused on specific substantive areas are not limited to the Civil Rules.

A Subcommittee member began by praising the supplemental rules as "extremely well-written," reflecting intense and engaging work. But "I'm on the fence," uncertain both whether we need special rules and whether they will much improve things.

Dean Coquillette, who served three decades as Standing Committee Reporter, described himself as "an apostle of transsubstantivity." But this "is the best possible job. I can see doing it. It will address real problems."

The Subcommittee representative from the Department of Justice agreed that the rules are about as good as can be. But the Department remains concerned. The rules might be seen as designed to assist SSA attorneys, who often appear in these review actions as Assistant United States Attorneys. The plaintiffs' bar is at best divided. Should we favor, or appear to favor, one side? Yes, these are appeals. But they are not much different from the mine-run of APA cases; there is a risk of mission creep. And the hoped-for efficiency will be threatened by local rules that will persist in face of the new national practice.

A judge member of the Subcommittee said that the supplemental rules promote efficiency for all parties. They will be especially helpful for pro se plaintiffs. The briefing times will generate requests for extensions.

Another Subcommittee member judge reiterated the point that the Department of Justice is promoting a model local rule for adoption in all districts. It is similar to the supplemental rules. But it, like other local rules, has not gone through the lengthy and painstaking process that generated the supplemental rules. The Department model, for example, requires social security numbers. "These rules treat all parties equally and fairly."

Another judge agreed that the Subcommittee should be thanked for its great work. "The rules are top-notch." But it is important to consider at least two concerns. First, although these rules benefit all parties, will there be a perception that, in the face of opposition by claimants' organizations, they are proposed for the benefit of SSA? Second, although many judges seem to favor these rules, there are others who will remain inclined to do things their own way. Will uniformity in fact happen? Certainly there will be more uniformity, but how much more? How often will local rules and individual judges depart to satisfy their own desires? That is a risk for all national rules, but can we be confident of uniformity?

Yet another judge admitted to an initial reluctance about adopting substance-specific rules, "but I'm coming around. These are different from the mine-run of cases." "We struggle with the same issues" in my court. The proposed rules are better than many local rules. The Federal Magistrate Judges Association supports the proposal, and their views carry weight. Concern for pro se litigants also provides support. "Yes, judges will do what they want to do." There is not much that rules can do about that. But "On balance, I like this. A lot of districts will embrace them."

A lawyer summarized the views that the plaintiffs' bar and the Department of Justice oppose the proposals, while SSA supports them. These positions should be taken seriously. "We want neutral rules." But the Subcommittee has taken these concerns seriously. It is right in finding that the rules are neutral and address the proper concerns that have been expressed. "The asymmetry of support is almost an optics problem" that should not get in the way of adopting good rules.

Judge Lioi concluded the discussion, saying that these are rules of procedure. Judges have not resisted them. Once they engage in discussion, they support them. And the benefits to pro se claimants are important.

The Committee voted to recommend the Supplemental Rules for adoption. A Committee member who arrived at the meeting just as the vote was being taken abstained. The Department of Justice dissented from the recommendation, at the same time agreeing that "these are strong rules."

Rule 12(a)(4)(A): Time to Respond

A proposal to amend Rule 12(a)(4)(A) was published last August. It is time to decide whether to recommend it for adoption.

The proposal was brought to the committee by the Department of Justice. It rests on experience with the difficulties the Department has encountered in one class of cases with the provision in Rule 12(a)(4)(A) that, unless the court sets a different time, directs that a responsive pleading must be served within 14 days after the court denies a motion under Rule 12 or postpones its disposition until trial. These are cases brought against "a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Department often provides representation in such cases.

The difficulty of responding within 14 days rests in part on the need for more time than most litigants need, at times in deciding whether to provide representation, and more generally in providing representation. But the need is aggravated by an additional factor. The individual defendant often raises an official immunity defense. Denial of a motion to dismiss based on an official immunity defense can be appealed as a collateral order in many circumstances. Time is needed both to decide whether appeal is available and wise, and then to secure approval by the Solicitor General. Allowing 60 days is consistent with the recognition of similar needs in Rule 12(a)(3), which provides a 60-day time to answer, and in Appellate Rule 4(a)(1)(B)(iv), which sets appeal time at 60 days.

There were only three comments on the proposal. The New York City Bar supports it. The American Association for Justice and the

NAACP Legal Defense Fund oppose it. The reasons for opposition reflect concern that plaintiffs in these actions often are involved in situations that call for significant police reforms, parallel concerns about established qualified immunity doctrine, the general issues arising from delay in resolving these actions, and the breadth of the proposal in applying to actions in which there is no immunity defense.

Discussion began with a statement for the Department of Justice. The proposal is important, in part because of the frequent need to seek approval of an appeal by the Solicitor General. Opposition that rests on the need for police reform, and on distress with official immunity doctrines, addresses collateral concerns. The Department appreciates these concerns, but continues to believe that the amendment is important.

A committee member suggested that the proposed amendment is overbroad, reaching cases in which there is no occasion to consider an appeal, most obviously in those that do not include an immunity defense in a motion to dismiss. As it stands, Rule 12(a)(4) allows the court to set a time different than 14 days. It will work better to require the Department to request an extension when needed to support its deliberation of a possible appeal, avoiding the opportunity for delayed answers in all of these cases.

Another member agreed, and added that "60 days is far too long in any event."

A judge member suggested that it is a question of what the presumption should be. Should it be presumed that the defendant gets more than 14 days? Or that the plaintiff is entitled to an answer within less than 60 days? The difference "is not likely to change the litigation very much." How many cases will provide likely occasions for appeal? How much difference will the choice of time to answer make in the progress of what often are very complicated cases?

An initial response for the Department of Justice noted that the Rule 12(a)(3) provision allowing 60 days to answer in these cases is important, whether or not grounds for an immunity appeal are anticipated. But data on the empirical question of how many cases involve potential immunity appeals are uncertain. This proposal originated in the Torts branch, prompted by experience when an answer is filed within the present 14-day period. In some actions they are required to proceed to Rule 16(b) scheduling conferences, and even into discovery, while a decision whether to appeal is being made.

A judge member observed that immunity defenses are often raised in § 1983 actions against state or local officials: don't they have similar arguments for more time? They may face local problems similar to the need arising from the need for Solicitor General approval of

appeals, and from the more general need for time. It was noted that similar concerns about the needs of state and local governments have been raised in considering other rules provisions that give distinctive treatment to federal actors, but that so far the needs of the federal government have been found to justify distinctive treatment not accorded to other governments.

A veteran of Department of Justice service observed that the Department must manage a great number of cases, and that it is important to have one person -- the Solicitor General -- responsible for making and enforcing a nationally uniform practice on taking appeals. It is unlikely that any state or local government faces like concerns. Fourteen days is a short period, and the pressure is not alleviated simply by seeking an extension. Until an extension is actually granted, the Department must proceed on the assumption that it will not be granted. Given the brevity of time, moreover, the request is likely to be pretty much boilerplate that does not adequately explain case-specific needs for an extension.

A judge member asked whether, if the 60-day period is adopted, the government will routinely ask for extensions? Judges are likely to be amenable to a first motion to extend, whether the period is initially set at 14 days or 60 days. They are less likely to be amenable to a second request. The choice of the initial period to answer makes a real difference. The Department answered that the process can, and often does, happen within 60 days. But not within 14.

A judge returned discussion to the argument that the proposed rule is overbroad by renewing the question whether it is possible to come up with an empirical estimate of how many cases will be affected? "I get the need for time when an appeal is in prospect. I rarely get requests to extend in § 1983 cases." This is a pragmatic question of where the burden should lie -- on the government to seek more time, or on the plaintiff to seek a reduced time if the rule sets the general time at 60 days.

The Department of Justice responded with a reminder that the need for 60 days to respond is felt even when there is no prospect of a collateral-order appeal. The reasons are the same reasons as have been accepted in providing 60-day periods by earlier amendments of Rule 12(a)(3) and Appellate Rule 4(a). Local attorneys still need to consult with the Department in Washington. And the reasons that explain denial of the motion to dismiss may affect the next steps, including the answer.

A judge agreed that the need for time to prepare an answer in all cases, including affirmative defenses, may justify a blanket 60-day provision.

Another judge agreed that the problem "is bigger than immunity

appeals." It is not surprising that the Department needs more time to answer in these cases, parallel to the needs that led to amending Rule 12(a)(3).

A committee member asked how often is the Department unable to complete its consulting process in 14 days? We have only the Department's statement that this is a problem. Is more time needed in all cases? Compare Rule 15(a)(3), which allows only 14 days to respond to an amended pleading if the original time to answer expires before then.

Another participant noted that the parallel to Rule 12(a)(3) is not complete. Rule 12(a)(2) gives the Department 60 days to answer in actions against the United States or its agencies or officers sued in an official capacity, but it has not been proposed that Rule 12(a)(4)(A) should be expanded to provide 60 days in those cases. And if the 14-day response period leads to a risk of discovery before the time to appeal runs out, the Department can always seek a stay of discovery. The Department responded that this is part of the problem. "Discretion is exercised differently."

A lawyer member asked about empirical evidence of actual problems. Perhaps this item should be tabled for further discussion in October. How often do courts deny an extension of the time to respond? How often does that force a rushed response, or lead to other problems?

A judge asked whether it is useful to put judges to the work of ruling on motions to extend the time to respond? Is it useful even if the motions are routinely granted? Experience in a United States Attorney office and as a district judge showed that "this is a gigantic system. The default mode should be enough time to make the system work." In the relatively rare cases where there is a real need for a response in less than 60 days, let the plaintiff make the motion to shorten the time.

A different member asked what is the reason for picking the particular figure of 60 days? It has no obvious anchor in the arguments that more time is needed in cases that do not present the possibility of a collateral-order appeal. A response was offered -- the 60-day period does have a clear anchor in the 60-day appeal period set by Appellate Rule 4 for cases with the possibility of an appeal.

These competing concerns were summarized. One argument is that this general provision is too broad; 60 days are not needed in cases without the prospect of a collateral-order appeal. But the Department responds that it needs this time for other purposes, not only to decide whether to seek the Solicitor General's approval for an appeal. It is important to remember that these competing concerns meet on a field of presumptions: should the presumption be that the period is 60 days,

subject to shortening by court order? Or should it be that the period is 14 days, subject to extension by court order?

A lawyer suggested that the problem arising from the time needed to win approval to appeal could be met by limiting the 60-day period to cases "where a defense of immunity was denied." Another member supported this suggestion.

A Department of Justice representative reported talking with the Torts branch during today's meeting. They do not track how often requests to extend the present 14-day period are made and denied. But the burdens on courts and the Department are those that have been described in today's discussion. And it is clear that the Department assumes that it must go forward even after moving for an extension unless the court acts quickly on the motion. Beyond that, the Torts branch reports that most motions to dismiss do raise immunity defenses. Any issue of overbreadth in reaching cases that do not include an immunity defense is not a real-world concern.

A judge noted that either way, the rule does not address stays of discovery. In most cases, discovery will be stayed because immunity is at issue. A Department representative responded that some judges do not grant stays. But it was noted that discovery stops once an appeal is taken.

The Department of Justice representative added that as compared to having no amendment of Rule 12(a)(4) for all of these actions, it would be better to have a rule extending the time to answer to 60 days in cases where an immunity defense is raised.

The possibility of narrowing the rule in this fashion led to the question whether the narrower rule should be republished to support a new period for comment. This is always an uncertain calculation. For this situation, a participant suggested that republication is probably not necessary. The narrower version gives the opponents something of what they wanted, and does not take away anything. But republication would be warranted if the task of drafting the amended rule shows a risk that the new language may not get it right.

A judge asked whether there is any real advantage in limiting the 60-day period to cases with an immunity defense, when the choice of time does no more than establish a presumption. Another judge noted that whichever is the presumed time to respond, a motion to stay discovery may remain necessary. A third judge responded that shifting the presumption to 60 days is likely to reduce the need for motions to extend, and it is likely that discovery will be suspended "on its own."

Another judge suggested that whether or not the Department is right that only a few cases do not include immunity defenses, limiting

the 60-day period to immunity cases would create a gap with the time to appeal, which remains set at 60 days both for cases with an immunity defense and for cases without.

Limiting the rule to cases with an immunity defense was defended again as a measure designed to address the cases where the Solicitor General has to be consulted. If indeed that covers most individual-capacity cases, there will be few occasions to move to extend the time to answer. But if there are a good number of cases without immunity defenses -- and we do not have hard data on that -- it can be useful to confine the 60-day period to cases with an immunity defense. Another member agreed. "Lunch-time conversations" within the Department of Justice do not take the place of firm data.

It was pointed out that there may be cases with two or more individual-capacity defendants, one of whom raises an immunity defense while the other does not. Should a rule that focuses on a defendant that raises an immunity defense be designed to set different times to answer for one defendant and the other? It was quickly agreed that if immunity-defense cases are to be distinguished, it would better to have a single time for all defendants. A judge observed that if the rule did set different times to answer, it is likely that the court would extend the shorter period to match the longer period. And it also is likely that if discovery is stayed as to one defendant, it will be stayed generally.

Another judge agreed that as long as there is an immunity defense and a possibility of a collateral-order appeal, it is not likely that the case will go to discovery before the end of the 60-day period, no matter whether there is a defendant that has not pleaded immunity. "There are complexities." But both judges agreed that their own experience and practices cannot be taken, without more, to describe practices universal to all judges. Yet another judge agreed, being moderately comfortable with the proposal without attempting to distinguish how many defendants have immunity defenses.

A motion was made to amend the rule to allow 60 days to respond only when "a defense of immunity has been postponed to trial or denied." The motion was defeated, six votes for and nine votes against.

A motion to recommend approval for adoption of the amendment as published passed, ten votes for and five votes against.

MDL Subcommittee Report

Judge Rosenberg delivered the Report of the MDL Subcommittee. Three topics are addressed.

One topic that remains under discussion is "early vetting." This is a broad term used to describe various methods of attempting to

get behind the pleadings to sort out individual plaintiffs who clearly do not have claims, who do not have a chance of success. Lawyers representing plaintiffs and defendants agree that some such process is desirable in at least some MDLs, particularly the "mass tort" proceedings that account for a great share of the total federal civil docket. A practice described as "plaintiff fact sheets" has grown up in the last few years, and has become widespread in the largest MDL proceedings. But more recently, plaintiffs have developed, and some MDL courts have adopted, a somewhat simpler process described as an "initial census." Under this practice, both plaintiffs and defendants send data to a "provider" that merges it and provides the results to all parties. One result may to ensure that the plaintiff sues the right defendant. The Subcommittee continues to study evolving practice closely.

The opportunity for interlocutory appeals has been a second topic that commanded close study for a good time, including conferences aimed at this topic alone. Last October the Subcommittee recommended that this topic be dropped from present work. The Committee agreed, and the Standing Committee accepted this disposition. Appeal opportunities are not being studied further.

A third topic is as much as anything a combination of topics. The broad general questions focus on the MDL court's role in appointing lead counsel and in setting a framework for settlement negotiations and possibly for settlement review. These broad questions lead to others that the Subcommittee has not yet discussed in any detail, including how to establish and administer common-benefit funds and the possibility of imposing limits on the attorney fees provided by contracts between individual plaintiffs and their counsel.

Counsel on all sides, and most MDL judges, agree that there is no need for a rule for supervising settlements. A March 24 conference sponsored by Emory Law School showed reasons to oppose judicial supervision of efforts to achieve "global" settlements. Defendants want to be free to settle segments of the proceeding without having to settle all parts. And they are concerned that it may be difficult for judges to understand the legitimate reasons that lead to different structures for different settlements.

Despite these concerns, the Subcommittee is continuing its investigation of practices in appointing lead counsel, and looking toward the MDL judge's role in settlement. MDL proceedings account for nearly half of the civil actions on the federal docket; it is important to be confident there is no need for rules addressing them. There also is concern that some individual plaintiffs whose attorneys do not have a role with lead counsel have only minimal representation.

As compared to the "Rule 23.3" draft in the agenda materials, the Subcommittee has turned to exploring the possibility of providing

general guidance in Rule 16(b), and perhaps in Rule 26. New Rule 16 provisions could offer guidance on orders appointing leadership, compensation, and early vetting. A lot has happened since the Manual for Complex Litigation was revised in 2004. Or it may be enough to simply help prepare a set of "best practices." Whatever the means, there is a broad interest in expanding the ranks of MDL judges to bring more federal judges into these proceedings. It may be helpful to find a means to guide them toward the special tasks required to manage MDL proceedings.

A general question has persisted throughout Subcommittee deliberations. Many of the issues that have been explored arise in "mega" MDL proceedings that bring together thousands or tens of thousands of cases. Despite efforts to engage lawyers and judges with experience in less sprawling proceedings, it remains unclear whether any new rules should be available in all MDL proceedings or should be limited only to more limited categories, however they might be defined.

More specific questions address particular topics. What standards might be defined for appointing lead counsel? Can they be drawn from the Manual for Complex Litigation? How should the court articulate the duties of lead counsel or a leadership team? Should a rule address common benefit funds? Caps on fees set by individual client contracts? How might a rule relate to Rule 23, recognizing that MDL proceedings often include class actions and may be resolved by certifying a class?

Professor Marcus added that "this is the toughest set of problems we had addressed in MDLs." One pervasive question is how to describe the court's duty -- sometimes characterized as a fiduciary duty -- to all claimants, especially those whose individually retained attorneys do not participate in or with the leadership team? There are tensions within the plaintiffs' side, and also on the defense side. We have heard of settlements of various sizes: global, continental, inventory, and individual. Can courts prefer global settlements? When inventory settlements are reached, we have heard that there are good reasons for settling on different terms with different inventories. One inventory may consist of cases that have all been thoroughly worked up, high-value cases that deserve high settlement values. Another inventory may consist of a large number that have not been carefully worked up, some of them with strong claims and others with weak or no claims. It may be difficult for a judge to evaluate the differences.

A judge observed that there is an important relationship between what happens early in a proceeding and what happens as the proceeding progresses. The structure at the beginning has a profound effect on how it ends. The leadership order may hamper the ability of non-lead individually retained plaintiffs' attorneys to represent their

clients. That cannot be avoided. "You cannot have 5,000 lawyers participating in a status conference."

Professor Marcus added that, as compared to class actions, almost every plaintiff brought into an MDL proceeding has a personal lawyer. There are likely to be few pro se plaintiffs. "Judges should be concerned with process more than outcome." The initial order appointing lead counsel structures the proceeding, setting the process in motion. Judges should be aware of this, and perhaps offered guidance in a rule.

A judge observed that at the annual conference for MDL judges, they are advised that all nonleadership lawyers "should be included in conference calls." This practice prompts lead counsel to communicate with nonlead counsel to forestall comments based on a lack of information about the work being done.

Discovery Subcommittee

Judge Godbey delivered the report of the Discovery Subcommittee, beginning with thanks to all Subcommittee members for participating in the February 26 meeting, noting that the contributions of the four lawyer members were invaluable. The thorough and thoughtful research by Kevin Crenny, the Rules Law Clerk, also was helpful.

The Subcommittee considered four topics: privilege logs; sealing orders; the availability of attorney fees under Rule 37(e) as a remedy for spoliating electronically discoverable information; and a proposal to add a new Rule 27(c) to authorize an independent action for an order to preserve information or an order that information need not be preserved. The first two deserve further study.

Privilege Logs Several general questions surround the privilege log practice mandated by Rule 26(b)(5)(A). It is common to observe that they are expensive, and not uncommon to suggest that often they are not helpful. Laments are made that lawyers commonly assume that a log has to be detailed on a document-by-document basis, even though the 1993 Committee Note said this: "Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." It has been suggested that complaints about expense are overblown -- that most of the expense is necessary to identify relevant and responsive documents, to screen them for privilege, and to decide which to withhold. It also is suggested that the opportunity to invoke Rule 26(b)(5)(B) or Evidence Rule 502 to establish clear provisions that protect against inadvertent waiver may reduce the burden of drafting a privilege log.

A common observation has been that most of the problems arise because privilege logs are commonly produced toward the close of the discovery period.

The central question is whether it will be possible to write new rule text that reduces the challenges of privilege log practice. The Subcommittee will reach out to the bar for further information that may help in addressing the problem.

Professor Marcus noted the proposal from Lawyers for Civil Justice included in the agenda materials. That proposal is essentially contingent on party agreement, without addressing any rule provision prompting such agreement or even discussion of possible agreement. The initial discussion in the Subcommittee has not been along the lines suggested by their actual proposal. Instead, the focus has been on getting lawyers to address these issues early in the litigation. "How do we provide a prod in a rule? Is improvement possible? If so, where would new provisions fit in the body of the Civil Rules"?

The invitation for discussion was met by brief silence. Then a lawyer member suggested that we need more information on technological implications for practice. Is metadata an appropriate means of compiling a log? Some lawyers find this an acceptable practice, but "judges are not yet there." And in fact creating a log can be as much of a problem as identifying protected documents when there a thousand of them.

Another lawyer member observed that the four lawyers on the Committee and the Subcommittee practice in large cases, with e-discovery and responses. "We should not lose sight of more regular cases."

Another lawyer said that this is a problem worth thinking about, although it is difficult to imagine a rule that will improve the process.

The fourth lawyer member agreed that "one rule for all sizes of cases is not likely to work. Metadata logs aren't likely to apply to most cases." Even with the most sophisticated lawyers in the most sophisticated litigation, there is much to learn about how to form a log by searching metadata.

A judge said that privilege logs are a not infrequent problem in practice. Adding provisions to Rule 16 to prompt the parties and court to address it early on may be useful.

A lawyer member agreed. "Timing is critical." Participants may often push these problems toward the discovery cutoff. Encouragement in Rule 16 to address them early in the litigation would be very helpful.

A judge suggested that silence among judges asked about their experience with these problems is not a sign that the problems encountered in compiling logs are unimportant. "A lot of money is spent that judges don't know about." A lot of further work by the Subcommittee will be valuable. Another judge agreed that the log and the process for logging are issues that deserve further work.

The subcommittee indeed will continue its work.

Sealing Orders Judge Godbey began the report on sealing orders by noting the proposal submitted by press interests to adopt an elaborate rule with many specific provisions to regulate orders that seal anything in court files. The proponents see a problem that media and First Amendment interests "are not at the table when these issues are discussed." The proposal can be seen as an attempt to give a "virtual seat" at the table to these interests.

The Subcommittee has not generated much enthusiasm for the specific proposal. But these issues "have been floating around for decades." A decade ago the Committee on Court Administration and Case Management produced a best practices guide for sealing. The Criminal Rules do address sealing.

The Rules Law clerk reviewed a sample of local court rules on sealing, drawing from districts represented on the committee. the survey shows the local rules are not uniform. Further information was provided by a letter from Lawyers for Civil Justice.

As work goes forward, it may be useful to do more to distinguish inter partes protective orders from sealing court files. The appropriate standards may be different.

Professor Marcus elaborated the introduction, suggesting that the "bells and whistles" in the submitted proposal are not productive. But it is important to remember that transparency in the courts has important constitutional and common-law aspects that are different from discovery protective orders. A basic question will be identifying a standard for sealing if it should be more demanding than "good cause." Further study will be important. Having many local methods of sealing "may be just fine, not in need of a national rule."

A lawyer member reported that the Sedona Conference is working on these issues.

Sealing orders will remain on the Subcommittee agenda.

Rule 37(e) Attorney Fee Awards A question has been raised whether attorney fees can be awarded to reimburse costs incurred by a party requesting discovery to restore or replace electronically stored information that should have been preserved in the anticipation or

conduct of litigation. Rule 37(e) addresses spoliation of electronically stored information, but does not include an express provision for attorney fees. Rule 37(e)(1) authorizes "measures no greater than necessary to cure the prejudice," but it might be read to be limited to circumstances where the information cannot be restored or replaced through additional discovery.

Research by the Rules Law Clerk shows that there is a potential problem in reading the rule text, but not a practical problem. Almost all courts that address the question find authority to award attorney fees. Compensation for the costs of successful efforts to retrieve information that should have been preserved in a more easily accessible form seems an obviously appropriate remedy.

Professor Marcus added that past work by Tom Allman, and a recent letter from him, bolster the conclusion that there is no practical problem. Reopening Rule 37(e), further, might lead to work comparable to the difficult process that led to adopting its current form.

This subject will be removed from the agenda.

Presuit Preservation Orders Professor Jeffrey Parness submitted a proposal to add a new element to Rule 27(c):

> (c) PERPETUATION BY AN ACTION. This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action.

Judge Godbey illustrated some of the questions raised by this proposal. The duty to preserve information in anticipation of litigation was left to the common law when Rule 37(e) was developed and revised, in part because of questions whether a rule that imposes a duty to preserve before any federal action is filed would be authorized by the Rules Enabling Act. Referring to a "possible later federal civil action" raises questions of subject-matter jurisdiction different from the provision in Rule 27(a)(1) for perpetuating testimony "about any matter cognizable in a United States court," showing that the petitioner expects to be a party to such an action but cannot presently bring it or cause it to be brought. The supporting memorandum suggests that "an action involving presuit information preservation" can include an action for a declaration that information need not be preserved. What if two actions, one to preserve and one to permit destruction, lead to conflicting orders?

Professor Marcus added that the proposal is not limited to electronically stored information, a limitation deliberately incorporated in Rule 37(e). In developing Rule 37(e), the Committee

"did not want to encourage preservation orders in litigation." Beyond that, pre-litigation discovery generally has not been popular. People do preserve information. Demand letters are sent. The committee should not take up this subject.

The committee agreed to remove this proposal from the agenda.

Rule 9(b): Pleading State of Mind

Judge Dow introduced the Rule 9(b) proposal by reminding the committee that this subject was taken up at the October meeting only for a brief introduction. A more thorough introduction will be provided today, but without any thought of moving toward a recommendation. Further consideration over the summer will be important.

Dean Spencer provided a summary of his article on this topic, which he has submitted as a proposal for action. The purpose today is not to advocate for adoption. The purpose, rather, is to show that the proposal is worthy of serious study. "There are concerns that need to be addressed."

The focus is on revising the second sentence of Rule 9(b) to modify the interpretation adopted by the Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662, 686-687 (2009). As revised, Rule 9(b) would read:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

The Supreme Court ruled that "generally" means pleading that satisfies the "plausibility" standard recently adopted for interpreting Rule 8(a)(2). Lower courts adhere to the Court's ruling, requiring that a pleading include facts that make plausible an allegation of state of mind.

One reason to question the Court's interpretation can be found in the meaning intended when the present language was adopted in 1938. The 1937 Committee Note refers to the English Rule that permitted conditions of mind to be alleged as a fact, without alleging facts from which the condition of mind might be inferred. The Court's interpretation is inconsistent with the intended meaning.

Added reasons can be found in the structure of the pleading rules. Rule 8(a)(2) addresses what is required to plead a claim. Rule 9(b) is a rule for pleading allegations, not claims. Rule 8(d)(1) is a

rule for pleading allegations, and requires that the allegation be "simple, concise, and direct." In Rule 9(b) itself, further, "generally" is used to establish a contrast with the "with particularity" standard required for allegations of fraud or mistake, but the Court's interpretation requires that conditions of mind be pleaded with particularity.

Policy issues further undermine the Court's interpretation. Plaintiffs cannot be expected to have detailed information of the facts that will support an inference of intent at the time an action is filed. Discovery is needed.

Discussion began with comments that recounted other themes in the article, offered from the perspective of one who was both surprised and nonplussed by the Supreme Court's interpretation of Rule 9(b). "Generally" had always seemed to recognize that knowledge, intent, malice, and other conditions of mind often are proved, not by confession but by inference from a mass of facts. Even if all the facts were available to the pleader at the time of framing the pleading, little purpose would be served by dumping them all into the pleading, much less to put a judge to the task of determining whether the "well pleaded" facts would permit a rational trier of fact to draw the asserted inference. It is more effective to permit a pleading to allege a state of mind as a simple fact -- the defendant intended to discriminate, and so on. There is a more particular danger that evaluation of plausible inferences is hampered by perspective: inferences that seem plausible to one mind may seem impossible to another, depending on experience and the influences of stereotypes. And of course the pleader is not likely to have access to all the supporting facts at the time of pleading. Discovery is necessary.

This comment went on, however, to suggest that the first rush of enthusiasm for this proposal should be tempered by further reflection. Practices that worked in the context of Nineteenth Century substantive law may not be as suitable to the enormous spread of substantive law, often through ambitious statutes, in the Twenty-First Century. Is it useful to apply a single rule for pleading intent in an individual employment discrimination action, an action under RLUIPA for denial of a zoning permit sought by a religious institution, or a "class of one" equal protection claim?

Professor Marcus added another perspective. It would be useful to know more about how Rule 9(b) was actually applied over the years before the Supreme Court adopted what has come to be described as the "plausibility" pleading standard. Practice under Rule 8(a)(2) varied widely, both in lower courts and at times in the Supreme Court. The same may have been true for Rule 9(b), reflecting concerns that will inform our consideration today. One example is provided by a mid-1970s Second Circuit decision that required pleading in a securities case of facts giving rise to a strong inference of scienter,

a standard that was later adopted by statute.

Professor Marcus also recalled Committee experience after the 1993 decision in the Leatherman case. The Court's opinion seemed to invite consideration of rules for "heightened pleading" of some matters, but repeated efforts failed to generate any proposal. The road ahead with the Rule 9(b) proposal may be long and arid. "It's an uphill push." Many judges seem to believe that the developing plausibility standard of pleading is desirable. So it may be for Rule 9(b).

A third observation was that this topic is "incredibly important, and deserves close attention."

A judge reported denial of a motion to dismiss in a Title VII case, relying on Dean Spencer's arguments. The Supreme Court standard is tough to meet in these cases.

Another judge observed that the plausibility pleading approach "gives me a tool to encourage the parties to come up with better pleadings." It is a way to encourage them to try harder. But different issues may be presented when pleading a defendant's state of mind. This proposal will be retained for further study.

It may prove desirable to appoint a subcommittee to study Rule 9(b). That could stimulate the kind of discussion we need. Dean Spencer agreed that a subcommittee with judges and practitioners could be useful.

Appeal Finality After Consolidation Subcommittee

Judge Rosenberg delivered the report of the joint Appellate-Civil Rules Subcommittee that is studying the impact of the decision in Hall v. Hall, 138 S.Ct. 1118 (2018). The Court ruled that even if initially separate cases are consolidated for all purposes, a judgment that completely disposes of all claims among all parties to what began as a separate action is final for purposes of appeal.

Last October the Subcommittee reported on the results of an in-depth FJC study that found no identifiable difficulties stemming from lost opportunities to appeal.

Since October, informal inquiries have been made to the Second, Third, Seventh, Ninth, and Eleventh Circuits. All routinely screen appeals for timeliness. Two have appeals handbooks that point to the rule in Hall v. Hall. Only one case in the Second Circuit was found to illustrate lost opportunities to appeal.

There is no sense of imminent need to consider rules that might establish a different rule of finality for appeal.

Discussion began with a judge's observation that the Supreme Court chose one of the various possible rules. That may be reason to let the question rest.

The choice now seems to be whether to leave this topic to rest for a while without further work, or instead to disband the subcommittee. There is no present plan to expand the informal survey. Expanding the FJC study would be costly, and there is little reason to suppose that it would produce markedly different results. "We're really doing nothing." But retaining the topic in a state of suspension may be useful, looking both for developing experience in practice and for possible reasons to believe that, even without evidence of lost appeal opportunities, integrating consolidation practice with the partial final judgment provisions of Rule 54(b) might better serve the needs of the parties, the trial court, and appeals courts.

Because the Subcommittee was appointed by the Standing Committee as a joint subcommittee, action by the Standing Committee will be required to dissolve it. The question will be taken to the Appellate Rules Committee for further consideration.

Rules 12(a)(2), (3): Statutory Appeal Times

Rule 12(a)(1) sets general times to respond to a pleading, subject to a qualification: "Unless another time is specified by * * * a federal statute." No similar qualification appears in either paragraph (2) or (3), which set 60-day response times for actions against the United States and for actions against a United States officer or employees sued in an individual capacity. The problem is that at least a few statutes -- most prominently the Freedom of Information Act -- set shorter periods. On its face, the rule supersedes any statute enacted before the rule was adopted, and is superseded by any statute enacted after the rule was adopted. There is no reason to believe that this result was intended. The problem also is easily fixed by revising the structure of Rule 12(a):

> (a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time is specified by a federal statute, the time for serving a responsive pleading is as follows:

Paragraphs (1), (2), and (3) would all be subject to a statute that sets a different time.

Two arguments have been advanced for deciding not to fix this textual misadventure. One is that it has not given rise to any practical problems. The Department of Justice reports that it is fully aware of the 30-day response times set in the Freedom of Information Act and the Sunshine in Government Act, and generally complies with them or, in appropriate cases, seeks an extension. Extensions are often requested in cases that combine claims, one subject to a 30-day

response period and the other subject to the general 60-day response period. But it fears that if the statutes are explicitly recognized in Rule 12(a) text, courts may be less willing to grant extensions in the combined-claim cases.

At the October meeting, these competing concerns led the Committee to an equally divided vote on recommending publication of the proposed amendment, six votes for publication and six votes against.

Since the October meeting, an extensive PACER survey of actual response times in FOIA action was made by John A. Hawkinson, a freelance news reporter, and Rebecca Fordon of the UCLA Law School. The survey covers FOIA actions in 87 districts from 2018 up to 2021. It shows nationwide mean times of 42 days, with 66% of responses received outside of 30 days. A spreadsheet shows the experience in each district. 1,391 of the 2,115 case total were filed in the District Court for the District of Columbia, a court that has a "mechanism" for issuing summonses that set a 30-day response time. The median there is 31 days, and the mean 40 days. The four other districts with more than 30 cases during this period show comparable or shorter times. The method used for preliminary analysis did not show whether the Department of Justice had moved for an extension of time during the 30-day period. Nor does it seem to show whether the FOIA claim was joined with a claim not subject to the 30-day response period.

This survey is remarkably helpful. It seems to confirm the description of Department of Justice practice.

The Department of Justice representative repeated the earlier descriptions of Department practice, adding that there has been no reason to think that plaintiffs are concerned about its practices.

Discussion concluded with the reminder that this topic was not listed for action at this meeting. The division of votes at the October meeting suggests that it deserves further consideration. It will be brought back for disposition at the next October meeting.

Rule 4(f)(2)

This suggestion raises a question about the interplay between paragraphs (1) and (2) of Rule 4(f).

Rule 4(f)(1) authorizes service "at a place not within any judicial district of the United States: (1) by any internationally agreed means of service * * * such as those authorized by the Hague Convention * * *." (f)(2) authorizes service "if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice."

The suggestion points out that the Hague Convention establishes a system for service through the central authorities in states that are parties to the convention. At the same time, it permits service by other means, all of which are specified. Thus these other means do not fall within (f)(2) -- the Convention authorizes them, but also does specify them.

Although this limit in (f)(2) is said to present a problem, the suggestion does not deal with the more apparent reading of (f)(1). Service by means that are both authorized and specified by the Hague Convention fits squarely within (f)(1). There is no apparent reason to undertake some revision of (f)(2) to include these circumstances.

The committee voted to remove this item from the agenda.

Rule 65(a)(2): Interlocutory Statutory Interpleader Injunctions

This suggestion points out that Rule 65(e)(2) seems curiously incomplete:

> (e) These rules do not modify the following:
>
> > (2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader;

The suggestion points out that § 2361 includes two paragraphs. The first provides that the court may issue its process for all claimants "and enter its order restraining them from instituting or prosecuting any proceeding" affecting the subject of the interpleader "until further order of the court." Without using the exact words, this provision seems to relate to interlocutory or preliminary injunctions. The second paragraph provides that the court may "make the injunction permanent."

The question asked, without further elaboration, is why does the rule address only preliminary injunctions?

The question in part may reflect a change made when Rule 65(e) was restyled in 2007. From 1938 to 2007, it referred to the provisions of the interpleader statute "relating to" preliminary injunctions. That language did not imply that § 2361 relates only to preliminary injunctions. As restyled, "which relates to" seems to say that § 2361 relates only to preliminary injunctions, apparently excluding permanent injunctions.

This potential explanation still leaves the question: Why should the statutory provisions for preliminary injunctions in interpleader actions be protected against modification by Rule 65, while the

provisions for permanent injunctions are not?

Preliminary research, stretching back into the Equity Rules that preceded the Civil Rules, has revealed no indication of the purposes that underlie the distinction. One plausible speculation may be that the original advisory committee thought that the statute might imply power to issue preliminary injunctions by a process, and perhaps on terms, not consistent with Rule 65. Rule 65(e)(2) then reflects an intent to avoid modifying the statutory powers.

There has been no indication that the uncertain purpose of Rule 65(e)(2) has caused any difficulties in practice. The few courts that have confronted this question have suggested that departures from regular Rule 65 procedure may be required by the imperative for immediate action to forestall competing judicial proceedings that might effectively defeat the interpleader action by disposing of the contested property. Permanent injunctions at the conclusion of the interpleader action do not present like problems.

It would be possible to reexamine the question whether changed circumstances, perhaps most plausibly the development of widespread means of instantaneous communication, justify the cautious approach reflected in Rule 65(e)(2). That would be a substantial undertaking, perhaps difficult to justify absent any sign of problems in practice. It would be much easier to undo the style revision, but that work too might fall before the general practice that avoids amendments framed only to revisit earlier styling decisions.

The Committee voted to remove this item from the agenda.

Rules 6, 60

This suggestion, addressing some effects of the Civil Rules on the Appellate Rules, raises separate questions for Rules 6 and 60.

Rule 6(d) Rule 6(d) provides that "3 days are added" when a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C), (D), or (F). The proposal is that 3 days should be added when a party must act within a specified time "after entry of judgment" and service is made by any of the same three means.

The underlying concern is that notice of judgment may be served by mail, delaying receipt of notice and thus shortening, as a practical matter, the time to make motions under Rules 50, 52, 59, or 60 after judgment is entered. The running of appeal time can be affected as well. (Service by leaving with the district court clerk or "other means consented to" does not seem likely to be at issue.)

This proposal enters a web of related rules that run time to

act from the entry of judgment, not from being served. Rules 50, 52, 59, and 60 set the time for various post-judgment motions to run from the entry of judgment. Appellate Rule 4(a) sets the time to appeal to run from the entry of judgment. Rule 77(d)(1) directs the clerk to immediately serve every party with notice of the entry of judgment "as provided in Rule 5(b)." Rule 77(d)(2) provides that lack of notice of entry does not affect the time for appeal or authorize the court to relieve a party for failing to appeal within the time allowed "except as allowed by Federal Rule of Appellate Procedure 4(a)." Rule 4(a)(5) provides a general authority to extend appeal time. Rule 4(a)(6) specifically allows the district court to extend appeal time for a party who did not receive the Rule 77(d) notice within 21 days after entry of judgment, subject to several limits.

The integrated framework of these rules shows that the Appellate and Civil Rules Committees have worked to coordinate the provisions for notice of judgment, post-judgment motions, and appeal times. Amending to allow "3 added days" would revise this system, and should be approached with care, if at all.

A potential complication was pointed out. It can be expected that ordinarily notice of judgment will be provided through the court's CM/ECF system. Mail is likely to be used primarily for pro se parties. A revised rule should resolve the question whether different parties should have different times for post-judgment motions and appeal, or whether all parties should get an additional 3 days because one party received notice by mail.

It also was suggested that automatically allowing an additional 3 days would seldom be the best way to address such legitimate needs as may arise in a few cases.

The Committee voted to remove this item from the agenda.

Rule 60(c)(1): Rule 60(c)(1) sets the time for making motions for relief from judgment under Rule 60(b). As reflected in the discussion of draft Rule 87 and Emergency Rule 6(2)(b)(2), integration of Rule 60(b) motions with Appellate Rule 4(a)(4)(A) has been more complicated than integration of post-judgment motions under Rules 50, 52, or 59. Rule 4(a)(4)(A)(vi) gives a Rule 60(b) motion the same effect as timely Rule 50, 52, or 59 motions "if the motion is filed no later than 28 days after the judgment is entered."

The proposal is to add a cross-reference to Appellate Rule 4 as a new subparagraph Rule 60(c)(1)(B): "A motion under Rule 60(b) must be made * * * (B) within 28 days to toll the time for filing an appeal." The idea of adding a cross-reference is clear, although the wording might need some work, particularly if Appellate Rule 4(a)(4)(A)(vi) is amended to refer to the time for a Rule 59 motion rather than 28 days.

June 17 version

The question is whether to add another cross-reference to the Appellate Rules in the Civil Rules. The cross-reference to Appellate Rule 4 in Rule 77(d) was noted above. Another example appears in Rule 58(e). Both of these provisions were worked out in careful coordination with the Appellate Rules Committee. Similar work integrated the general entry of judgment provisions of Rule 58 with Appellate Rule 4, leaving the task of cross-reference to Appellate Rule 4.

The purpose of adding a cross-reference to Rule 60(c)(1) would be a simpler purpose to provide notice to litigants who are not familiar with the interplay of appeal time provisions with Rule 60. Similar opportunities for cross-references have not been seized. The Rule 54(b) provisions for partial final judgment do not warn that appeal time starts to run on entry of the judgment. Nor has any attempt been made to provide notice, perhaps in Civil Rule 42, of the effects of the decision in Hall v. Hall, noted above, on the time to appeal. Cross-references may be difficult to draft -- just what sorts of consolidations might fall into a potential cross-reference, for example, might be challenging to identify. And a proliferation of cross-references might generate misleading implications that there is no need to worry about Appellate Rule 4 when there is no cross-reference in a Civil Rule, for example when a preliminary injunction is entered.

The Appellate Rules Committee has removed this proposal from its agenda.

The Committee voted to remove this proposal from the agenda.

In Forma Pauperis Standards and Procedures

Judge Dow introduced this subject. Professors Clopton and Hammond have submitted a proposal that the Committee should renew its consideration of standards and procedures for granting petitions to proceed in forma pauperis. Similar issues were considered at the three most recent committee meetings. The submission underscores the evidence that standards for granting i.f.p. status vary widely across the country and even within a single district. And the forms used to collect information are confusing and often invade privacy, including privacy interests of nonparties, and may imply that it is appropriate to consider information that is not properly considered.

This is a succinct suggestion. The Committee has recognized at its earlier meetings that “these are big problems.” Both the Court Administration and Case Management Committee and the Appellate Rules Committee have considered proposals that relate to these topics.

The Northern District of Illinois has taken a close look at its practices, prompted by the work of Professors Clopton and Hammond. The local rules committee studied the issues for many months, and

the Chicago Council of Lawyers collected a lot of data. The local i.f.p. form has been revised a number of times -- revisiting the form is a constant battle. The District has 12 staff attorneys for prisoner litigation; they do the preliminary screening of i.f.p. requests and apply uniform standards. Uniformity has been further promoted by the departure from the bench of judges who had adopted "outlier" practices.

These are important issues, but it is not clear whether answers are best sought by adopting new Civil Rules to address a topic that has not been addressed by the rules. Would other means be more flexible, more readily adapted to different circumstances -- most notably the cost of living -- in different parts of the country, and perhaps better informed by procedures different from Rules Enabling Act procedures? Model standards, or model local rules, might be developed and offer better help than formal national rules.

One beginning might be to collect information from the districts represented on the Committee. Further study may lead to a decision whether to proceed further.

A judge noted that her district's pro se clerks show the judges of the district "are all over the map in standards," and even on whether they take up the i.f.p. question before or after screening. The Administrative Office has a working group for pro se issues. Perhaps they can help us gather information.

Judge Dow noted that the very process of gathering information may show the districts that they need to get their practices in order. "Highlighting the issue can be helpful."

Another judge suggested that this topic might benefit from joint work with the Appellate Rules Committee. They have an i.f.p. subcommittee at work now, investigating suggestions for revising the Appellate Form 4 affidavit to accompany a motion for permission to appeal in forma pauperis. It seems likely that the Bankruptcy Rules Committee also frequently encounters these problems.

Judge Dow brought the discussion to a point by suggesting several steps that may be taken to gather more information. He will consult with the Federal Judicial Center. Judge Rosenberg can help with the Administrative Office pro se working group. The Appellate and Bankruptcy Rules Committees chairs and reporters will be consulted; it may make sense to establish a means for coordinating work, whether through a joint subcommittee or more informal coordination among the reporters. Emery Lee volunteered to cooperate with the work and with coordinating the reporters.

Initial Mandatory Discovery Pilot Projects

Judge Dow provided an interim summary of the mandatory initial

discovery pilot projects in the Northern District of Illinois and the District of Arizona. It was a good thing to have done in Illinois. "What we learned is all in the eyes of the beholder." The FJC is mining the data to see what conclusions can be drawn beyond the impressions of each judge, both those who participated in the project and those who did not.

Emery Lee offered a brief summary. Each pilot project ran for three years, concluding on April 30, 2020, in the District of Arizona, and on May 31, 2020, in the Northern District of Illinois. There will be no new pilot cases.

More than 5,000 cases came into the project in Arizona; 90% of them had terminated by this April 1. Some 12,000 cases came into the project in Illinois; some 83% of them had terminated by April 1.

The FJC is tracking the longer-pending cases. The pandemic disrupted the study; about two-thirds of the cases had terminated when the pandemic began, about the same proportion in both districts. It seems probable that the effect of the pandemic was the same in both districts, so comparisons will not be distorted. The same is true for the comparison districts. If problems do arise on that score, there are statistical techniques that can help adjust, but it is too early to know whether they should be used.

The FJC is on the eighth round of closed-case attorney surveys. Response rates have held up across the pandemic.

Judge Dow closed the meeting with thanks for the good work and attention of everyone involved. Let us hope that the next meeting, scheduled for October 5 in Washington, D.C., will indeed be held in person.

Respectfully submitted,

Edward H. Cooper
Reporter

CIVIL RULES APRIL 23, 2021 OBSERVER LIST

Alex R. Dahl	Founder - Strategic Policy Counsel	**Alex Dahl**
Amy Brogioli	Associate General Counsel - AAJ	**Amy Brogioli**
Amy E. Sellars	Assistant General Counsel - Cardinal Health	**Amy Sellars**
Andrew Cohen	Director/Counsel - Burford Capitol	**Andrew Cohen**
Andrew Hammond	Assistant Professor of Law - U. of Florida Levin College of Law	**BY PHONE**
Andrew Peck	Retired Magistrate Judge SDNY, Senior Counsel DLA Piper	**Andrew Peck**
Benjamin Robinson	Partner - Holland & Knight	**Benjamin Robinson**
Brittany K. T. Kaufman	Senior Director - IAALS	**Brittany Kaufman**
Dai Wai Chin Feman	Corporate Counsel - Parabellum Capitol	**Dai Wai**
Eric H. Blinderman	Chief Executive Officer - Therium Capital Management	**Eric H. Blinderman**
Fred B. Buck	Representative - American College of Trial Lawyers	**BY PHONE**
Jakub Madej	Research Assistant - Yale University	**Jakub Madej**
James L. McCrystal, Jr.	Attorney - Sutter O'Connell	**BY PHONE**
Jason Cantone	FJC	**Jason Cantone**
Jeannine M. Kenney	Partner - Hausfeld	**Jeannine Kenney**
Jennie Anderson	Attorney - Andrus Anderson LLP	**Jennie Anderson**
Jerome Kalina	AO Staff Attorney - Judicial Panel On Multidistrict Litigation	**Jerome Kalina**
Jerome Scanlan	Assistant General Counsel - EEOC	**BY PHONE**
Jim Batson	Legal Counsel - Omni Bridgeway	**Jim Batson**
Joe Cecil	retired from FJC; fellow at Berkeley Law School	**Joe Cecil**
John H. Beisner	Counsel - Skadden Arps	**John Beisner**
John Hawkinson	Freelance Journalist	**John Hawkinson**
Jordan Singer	Professor - New England Law	**Jordan Singer**
Kenneth J. Withers	Deputy Executive Director - Sedona Conference	**Kenneth J. Withers**
Kevin F. Brady	Corporate Counsel - E-Discovery & RIM, Volkswagon	**Kevin Brady**
Laura M.L. Wait	Associate General Counsel - District of Columbia Courts	**Laura Wait**
Lea Bays	Counsel - Robbins Geller Rudman & Dowd LLP	**Lea Bays**
Maria Salacuse	Assistant General Counsel for Technology - EEOC	**Maria Salacuse**
Martin T. Tully	Partner - Actuate Law LLC	**Martin Tully**
Matthew Lee Wiener	Acting Chairman - Administrative Conference of the U.S.	**Matt Wiener**
Patrick J. Dempsey	Chief Investment Officer - Therium Capital Management	**Patrick Dempsey**
Robert Levy	Executive Counsel - Exxon Mobil Corporation	**Robert Levy**
Robert Owen	Senior Counsel - Eversheds Sutherand	**Bob Owen**
Ross M. Gotler	E-Discovery Counsel - Paul, Weiss, Rifkind, Wharton & Garrison LLP	**Ross Gotler**
Sai	Pro se litigant	**Sai**
Sandra Metallo-Barragan	Deputy Chief E-Discovery Division - NY City Law Department	**Sandra Metallo-Barragan**
Sue Steinman	Senior Director of Policy & Sr. Counsel - AAJ	**Sue Steinman**
Tatiana S. Laing	Litigation Associate - Paul, Weiss, Rifkind, Wharton & Garrison LLP	**Tatiana S. Laing**

Theodore Hirt	Professorial Lecturer in Law - GW	**BY PHONE**
Thomas Allman	Adjunct Professor - U. of Cincinnati College of Law, Member of Sedona Conference Steering Committee	**Tom Allman**
Tim Reagan	FJC	**Tim Reagan**
Tina Young	Chief of Staff - Omni Bridgeway	**Tina Young**
Zachary Clopton	Law Professor - Northwestern	**Zachary Clopton**

TAB 6

6. FOR FINAL APPROVAL: PROPOSED AMENDMENT TO RULE 12(a)(4)

A proposal to amend Rule 12(a)(4) was published in August 2020. This Committee recommended it for adoption at the April 23, 2021 meeting, with 10 votes for and 5 votes against. At its June meeting the Standing Committee returned it for further consideration. The discussions at both meetings showed that the competing considerations are more complex and contentious than had appeared in the discussions that led to publication. Further careful study is appropriate now, recognizing that there is little need to reach a final conclusion if it seems better to carry the work over to next spring. Either a renewed recommendation to adopt the amendment as published or as it might be modified, or a recommendation to republish, would be timely at the June Standing Committee meeting.

The published proposal added a clause to Rule 12(a)(4) that provided additional time to respond after a Rule 12 motion is denied or postponed for disposition at trial and the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf:

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

(a) Time to Serve a Responsive Pleading.

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

* * * * *

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

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

* * * * *

Suggestion 20-CV-B was submitted by the Department of Justice. Two rather distinct justifications were offered to support the additional 46 days, more than quadrupling the ordinary time to respond. First, the Department often represents individual federal employees sued in an individual capacity for actions in the course of their federal duties. The Department may need more time than other litigants, at times because it comes to represent the defendant late in the

action—perhaps even after the Rule 12 motion has been filed, and regularly because its many competing responsibilities across a wide universe of litigation impede the opportunities for nimble response that are available to private lawyers. This general condition is said to be justification enough.

But a second and distinctive justification is also advanced. An employee sued in an individual capacity often raises an official immunity defense, commonly qualified immunity but perhaps absolute immunity. Denial of a motion to dismiss that presents an official immunity defense is ordinarily appealable as a collateral order. The government can represent the individual defendant on appeal only if the Solicitor General approves the appeal. Time is required to determine whether an appeal is available and whether an immediate appeal is desirable. If appeal seems desirable, more time is needed to decide whether the reasons are so strong as to seek approval by the Solicitor General. And if approval is sought, some time is needed for the Solicitor General to decide. Maintaining this effective central control is an important means of establishing and implementing uniform government-wide appeal practices and substantive positions as well.

These reasons were accepted without much challenge up to the time of publication. And only three comments were made during the publication process. A summary of the comments is attached below.

The Federal Courts Committee of the New York City Bar supported the proposed amendment, particularly because the court can set a shorter time to respond if expedition is appropriate.

Two comments opposed the proposal. The American Association for Justice submitted that plaintiffs often are involved in actions of the sort that call for significant police reforms, and their heavy burdens should not be increased by adding to delay in bringing the case to issue. The Department of Justice, having made the motion, can prepare to respond promptly after notice of the court's action.

The NAACP Legal Defense Fund also suggested that the proposal will add delay, and exacerbate problems with qualified immunity doctrine. The proposal, further, applies to cases in which there is no immunity defense, and even when there is an immunity defense the duty to file an answer should rarely interfere with the opportunity to appeal. An extension of time can be had if appropriate, and discovery can be stayed pending appeal.

The Committee's full discussion is summarized in the draft April Minutes. One perspective that recurred frequently began with the first words of Rule 12(a)(4): "Unless the court sets a different time * * *." Under the present rule, a response is presumed due within 14 days, but the government can win an extension. Under the published rule, a response is presumed due within 60 days, but the plaintiff can seek an order setting a shorter time. Moving the presumption to 60 days can make sense if the government generally needs more time. Keeping the time at 14 days likely will mean frequent government motions to extend. If motions are frequently made and commonly granted, little is accomplished by the 14-day presumption apart from waste motion. In addition, the government will feel compelled to begin to prepare a response to enable it to meet the deadline if an extension is denied. A 14th-day response,

moreover, is likely to be less helpful than a more deliberately prepared response. On the other hand, if the government does not often truly need more than 14 days, keeping the rule as it is may — although not always — expedite eventual disposition of the action. When unusual circumstances justify an extension, the government can seek it. The choice should depend on pragmatic considerations of actual experience that should be better explained by the Department.

A related question asked why an amendment should extend the time to 60 days. The Department offers two analogies. One is to Rules 12(a)(2) and (3), which set the time to answer at 60 days when the defendant is the United States or its agency, officer, or employee. The 60-day period for actions against an employee in an individual capacity was added in 2000 to reflect the amendment of Rule 4(i) that required service on the United States, reasoning that the United States needs the time to decide whether to provide representation and to do so. The analogy, however, is imperfect. The 14 days allowed after disposition of a Rule 12 motion is added on top of the time allowed for making the motion, which is the 60-day time for the answer; the time for the plaintiff to respond and for the motion to be submitted; and the time to decide. Why cannot the Department, just as other litigants, use this time to learn enough about the case to prepare an answer within the general 14-day period?

The other analogy offered by the Department is to Appellate Rule 4(a)(1)(B)(iv), which was amended in 2011 to provide 60 days for filing the notice of appeal in these actions. When a Rule 12 motion raises an immunity defense, the defendant — whether or not represented by the Department — has 60 days to appeal. This provision was added to complement the purposes of Rule 12(a)(3) and, as the Department points out, was supported by Congress in amending 28 U.S.C. § 2107 to expressly enable the Rule 4 amendment. Why should an answer be due while the Department is deciding whether to appeal and seeking the Solicitor General's approval?

These arguments met some skepticism at the April meeting. Department representatives were pressed for data to give a firm factual basis for the concerns initially expressed in general terms. How often is an immunity defense raised? How often does the Department seek and win an extension of the 14-day period now set for these cases as for all others? How much work is lavished on preparing an answer during the interval between making a motion for an extension and the order granting or denying the motion? How often does denial of an extension lead not only to an answer but also to further pretrial proceedings or even the start of initial disclosures and discovery before an appeal cuts them off? Mid-meeting consultations within the Department provided general impressions, including the belief that immunity defenses are raised in most of these cases, but no hard information.

The problem of actions with multiple defendants was briefly noted. The simplest case would be an action in which all defendants but one are not federal entities, officers, or employees, and in which the Department is involved only in representing an employee sued in an individual capacity. All the others are subject to the 14-day response period. Or the Department may represent two or more defendants, but some are the government itself, an agency, or an officer sued in an official capacity; the published amendment would not extend the 14-day period as to them. More poignantly, a government employee may be sued in both an individual capacity and an official capacity; the published amendment would seem to require an official-capacity

answer in 14 days, and the individual-capacity answer in 60 days. So too, the government might be substituted as the defendant for some claims, but not others.

Another question asked why an action against a federal employee in an individual capacity should be treated differently than an action against a state or local employee. Is it fair to assume that state and local government legal bureaucracies are nimbler than the Department of Justice?

A similar question might ask whether the rule should distinguish between cases in which the Department represents the defendant and those in which it does not. An effort to draft the distinction in rule text could become complicated by the prospect that the Department might represent the defendant at the time of the motion and then withdraw, or begin to represent the defendant only after the motion is submitted — and, conceivably, after the 14-day period has expired. This complication seems better avoided, so that any extended period is available to the defendant even if the Department has never been involved.

One response at the April meeting was to discount the argument that more time is needed even in cases without an immunity defense, and to propose that the 60-day period be provided only in cases with an immunity defense. A motion was made to add these words at the end of the published proposal: "and a defense of immunity has been postponed to trial or denied." The motion failed, but by a close vote, 6 for and 9 against.

At least equal measures of skepticism were expressed during the Standing Committee discussion.

One concern in the Standing Committee was that the published rule is one more instance of special treatment for the United States. Why is it different from state governments, who may face similar issues in representing state officials? One member suggested that the United States may well be different. How many states centralize the decision whether to appeal in one person? And how many appeal decisions are they likely to face, as compared to the United States? Rule 12 itself, and Appellate Rule 4, recognize the special needs of the United States without providing comparable treatment to states.

A second but also related concern was that it is important that the rules press litigants toward prompt action, not encourage drawn-out action. Why give the United States four times as long to respond? "Moving the process along is good at all levels." Why not 30, or at most 40 days?

The suggestion that a short time to respond will encourage protective notices of appeal met the response that "protective notices of appeal happen whatever time you have."

The question whether any extended time should be limited to cases with an immunity defense was also noted.

A concluding suggestion in the Standing Committee was that the committee note should provide a better justification for any extended period that may be recommended. The vote for further consideration reflected both the question whether any amendment should be limited to

cases with an immunity defense and the question whether any additional time should be for some period well short of 60 days.

So the question on remand is framed.

The Department of Justice has responded to the concerns expressed in this Committee and in the Standing Committee in a letter attached below. The letter continues to emphasize two points. The internal structure and procedures of the Department make extra time to respond necessary even in cases that do not involve an immunity defense. And when an immunity defense and a possible appeal are involved, the time needed for deliberation and approval by the Solicitor General cannot be reduced. Time is needed to assess the questions involved in the specific case, and also to maintain uniformity in Department practice and — often more important — substantive legal issues of nationwide importance. Forcing a response within 14 days leads to motions to extend. If extra time is not allowed, a 14-day response is not likely to be well developed, and the purpose of protecting the defendant against the burdens of litigation is thwarted. Sixty days was deliberately and carefully chosen as the appeal period for these reasons, and should be matched by a 60-day period to respond. The full 60 days is so important, indeed, that the Department believes that amending the rule to provide any shorter period is not worth the effort.

The Department letter does not provide any information beyond that provided at the April Committee meeting about the frequency of immunity defenses in these cases, practice in seeking extensions, efforts to prepare a response before knowing whether an extension will be granted, the frequency of winning extensions, and the length of the extensions that may be granted.

All of this sets the stage for renewed discussion. The concerns expressed by the Department have been framed in earlier Committee discussions and in presenting the proposal to the Standing Committee as a choice between competing presumptions. The 60-day period can be defended as the better presumption. It will reduce the need for motions to extend; if motions are routinely granted now, the reduction in motion practice is a net advantage and there is no added delay in reaching final resolution. A plaintiff that has special reasons for expedition can move to shorten the time to respond under the "different time" feature that applies to all of Rule 12(a)(4). The present 14-day period, on the other hand, can be defended by the general value of moving all actions ahead promptly. The government can, as now, seek extensions when truly needed.

As deliberations move beyond this point, it is useful to bear in mind the concerns expressed in the two public comments that oppose the proposal. These concerns reflect dissatisfaction with current official immunity doctrine, and also with the adaptation of collateral-order doctrine to support immunity appeals. But attempts to predict possible evolution of substantive immunity doctrine — much less hostility to it — do not seem a useful basis for considering the present proposal. Nor is there much prospect that an effort will be made to create court rules to express and revise current immunity appeal doctrine. As many difficulties as can be found in current doctrine, devising an improved approach by court rules presents an immense challenge, in part because of the close tie to substantive immunity doctrine. Casting appeal rights in terms of "a right not to be tried" is a clear sign to go slow.

Another factor that bears on the Department's need for time to decide whether to appeal and to win approval has not been much discussed. This factor is the unsatisfactory nature of deciding immunity on the allegations in the complaint. Affirmance of a refusal to dismiss may well be followed by a second appeal from denial of a motion for summary judgment on a record that gives a much better picture of the legal issues that need be confronted. In *Kwai Fun Wong v. U.S.*, 373 F.3d 952, 956-957 (9th Cir. 2004), Judge Berzon described this issue in terms that reflect the need for careful deliberation by the Department in deciding whether an appeal at the pleading stage is a responsible use of judicial resources:

> The confluence of two well-intentioned doctrines, notice pleading and qualified immunity, give rise to this exercise in legal decisionmaking based on facts both hypothetical and vague. *** The unintended consequence of this confluence of procedural doctrines is that the courts may be called upon to decide far-reaching constitutional questions on a nonexistent factual record, even where *** discovery would readily reveal the plaintiff's claims to be factually baseless. We are therefore moved *** to suggest that while government officials have the right, for well-developed policy reasons, *** to raise and immediately appeal the qualified immunity defense on a motion to dismiss, the exercise of that authority is not a wise choice in every case. The ill-considered filing of a qualified immunity appeal on the pleadings alone can lead not only to a waste of scarce public and judicial resources, but to the development of legal doctrine that has lost its moorings in the empirical world, and that might never need to be determined were the case permitted to proceed, at least to the summary judgment stage.

Further discussion might be framed around three alternatives to adopting the proposal as published. All deserve careful consideration. One is to abandon the published proposal. A second is to retain it as published, but shorten the extended time. Thirty-day periods are common in the rules and practice. Rule 23(f) provides a more direct analogy: the ordinary period to petition for permission to appeal a class-action certification or refusal to certify is 14 days, "or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf." The analogy is not perfect; a class-certification grant or denial is likely to occur at a time when the Department is fully familiar with the case, particularly the class-certification issue. If that analogy seems unpersuasive, a compromise at 35 days — a period unique in the rules — would have the advantage of "same-day" calculation at five weeks. A third alternative would limit the extra time, however many days it may be, to cases with an immunity defense.

The competing considerations that bear on the choices whether to abandon the proposal, or to support it for adoption as published or with a shorter extended period, are familiar and will be explored in discussion at the meeting. Either choice has the advantage that there is no apparent reason to republish.

The possible limit to cases with an immunity defense requires more elaboration. Denial of a motion to dismiss based on an immunity defense is almost always an unambiguous event that supports a collateral-order appeal. The most likely complication is that prolonged delay may eventually support appeal as if it is a denial. That should not present a problem for Rule 12(a)(4),

which sets the time to respond only by an actual denial or postponement of disposition until trial; mere unexplained delay in ruling should not count. And an explicit postponement to trial should support an appeal to protect against the burdens of pretrial proceedings.

Rule 12(a)(4) is limited to "a motion under this rule." The messy state of appeal doctrine for denials of immunity motions for summary judgment should not be encountered, at least if it is possible to count on a sensible interpretation of Rule 12(d), which treats consideration of matters outside the pleadings as a motion for summary judgment. It might be argued that this provision takes denial of the motion outside of Rule 12(a)(4). But that reading would mean there would be no time set for an answer. It is so sensible to treat the imputed denial of summary judgment as simultaneously denial of the Rule 12 motion that the rule sketch set out below does not attempt to address this possible snag.

Greater difficulty may be encountered in finding words to describe the kinds of immunity that may trigger the right to appeal. The routine concepts of qualified and absolute immunity are the most likely kinds. It seems likely that a federal employee sued in an individual capacity may be sued on state law claims as well as federal, or possibly on state law claims alone. The availability of collateral-order appeal depends on state immunity law — appeal is available in a federal court if state law treats the immunity as a protection against the burdens of pretrial and trial proceedings, but not otherwise. That complication need not interfere with drafting a Rule 12(a)(4) amendment. The purpose of the amendment is to provide time to determine whether an appeal is available, and if so whether to take the appeal. It would be self-defeating to allow extra time to answer only if the order is in fact appealable.

A more awkward drafting question may arise from the provisions of the Westfall Act, 28 U.S.C. § 2679, that provide for substitution of the United States as defendant in an action against any employee for a negligent or wrongful act or omission "while acting within the scope of his office or employment." The effect of substitution should be viewed as equivalent to an absolute immunity. Appeal is available from an order denying a government certification that the employee was acting within the scope of his office or employment, or from an order denying a petition that the court make the certification after the government has refused. Despite some potential for confusion, however, this procedure is not directly tied to a motion to dismiss, and likely should not affect the rule text.

Other forms of immunity may support collateral-order appeals, but are unlikely to be involved. The Speech or Debate Clause would enter only if a member of Congress is treated as an officer or employee of the United States within Rule 12(a)(3) and (4). Double jeopardy would be involved only in the unlikely event that some form of civil penalty is both available against an individual-capacity defendant and so punitive as to raise a colorable double-jeopardy defense. Various forms of sovereign immunity seem not to be involved.

An amendment that provides extra time to answer only in cases with an immunity defense should not be limited to cases in which an appeal is actually available. It should be enough that the motion invokes an immunity defense. Some effort might be made to exclude arguments that any avoidance or affirmative defense is an "immunity" for this purpose; variations are illustrated in a footnote to this sketch:

. . . , or within **[30?]** days if the motion includes[1] an [official][2] immunity defense [advanced][3] by ~~if the defendant is~~ a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf ; or

The four central alternatives remain for further discussion: (1) recommend adoption of the proposal as published; (2) withdraw the proposal; (3) reduce the extended time with no other changes; and (4) attempt to find suitable rule language to provide extended time only in cases with the prospect of a collateral-order appeal.

For the moment, no revised committee note language is offered to pick up the suggestion in the Standing Committee that a "more persuasive" justification should be provided for the 60-day period. If adoption as published is recommended, it will be for the reasons advanced by the Department of Justice. Those reasons are described, albeit in a matter-of-fact tone, in the note as published. Past practice has shied away from using committee notes as a tool of advocacy. More elaborate explanations and discussion are provided in agenda materials, minutes, and the explanations provided with a published proposal. Some care is warranted in deciding whether to depart from this tradition. If an amended proposal is recommended, the note will be revised, and likely would include a more elaborate justification for a shorter period that does not rely on analogy to the Rule 12(a)(3) time to answer or the Rule 4(a)(1)(B)(iv) time to appeal.

The appendix to this report includes the following:

- Letter from the Department of Justice (August 18, 2021)
- Proposed amendment to Rule 12(a)(4) and summary of public comments

[1] *See* "advanced" and n.3.

[2] "official" may be useful to tie the rule to the kinds of immunity that shield a government agent against individual liability for acts that in fact violate the plaintiff's substantive rights. The committee note would provide some elaboration, and might note the issue of state-law immunity.

An alternative might attempt to describe that kind of immunity in rule text talk: "a[n immunity] defense that protects the defendant against the burdens of litigation," or "that establishes a right not to be sued."

As suggested in the discussion, it seems unwise to attempt a direct tie to appeal doctrine: "an immunity defense that may support an appeal if the motion is denied or postponed to trial." "supports an appeal" would be an obvious mistake.

[3] raises? presents? makes? "includes," if chosen, belongs where it is at n.1.

U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, DC 20530

August 18, 2021

Honorable Robert Dow
Chair, Advisory Committee on Civil Rules
One Columbus Circle, NW
Washington, D.C. 20544

Re: Rule 12(a)(4) Proposal

Dear Judge Dow:

The United States Department of Justice has been asked to provide its views concerning its proposal to amend Federal Rule of Civil Procedure 12(a)(4)(A) to extend the time to answer a complaint in personal liability suits against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), where a qualified immunity defense has been denied. The Department understands that certain members of the Standing Committee have expressed concerns about a sixty-day answer deadline, but that there may be willingness to consider a shorter period of time. As discussed in more detail below, the Department's proposed 60-day period to answer a complaint where qualified immunity has been raised is based on the need to provide sufficient time for the Solicitor General to determine whether to take an appeal of the denial of a claim of qualified immunity, while avoiding the need for the *Bivens* defendants to answer the complaint during the pendency of that decision-making process. Although we very much appreciate the attempt to find a middle-ground solution, on balance we have concluded that a modification of the answer deadline to provide for less than 60 days would not provide a sufficient benefit to justify the effort to modify the rule. Such a modification would still require defendants to file an answer or seek an extension in almost all cases. For these reasons, if the Advisory Committee is not inclined to recommend an amendment of Rule 12 that would provide for a 60-day deadline for answering the complaint, the Department does not believe any amendment would be warranted.

DISCUSSION

The time to answer a complaint after a district court has denied a motion to dismiss is 14 days. *See* Federal Rule of Civil Procedure 12(a)(4)(A). Personal liability suits against federal officials brought under *Bivens* are subject to immunity defenses that usually carry an immediate appeal right when they are rejected by a federal district court. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996). The appeal time under such circumstances is 60 days, the same as in suits against the federal government itself. As the Department previously has explained, requiring an answer when the appellate court might

uphold the immunity defense is inconsistent with the "suit immunity" underlying official immunity defenses. It also risks triggering the mandatory disclosure obligations and pretrial discovery that immunity is supposed to guard against.

Critical to the Department's proposal is the fact that the Solicitor General must authorize the appeal of the denial of qualified immunity. *See* 28 C.F.R. § 0.20(b). For that reason Federal Rule of Appellate Procedure 4(a)(1)(B)(iv) gives federal officers and employees 60 days in which to appeal even though the government itself is not a party. Both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure recognize that the government is uniquely situated among federal litigants and that the government's interests sometimes warrant special timing rules. Civil Rule 12(a) has long allowed the government 60 days to answer a complaint. Appellate Rule 4 has similarly allowed for 60 days to appeal when the government is a party. Over time both rules were amended to acknowledge the government's interests in personal-capacity suits based on its employees' official acts and the government's need for extended time to address them. For example, Civil Rule 12(a) was amended in 2000 to provide federal employees 60 days in which to respond to complaints in personal-capacity cases. That amendment now appears in Federal Rule of Civil Procedure 12(a)(3). The advisory committee note accompanying the amendment observed that "[t]ime is needed for the United States to determine whether to provide representation" to the employee and that if it does represent the employee "the need for an extended answer period is the same as in actions against" the government itself. Appellate Rule 4(a) was similarly amended in 2011 to ensure that personal-capacity suits against federal employees are covered by the 60-day "government" appeal time. The advisory committee note accompanying that amendment made a direct link to the extended response time in Civil Rule 12(a)(3) and the reasons supporting it. The Committee stated that the appeal-time amendment "is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints[.]" It acknowledged that "[t]he same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal." *Id.* (At the same time Rule 4 was amended, Congress amended 28 U.S.C. § 2107 to also provide for a 60-day appeal time in government-employee cases.)

As the Department previously has explained, the extended time periods under these rules reflect two practical realities. First, the government needs more time than private litigants to assess a case and determine a district court response. Second, in light of the need for Solicitor General approval, the government in particular requires an extended time to make an appeal decision. The same considerations also warrant allowing a government employee 60 days in which to answer a complaint after denial of a dismissal motion. The need for 60 days is especially acute when the order denying dismissal is appealable. The current 14-day response period generally requires an employee to answer a complaint before the Solicitor General has had time to decide whether to file an appeal. That risks creating confusion about whether the employee will forego appeal and instead defend in district court or requires the employee to seek an extension of time to answer.

The Advisory Committee unanimously recommended the Department's proposal for publication, and the Standing Committee unanimously approved that recommendation. Only three comments were received—one in support of the proposal and two in opposition. The two comments in opposition largely focused on their substantive objections to the doctrine of

qualified immunity and the belief that the proposal would cause delay. During the recent Standing Committee meeting, some members expressed concerns that a sixty-day answer deadline was too long, but that a shorter period of time may be appropriate.

At the outset, it is important to emphasize that the Department's proposal does nothing to enlarge or otherwise modify the substance of the qualified immunity doctrine. The Department understands that qualified immunity is a sensitive issue that many feel strongly about. But the Department's proposal does not seek to endorse the doctrine or otherwise enshrine it in the federal rules. Rather, the Department seeks to ensure that the centralized decision-making process for appeals within the federal government, reflected in other federal rules discussed above, is permitted to proceed consistent with qualified immunity principles. After careful consideration, we have concluded that enlarging the answer deadline to a date short of sixty days would not adequately address the Department's concerns given that the Solicitor General has sixty days to decide whether to appeal an adverse qualified immunity decision. A deadline of less than sixty days would continue to require defendants to seek, and courts to adjudicate, motions for enlargements of time.

In addition, we respectfully submit that concerns about delay are outweighed by the benefits of the proposed modification. The Department seeks only a modest 45-day modification of the current response time to allow for either answering the complaint or appealing the denial of a claim for qualified immunity. In fact, the two objections to the Department's proposal seem to focus their concerns about delay on the appeal of denials of qualified immunity—a delay that already exists due to the immediately appealable nature of qualified immunity decisions. The Department's proposed amendment is designed to avoid the burden of enlargement motions and the potential need to answer a complaint or participate in discovery where a successful appeal of the denial of qualified immunity is taken. After careful review, we have concluded that extending the answer deadline to a date short of sixty days would provide only a marginal benefit given that the Solicitor General has sixty days to decide whether to appeal an adverse qualified immunity decision. We think such an extension would still require the parties to seek extensions in most cases. Given the modest benefit of a shorter extension, we are not convinced that it is worthwhile to undertake the effort to make such a change.

As a result, the Department respectfully suggests that the Advisory Committee either proceed with the proposed 60-day modification or proceed no further on the proposal. Thank you for your consideration.

Sincerely,

Brian M. Boynton
Acting Assistant Attorney General

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

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

(a) Time to Serve a Responsive Pleading.

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

* * * * *

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

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of

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

the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

* * * * *

Committee Note

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days to serve a responsive pleading after the court denies a motion under Rule 12 or postpones its disposition until trial. The United States often represents the officer or employee in such actions. The same reasons that support the 60-day time to answer in Rule 12(a)(3) apply when the answer is required after denial or deferral of a Rule 12 motion. In addition, denial of the motion may support a collateral-order appeal when the motion raises an official immunity defense. Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days in these cases, and includes "all instances in which the United States represents that person [sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf] when the judgment or order is entered or files the appeal for that

person." The additional time is needed for the Solicitor General to decide whether to file an appeal and avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

Changes Made After Publication and Comment

No changes were made after publication and comment.

Summary of Public Comment

There were only three comments clearly directed to the proposal to amend Rule 12(a)(4)(A) that was published in August 2020. Rule 12(a)(4)(A) sets the time to file a responsive pleading at 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. The amendment would allow 60 days "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf."

American Association for Justice (CV-2020-0003-0011): This is "an unfair and unnecessary across the board rule-based extension."

"[T]here have been dozens of highly publicized incidents of police brutality" that "call for significant police reforms at both the state and federal level." "The plaintiff already bears the burden to prove the case. So does it seem right or fair to add to that burden and provide DOJ with additional time?" The initial period for a DOJ response is 60 days. When a motion is filed, suspending the time, "the DOJ knows that the time to respond is coming and can plan for

it." It will have all the time the court takes to consider the motion in addition to the 14 days.

"It is already extraordinarily difficult for a plaintiff to successfully bring a claim under *Bivens* and its progeny. If anything, the Advisory Committee should be considering whether DOJ has too much time to consider appeals * * *."

Federal Courts Committee, New York City Bar (CV-2020-0003-0018): "The Federal Courts Committee supports this minor change, particularly given that the court retains its authority to set a different time for the responsive pleading—including a shorter time, if expedition is appropriate."

NAACP Legal Defense and Educational Fund (CV-2020-0003-0020): Opposes the proposal. It will add delay to litigation, and exacerbate problems with qualified immunity doctrine. "The proposed rule changes were requested by the DOJ with the express purpose of further sheltering federal defendants from litigation and expanding their already widespread use of immunity doctrines."

The Department's concern with interlocutory appeal opportunities in official immunity cases is characterized as the "primary justification" underlying its request for this rule change. The proposal is overblown as applied to cases with no potential immunity defense. All other defendants would still have to answer within 14 days. Filing an answer would rarely, if ever, interfere with the opportunity to file an interlocutory appeal; in the rare case that does present a problem, the defense can request an extension. And a stay of discovery can be sought pending appeal.

TAB 7

7. FOR PUBLICATION: PROPOSED AMENDMENT TO RULE 12(a)(2), (3)

This proposal has been considered twice, first at the October 2020 meeting and then again at the April 2021 meeting. It can be refreshed by setting out the April agenda materials and offering a brief summary of the discussion described in the draft April Minutes.

After two rounds of discussion, the question remains unchanged. It is discomforting to have rule text that does not reflect the reality of superseding statutes, and that may present a risk of unintended supersession of statutes enacted before the present rule text was adopted. But there may be good reason to avoid the bother of correcting rule defects that do not seem to cause serious problems, only occasional inconvenience, in the real world.

Rule 12(a) begins like this:

> **(a) Time to Serve a Responsive Pleading.**
>
> > **(1)** ***In General.*** Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
> >
> > > **(A)** A defendant must serve an answer:
> > >
> > > > **(i)** within 21 days after being served with the summons and complaint; or * * *
> >
> > **(2)** ***United States and its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
> >
> > **(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later. * * *

The problem is simply stated. The deference to a statute that sets a different time is limited to paragraph (1). But there are federal statutes that set 30 days to answer a complaint addressed by paragraph (2), not the 60 days specified in paragraph (2). A survey failed to turn up any statute that sets a time different than the 60 days specified by paragraph (3), but it remains possible that there is such a statute now or that one may be enacted in the future.

This item was discussed at the October 2020 meeting and dissolved into an equal division of opinion, to be carried forward for further discussion at this meeting. The October Minutes summarize the competing concerns, and are duplicated here for convenience.

Excerpt from the Minutes of the Advisory Committee's October 16, 2020 Meeting

Rule 12(a) establishes the times for serving a responsive pleading. Paragraph 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." This qualification does not appear in either of the next paragraphs, (2) and (3). It is clear, however, that there are federal statutes that set different times than paragraph (2) for some actions brought against the United States or its agencies or officers or employees sued in an official capacity. No statutes have yet been uncovered that set a different time than paragraph (3) for an action against a United States officer or employee sued in an individual capacity.

Although it might be argued that the provision in paragraph (1) that recognizes different statutory times carries over to paragraphs (2) and (3), that is not the way the rule is structured. Nor is it wise to rely on this argument. Reading Rule 12(a) in this way to achieve a sound result would pave the way for disregarding clear drafting in other rules.

It is easy to draft a correction. The provision for federal statutes could be moved into subdivision (a) so that it applies to all of paragraphs (1), (2), and (3):

> **(a) Time to Serve a Responsive Pleading.** ~~(1) *In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
>
> **(1)** ***In General.***
>
> **(A)** a defendant must serve an answer * * *.

Discussion of this question at the April meeting came to a close balance. The present text is wrong at least as to paragraph (2). The Freedom of Information Act and Government in the Sunshine Act both establish a 30-day time to respond, not the general 60-day period set out in paragraph (2). There is no reason to supersede these statutes. It is better to make rule text as accurate as it can be made.

The question is somewhat different as to paragraph (3) because no statutes that set a different time have been found. But such statutes may exist now, or may be enacted in the future. Here too, there is no reason to supersede these statutes, nor to encounter whatever risks that might arise from the rule that a valid rule supersedes an earlier statute while a valid rule is superseded by a later statute. Including paragraph (3) in the general provision will do no harm if there is not,

and never will be, an inconsistent statute. And including it is desirable in the event of any inconsistent statute.

The counter consideration is the familiar question whether it is appropriate to address every identifiable rule mishap by corrective amendment. A continuous flow of minor or exotic amendments may seem a flood to bench and bar, and distract attention from more important amendments. This consideration conduces to proposing changes only when there is some evidence that a misadventure in rule text causes problems in the real world.

This topic was brought to the agenda by a lawyer who encountered difficulty in persuading a court clerk to issue a summons providing a 30-day response time in a Freedom of Information Act action. The clerk was ultimately persuaded. The Department of Justice said in April that it is familiar with the statutes, and honors them, but that it often asks for an extension, and particularly seeks an extension in actions that involve both FOIA claims and other claims that are not subject to a 30-day response time. From their perspective, paragraph (2) does not present a problem.

Discussion began with the observation that Rule 15(a)(3) also governs the time to respond to an amended pleading. But this does not seem to conflict with the federal statute question presented by Rule 12(a). Rule 15(a)(3) simply calls for a responsive pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." If more than 14 days remain in the time set by Rule 12(a), including its incorporation of different statutory times, Rule 15(a)(3) makes no difference. If fewer than 14 days remain, Rule 15(a)(3) extends the time.

The Department of Justice renewed the observations made at the April meeting. There is no need to fix this minor break in the rule text. There is a risk that if the change is made, a court might be misled as to its discretion to extend the time to respond to a FOIA claim in cases that combine FOIA claims with other claims that are subject to the 60-day response time. The committee note to an amended rule could say that the amendment merely fixes a technical problem and does not affect the court's discretion, but "we welcome the chance for a longer period in resource-constrained cases." Another committee member agreed with this view.

The contrary view was expressed. If there is a chance that this is tripping people up, why not fix it? It does seem a mistake in the rule text that deserves correction.

This view was questioned by suggesting that the problem described by the Department of Justice is a bigger one than the inconvenience described by the lawyer who brought this problem to us. It is nice to make the rules as perfect as can be, but "I don't like to create problems for the Department of Justice to fix what may be a rare problem for plaintiffs."

> A proponent of amending Rule 12(a) suggested that the question is close. But the problem described by the Department of Justice does not seem real. The Department position was renewed in reply. "Inherently, it's a prediction. We have no experience with the proposed rule." But a number of career Department lawyers are concerned. "Hybrid" cases do arise with both a shorter statutory period and the longer Rule 12(a)(2) period. This is a "predictive point."
>
> The proposed amendment failed of adoption by an equally divided vote of 6 committee members for, and 6 against. The proposal will be carried forward for further consideration at the [April 2021] meeting.

At the April 2021 meeting, the Department of Justice repeated its position that no amendments are called for. It is aware of the statutes that provide for a shorter time to respond, and honors them. There is no reason to think that plaintiffs are concerned about its practices. At the same time, there is a risk that calling attention to the statutes in rule text will make courts less willing to grant extensions of the statutory periods in cases that combine claims subject to the statutes with claims that are governed by the ordinary 60-day period.

Note was taken of an extensive PACER survey undertaken by John A. Hawkinson, a freelance news reporter, and Rebecca Fordon of the UCLA Law School. It seems to show that actual response times in cases governed by a 30-day statute come close to the statutory mark, particularly in courts that have high volumes of these cases (the District Court for the District of Columbia had about two-thirds of the cases surveyed, and has a "mechanism" for issuing summonses that reflect the statutory response time). A copy of that material is attached.

The appendix to this report includes the following:

- Suggestion 19-CV-O
- Letter from John A. Hawkinson (April 16, 2021)

20-CV-EE

John A. Hawkinson, freelance news reporter
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October 17, 2020

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Rule 12(a) shortened summonses / Rule 5(d) *pro se* electronic filing

Dear Judge Dow and members of the Committee:

In light of the uncertainty[1] of the Committee at yesterday's meeting on how to proceed with the proposal to clarify Rule 12(a) in the context of statutes setting a reduced answer time, I wanted to advise the Committee that the problems raised in Daniel Hartnett's 19-CV-O suggestion are not unique to him nor to the Northern District of Illinois, and appear to be commonly encountered by FOIA litigants. As much of the Committee's discussion appeared to be premised on whether this was a problem worth fixing, and how often it occurred, I hope this narrative is useful.

I filed a FOIA action in D. Massachusetts[2] in early 2020, and in reviewing the rules and statute, immediately had to grapple with this problem.
I analyzed recent FOIA litigation in my district and found:

1. FOIA litigants issued 60-day summonses and did not press the issue; DOJ did not respond in accordance with the shortened timeframe of the statute. *E.g.* 19-cv-10916.
2. FOIA litigants were issued 60-day summonses and did not press the issue, and DOJ **did** timely answer within 30 days of service. *E.g.* 19-cv-10690.
3. FOIA litigant sought 30-day answer deadline by motion filed simultaneous with the complaint. Motion was not timely adjudicated, but DOJ answered within 35-days of filing (date of service is unclear). 19-cv-12564.

[1] "The *status quo* was affirmed by an equally divided Committee." I laughed out loud.

[2] One aspect of confusion is that different districts handle the issuing of summonses differently. In some districts, such as my own, summonses are issued immediately or within minutes of the filing of the complaint. In other districts, a plaintiff submits proposed summonses to the Court, which then reviews and issues them, typically a day or two later. Anecdotally, I understand that Districts that deal in a higher volume of FOIA cases (*e.g.* D.D.C.) have more effective procedures for obtaining 30-day summonses.

4. FOIA litigant sought 30-day answer deadline by motion 23 days after filing. Motion granted the same day; DOJ timely answered 29 days after service. 19-cv-12539.
5. FOIA litigant moved, 15 days after filing, to re-issue a 30-day summons. Motion allowed; DOJ moved for an extension of time to answer 35 days after service of the initial 60-day summons. 19-cv-12440.

In light of this landscape, it seemed clear that either re-issuing the summons or attempting to convince the Clerk's Office to issue a shorter summons (similar to Daniel Hartnett's experience, staff declined to do so initially) would likely take days, delaying 30 days to 35 or 40 or more. Instead I moved, simultaneously with filing of the complaint, to set a 30-day answer deadline, and notified defendants with a cover letter accompanying service of the summons, complaint, and motion.

Result: motion denied without prejudice, as it "requests an order directing respondents to follow the requirements of a federal statute." DOJ then timely moved for an extension of time to answer, 29 days after service of the initial 60-day summons.

Conclusion: The interplay between the Rule and the FOIA statute is confusing to Clerks' staff, and attempting to make statutory arguments to intake/operations staff is unlikely to work smoothly. There is judicial economy in avoiding motions to re-set CMECF to account for statutory deadlines, and the result of that motion practice is uncertain anyhow. All would benefit from a Rule 12 clarification leading to better uniformity.

In the alternative, perhaps the operational issue could be referred to CACM?

Unrelatedly, on the topic of *pro se* electronic filing, Rule 5(d)(3): I recently became aware that some districts by standing order unconditionally bar non-attorney *pro se* litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). *See Perdum v. Wells Fargo Home Mortg.*, No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). *See also Oliver v. Cnty. of Chatham*, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).

The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. *Oliver* at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

Postscript: I thank the Committee and its staff for allowing public video access to Friday's meeting. It was educational.

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April 16, 2021

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
BY ELECTRONIC MAIL: *rulescommittee_secretary@ao.uscourts.gov*

Re: Rule 12(a) shortened summonses in FOIA cases

Dear Judge Dow and members of the Committee:

I write to supplement my letter of Oct. 17, 2020 (20-CV-EE) regarding the practical ramifications of Daniel Hartnett's 19-CV-O suggested change to Rule 12's answer time language as applied to Freedom of Information Act (FOIA) cases.

I thought it would be a fun research project, so I solicited an academic partner (Rebecca Fordon of UCLA School of Law) and we applied for a PACER Fee Exemption to study whether the Department of Justice typically responds within the FOIA statute's 30-day requirement, looking at 2018 through 2021. Although that analysis is not yet complete[1], I have some preliminary results for the Committee's consideration.

It is indeed common for 60-day summonses to be issued in FOIA cases, and DOJ does not have a practice of replying within the statutory 30 days.

Of the 2,536 FOIA actions filed after Jan. 1, 2018 in the 87 district courts that we reviewed, 66% of cases received responses[2] outside 30 days, the time required under the FOIA statute. The mean time was 42.1 days and the median time was 30 days. For those within 30 days, the mean was 22.4 days and the median was 24 days. For those exceeding 30 days, the mean was 62.1 days and the median was 48 days.

[1] Our automated preliminary analysis of Nature of Suit 895 cases — FOIA — excludes those where the plaintiff sought *in forma pauperis* status, and does not attempt to determine whether the Department of Justice filed a motion to extend its answer time prior to the expiration of the 30 day period. It does not attempt to account for the government shutdown of early 2019, and it may double-count cases that are transferred between districts. In some cases, the docket text may not clearly identify the date of service, in which case the analysis software estimates service took place 20 days after filing, the average from the remainder of the corpus (1480 cases).

[2] We count answers, Rule 12(b) motions to dismiss, and Rule 56 summary judgment motions. But we also count stipulations and joint motions, as they more-often-than-not appear to represent meaningful engagement in the case by the parties, unlike rote motions to extend the time for filing an answer.

The districts omitted from our analysis due to the lack of a fee waiver[3] would have contributed merely 35 cases as of Dec. 31, 2020, according to the FJC's Integrated Database (IDB), or 1.36% of the study corpus.

E.D.N.Y.	17 cases	0.66%
S.D. Texas	11 cases	0.43%
D. Wyoming	3 cases	0.12%
N.D. Alabama	2 cases	0.08%
D. Guam	1 case	0.04%
S.D. Iowa	1 case	0.04%

It's worth noting that much of this varies based on district. Although most districts lack a practical mechanism for obtaining 30-day summonses in FOIA actions, the District of Columbia has such a mechanism, and it represents 62% of the corpus (1569 cases before exclusions). Unsurprisingly, its mean and median are nearly the same as the overall corpus — its mean was 40.2 days and its median 31 days. Looking at all districts *other than D.D.C.*, the mean time to answer was 46.0 days and the median was 30 days.

A handful of U.S. Attorney's offices appear to have a practice of responding within 30 days in FOIA actions, despite receiving 60-day summons. They seem to be a small minority.

The minutes suggest the Committee's interest in other statutes that might specify an answer time. I was able to find one such[4].

I anticipate having a more final analysis and report over the summer, which I will make available to the Committee. This work was originally intended to be complete prior to the April Agenda Book deadline, however it slipped.[5]

At the October meeting, the Committee appeared to be wrestling with the question of whether the problem of Rule 12's language conflicting with statutes was a problem in practice. After reviewing hundreds of FOIA dockets by eye and thousands with automation, I can confirm there is a real problem. All but a few districts issue the standard 60-day summons, and DOJ frequently hews to the date in the summons, not the date in the statute.

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[3] It is now apparent that lack of the fee waiver is no real obstacle to including these dockets, given their small numbers.

[4] 16 USC § 1855(f)(3)(A), part of the Magnuson-Stevens Fishery Conservation and Management Act, specifies 45 days for the Secretary of Commerce to respond to § 1855(f)(1) petitions, which appear to be filed in the district court in at least some instances. To my inexpert eye, it only involves official-capacity defendants, so does not implicate Rule 12(a)(3).

[5] The multi-court fee exemption process is not efficient, and I failed to accurately predict how long it would take. Our application was filed with the AOUSC on Nov. 11, 2020 and the AO distributed it to all district courts on Dec. 4, 2020 with the recommendation that it be approved. We were approved by approximately 32 courts within the first week, 7 during January, and 2 during February. Some courts never received the AOUSC's recommendation, and others lost track of the request. After numerous individual follow-up inquiries, our exemption was granted in 87 of the 94 district courts, the most recent in early April. None have been denied, per se.

If the Committee has any questions regarding this work, I would be pleased to answer them. I will also be present during the April 23 virtual meeting; although members of the public are directed by the AO not to raise our virtual hands, I will be available if the Committee wishes to hear from me.

Very truly yours,

/s/ John A. Hawkinson
John A. Hawkinson

encl: Appendix: summary of FOIA answer times, broken down by district.

cc: Rebecca L. Fordon, Daniel T. Hartnett

16 April 2021

Preliminary analysis of FOIA case (NOS 895) response times across 87 courts, excluding *in forma pauperis* cases. This version makes no attempt to account for motions to extend the time for answers.. The clock is stopped by an answer, a motion to dismiss (Rule 12), a motion for summary judgment (Rule 56), a joint filing, or a stipulation. Cases whose date of service precedes date of filing likely reflect transfered cases, and have been removed. Where date of service is unavailable in CMECF, it is presumed to be 20 days from filing. This analysis is preliminary and subejct to revision.

Court	Count	Mean days	Median days	Minimum days	Maximum days	
ALL	2115	42.14	30	0	974	
<=30	1064	22.44	24	0	30	
>30	1051	62.08	48	31	974	
NOT dcd	724	45.94	30	0	974	
akd	5	57.6	56	18	106	
azd	10	34.2	30.5	10	77	
cacd	34	29.85	24	3	116	
caed	7	28	29	7	50	
cand	108	24.19	19	2	163	
casd	15	55.33	34	13	212	
cod	25	57.56	30	10	485	
ctd	4	23.25	22	20	29	
dcd	1391	40.16	31	0	704	
ded	1	33	33	33	33	
flmd	10	47.9	33	11	120	
flsd	20	87.25	43	14	709	
gamd	1	43	43	43	43	
gand	19	64.11	59	2	125	
hid	1	105	105	105	105	
iand	1	46	46	46	46	
idd	8	30.38	28	13	65	
ilnd	19	121.58	74	16	974	
ilsd	2	22.5	22.5	14	31	
insd	3	35	26	1	78	
ksd	1	35	35	35	35	
kyed	1	21	21	21	21	
kywd	1	128	128	128	128	
laed	3	23	21	17	31	
lawd	1	77	77	77	77	

Court	Count	Mean days	Median days	Minimum days	Maximum days	
mad	19	51.58	45	6	116	
mdd	21	110	61	33	581	
med	4	34.5	32	21	53	
mied	6	35.83	36	22	50	
miwd	9	42.78	38	15	133	
mnd	12	32.08	17	0	99	
mowd	5	129.4	125	0	318	
msnd	1	127	127	127	127	
mssd	2	70.5	70.5	41	100	
mtd	7	18.57	15	13	37	
nced	3	115.33	62	33	251	
ndd	2	35.5	35.5	28	43	
nhd	1	210	210	210	210	
njd	8	66.5	55.5	26	117	
nmd	7	34.14	35	7	69	
nvd	1	30	30	30	30	
nynd	2	60	60	60	60	
nysd	150	39.41	32	1	283	
nywd	8	36.38	32.5	14	70	
ohnd	3	40	37	21	62	
ohsd	2	88.5	88.5	31	146	
ord	18	45	31.5	13	193	
paed	7	57.14	19	11	222	
pawd	5	64.6	63	17	106	
rid	1	42	42	42	42	
scd	8	41.25	30	15	84	
sdd	2	70	70	23	117	
tned	3	36.67	19	14	77	
tnmd	1	67	67	67	67	
txed	3	72.33	91	35	91	
txnd	17	35.82	37	17	61	
txwd	9	28	27	2	60	
utd	3	32.67	29	29	40	
vaed	14	45.71	33.5	14	109	
vawd	5	20	14	13	43	
vtd	4	59	46.5	21	122	
waed	1	13	13	13	13	
wawd	45	34.04	19	11	163	
wied	2	58	58	29	87	
wvnd	2	67	67	15	119	
wvsd	1	64	64	64	64	

TAB 8

8. REPORT: MULTIDISTRICT LITIGATION SUBCOMMITTEE

As reported during the Committee's April meeting, the Multidistrict Litigation (MDL) Subcommittee continues to study some of the topics it originally undertook to examine. On March 24, 2021, shortly before this Committee's April meeting, subcommittee members had the benefit of another conference organized by the Emory Law School Institute for Complex Litigation and Mass Claims, focusing largely on the issues on which the subcommittee has been working since that time.

The appendix to this report includes the following:

- Rule 23.3 sketch
- Notes of the subcommittee's August 23, 2021 videoconference

By way of background, the subcommittee has concluded that it need not continue to pursue some ideas originally proposed. It seems useful to mention those issues before turning to the issues under active consideration.

Issues No Longer Under Consideration

Interlocutory Appeal

One early issue was expanding interlocutory appeal opportunities in at least some MDL proceedings. This set of issues was studied intensely, and eventually the subcommittee reached a consensus that at this time there is not a persuasive case for rulemaking along these lines.

TPLF Disclosure

In addition, the MDL Subcommittee was initially tasked with examining proposals (first presented to the Advisory Committee in 2014) that there be new rule provisions for disclosure of third-party litigation funding (TPLF). After careful review of experience with TPLF in MDL proceedings, the subcommittee concluded that there did not seem to be a significant role for TPLF in those proceedings. So the subcommittee reported back to the full Committee that it was discontinuing work on this topic. Because TPLF remained important more generally, however, the topic was retained on the Committee's agenda, and has been monitored since that time. Elsewhere in this agenda book there is a report on what monitoring TPLF issues has produced. That report does not recommend any immediate action and does not come from the subcommittee.

Initial Consideration of "Vetting," or a "Jump Start" for Discovery

In addition, the subcommittee looked carefully at a somewhat different set of issues, sometimes called "vetting." That concern was supported originally by assertions that a large proportion of plaintiffs in some MDLs had not used the product involved or had not suffered the harm allegedly caused by the product. Such concerns seemed to lie behind proposed legislation in Congress mandating very demanding early scrutiny by judges of every claimant's evidence. (Provisions of this sort were included in the Fairness in Class Action Litigation Act of 2017, H.R. 985, which was passed by the House in early 2017 but not acted on by the Senate.)

The subcommittee's examination of these issues, greatly aided by FJC research, showed that a practice known as "plaintiff fact sheets" (PFS) had developed for a similar purpose, and that PFS practice was used in the great majority of "mega" MDL proceedings. In many of those proceedings there was also something like a "defendant fact sheet" (DFS) process, calling for defendants to provide information to plaintiffs early in the proceedings. But it also became apparent that the actual contents of a PFS or a DFS had to be tailored to the particular MDL proceeding, so that a rule trying to dictate the contents would be unlikely to work. In addition, it appeared that the process of developing a tailored PFS or DFS was time-consuming and difficult. Finally, some objected that PFS practice had become too much like full-bore discovery and produced overlong requests for information.

At the same time, concern with unfounded claims in MDL proceedings persisted, among both defense and plaintiff counsel. A new simplified method, called a "census," was introduced, and it is being employed in several major MDL proceedings presently. (Judge Rosenberg, chair of the subcommittee, is presiding over one of these — the Zantac MDL.) The idea with this method is to devise a less burdensome initial fact-gathering method, and expedite the early development of the litigation. As reported in April, the subcommittee continues to monitor these developments.

Since the agenda materials for the full Committee's April meeting were prepared, partly due to the insights provided by the Emory conference in late March, the subcommittee's views have evolved. The main focus in the March/April period was the difficult topic of rules regarding management of MDL proceedings, and particularly of the appropriate role of the court in regard to resolution of MDLs, usually by settlement. As reported below, the subcommittee is now considering methods of addressing these concerns via Rules 26(f) and 16(b). It invites input from the full Committee about these ideas.

Comparison with Class Actions

This focus on settlement and management was partly stimulated by a comparison of MDL mass tort proceedings with class actions. At least among academics, there have been calls for rules specifying criteria for appointment of leadership counsel parallel to the criteria for appointment of class counsel in class actions, and also for adoption of rules for judicial involvement in the process of settling MDL proceedings, or major parts of them, analogous to Rule 23(e)'s newly expanded provisions regarded review of class action settlements.

There is much to be said for the view that some MDL proceedings are similar to class actions, perhaps particularly from the perspective of claimants whose lawyers are not selected to serve in leadership positions, sometimes called individually represented plaintiffs' attorneys (IRPAs). With some frequency, these claimants (and their lawyers) may feel that they are "on the outside looking in" as the MDL proceeding advances. Neither the claimants nor the IRPAs may be free to pursue ordinary litigation activities, such as doing discovery or making motions. And it may happen after extensive litigation conducted by leadership counsel appointed by the court that some sort of broad "global" settlement will be announced which may be contingent on participation by most or all claimants, leading to considerable pressures to accept that settlement negotiated by leadership counsel.

These scenarios, which may have played out in some prominent MDL proceedings, can be seen to call for creating a judicial role in MDL proceedings analogous to the judicial role in class actions. But in very important ways MDLs are different from class actions. For example, Rule 23(g)(4) says that class counsel "must fairly and adequately represent the interests of the class." And Rule 23(e)(2)(D) makes judicial approval of a class action settlement contingent on the court's conclusion that "the [settlement] proposal treats class members equitably relatively to each other."

The March 24 Emory conference identified significant concerns about importing some of these class action practices into the MDL context. In class actions, the court is in effect appointing class counsel to act as lawyers for all members of the class. Hence the directive of Rule 23(g)(4) that class counsel represent the interests of the class as a whole, not just their individual clients. As the committee note to Rule 23(g) points out, that means that although the class representatives are in form the "clients" of class counsel, they cannot "fire" class counsel as an ordinary client may fire a lawyer.

For leadership counsel in MDL proceedings, however, the "class" of claimants may be divided into those who are actual clients of leadership counsel and others who are not. Those others usually have their own lawyers (the IRPAs), something probably not true of most class members in most class actions.

Finally, in class actions the court has authority under Rule 23(e) to reject a settlement, denying whatever benefits it may offer to class members, or to approve a settlement despite class-member objections. An MDL transferee judge may not require a claimant to accept a settlement the claimant regards as unacceptable, nor prevent a claimant from accepting a settlement the claimant finds acceptable. (Technically, any class member could settle an individual claim with the defendant, but the reality of class action practice is that often defendants will settle only for something resembling "global peace.")

Realities of MDL Settlement Practice

The Emory conference and other sources portray a very different settlement reality in MDL proceedings, particularly "mass tort" MDL proceedings. For one thing, the scope of settlements does not seem to fit the class action model. Though there is a possibility in class actions for subclassing, it seems that class action settlements most often involve something like "global peace," and therefore are "global deals." In the MDL mass tort world, there are some "global" settlements and individual settlements, but also "continental," "inventory," and probably other non-individual settlements.

In the class action world, there have been "inventory" settlements, but those occur without court review. It appears that something like that also occurs with some frequency in MDL proceedings, at least of a mass tort variety. And it may be that some lawyers — whether in leadership or IRPA positions — may receive settlement offers for their clients that differ from terms offered to other lawyers and their clients. Overall, it seems that judges are not in a position to do something in MDL proceedings like what Rule 23(e) tells them to do in class actions — focus on whether settlements treat claimants "equitably relative to each other."

So it may be that the most a judge might do in regard to settlements in MDL proceedings would be to consider whether the process of reaching a settlement was appropriate. Rule 23(e)(2)(B), for example, instructs a judge reviewing a proposed class action settlement to determine whether the settlement "was negotiated at arm's length." Perhaps some similar attention to the negotiation process could be useful in MDL proceedings. (As noted below, however, the subcommittee is not confident presently that even this role in regard to settlements would work in the MDL setting.)

Judge Chhabria's Common Benefit Order

Another feature of the subcommittee's discussions has been the use and allocation of "common benefit" funds to compensate leadership counsel. In June, Judge Chhabria (N.D. Cal.), entered a very thoughtful order about common benefit funds in the Roundup MDL, over which he is presiding. *See In re Roundup Products Liability Litigation*, 2021 WL 3161590 (N.D. Cal., June 22, 2021). The judge began his 33-page decision with the following observation:

> [C]ourts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control.

Slip op. at 1.

The judge made a number of other observations in this opinion that bear mention here because they relate to some of the topics the subcommittee is currently addressing:

> [A]n MDL judge's first order of business is often to decide which lawyers will take the lead in managing and litigating the cases. This is an important decision because of the performance of those lawyers, and the strategic decisions they make, often affect the outcome of the entire group of plaintiffs. (slip op. at 3)

> [T]o be candid, this Court did not adequately scrutinize lead counsel's proposal [regarding creation of a common benefit fund] — the motion was unopposed at the time, and the Court was not very familiar with the nuances of MDL proceedings." (slip op. at 4)

> [L]ead counsel's hard work helped lay the groundwork for other lawyers in the MDL to get settlements for their clients, but the settlements obtained by those lawyers were likely far lower than the settlements obtained by lead counsel for their "inventories," thus diminishing the need to address the free rider problem [that IRPAs get a free ride due to the work of leadership counsel].

Id. at 27.

Judge Chhabria also raised questions about whether familiar common fund practices in MDL proceedings really correspond to situations in which the litigation itself creates the fund that is then distributed to beneficiaries. In the MDL context, the "funds" may come from

settlements with individual plaintiffs or groups of plaintiffs, and the fund results solely from the court's order holding back a portion of those settlement proceeds. *Id.* at 9-16.

Addressing MDL Proceedings in the Rules

One additional topic merits mention. As the full Committee has been informed before, discussions with experienced MDL transferee judges and lawyers with much MDL experience did not disclose great enthusiasm for rule changes. Indeed, there might be some opposition to that idea.

That attitude among experienced judges and practitioners is important, but perhaps not dispositive. For one thing, it may not emerge with the more limited rule changes the subcommittee now has under consideration. For another, it may be that rules would benefit those not so experienced in MDL proceedings. Consider, for example, Judge Chhabria's comment (quoted above) that at the time he initially accepted the parties' proposed common benefit order he "was not very familiar with the nuances of MDL proceedings."

One recurrent theme the subcommittee has heard for some time is that for awhile MDL proceedings seemed to be limited to "insiders" — judges who were repeatedly transferred cases by the Judicial Panel and lawyers who were appointed to leadership positions in those MDLs because of their track record in prior MDL proceedings. We understand that there has been a conscious push to broaden involvement to other judges and other lawyers. For these new participants, rule provisions may provide "guard rails" of a sort.

Beyond that, the absence of any mention of MDLs in the Civil Rules seems a striking omission. In historical terms, it is understandable. Until relatively recently, MDL proceedings did not have much of a profile. Consider, for example, the beginning of a 2004 interview with Judge Hodges, then Chair of the Panel, by an experienced Maine lawyer:

> Imagine you are minding your own business and litigating a case in federal court. Opening your mail one day, you find an order — from a court you have never heard of — declaring that your case is a "tag along" action and transferring it to another federal court clear across the country for pretrial proceedings. Welcome to the world of multidistrict litigation.

Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 2 Maine Bar J. 16, 16 (2004).

It is unlikely that multidistrict litigation remains an unknown to the bar since something between one third and half of the pending civil cases in the federal system are subject to a Panel order. Instead, one might say that the fact it is unnoticed in the rules is a gap that should be addressed. Some argue that MDL proceedings exist "outside the rules." That is surely overstatement; they are conducted under the rules, though often judges take advantage of the rules' flexibility in managing these complex proceedings. But some formal recognition in the rules might both provide guidance for those not among the *cognoscenti* and constitute recognition within the rules of the major importance of this form of litigation.

Current Focus of Subcommittee

Having taken all these developments into account, the subcommittee met by Zoom on August 23, 2021. Notes of this call are included in this agenda book. The main thrust of the call was to discuss a choice between what were described as "low impact" and "high impact" approaches to rulemaking on these subjects. The "high impact" approach was exemplified by the Rule 23.3 sketch that has been in previous agenda books.

The subcommittee decided to focus for the present on the "low impact" approach, basically relying on possible changes to Rule 16(b) and Rule 26(f).

Rule 16(b) Approach

Based on the subcommittee's August 23 discussion the "low impact" approach would mainly focus on Rule 16(b) (some potential issues should this effort go forward are identified in footnotes):

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Case Management.

* * * * *

(3) ***Contents of the Order.***

* * * * *

(B) *Permitted contents.* The scheduling order may:

* * * * *

(vi) set dates for pretrial conferences and for trial~~; and~~

(vii) include an order under Rule 16(b)(5); and

(viii) include other appropriate matters.

* * * * *

(5) ***MDL Cases***. In addition to complying with Rules 16(b)(1) and 16(b)(3), a court managing cases transferred for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407 should[1] consider

[1] The operative verb is "consider." The subcommittee discussed whether a rule might say "must" or "may" consider. Neither of those seemed appropriate. Using "should" is a prod, not a command.

entering an order about the following at an early pretrial conference:

(A) directing the parties to exchange basic information about their claims and defenses at an early point in the proceedings;[2]

(B) appointing leadership counsel[3] who can fairly and adequately discharge[4] their duties in representing plaintiffs' interests[5], and including specifics on the responsibilities of leadership counsel,[6] [specifying that leadership counsel must throughout the litigation fairly and adequately discharge the responsibilities designated by the court],[7] and stating any limitations on the activities of other plaintiff counsel[8];[9] [10]

[2] This provision refers to both claims and defenses because we have been informed that there has been an active DFS (defendant fact sheet) practice in many MDL proceedings. It does not delve into how to characterize claimants on a "registry" or other arrangement of that sort, as in the Zantac MDL.

[3] This term is used in place of "lead counsel" because often such appointments are of numerous lawyers drawn from different law firms.

[4] This phrase somewhat emulates Rule 26(g)(1)(A)'s criteria for appointing class counsel. A committee note might mention the similarity of concerns, but it seems that the detail included in Rule 23(g)(1)(A) would not be helpful here.

[5] The question what exactly "represent" means here may need to be addressed carefully in a committee note since most (perhaps all) plaintiffs have their own lawyers.

[6] There may be some reason to stress in the committee note the value of fairly detailed appointment orders as a way to avoid problems down the line.

[7] It is not clear whether the bracketed phrase is necessary in the rule. Perhaps a rule provision recommending that the court select counsel who can "fairly and adequately discharge their duties" suffices, though the bracketed phrase calls attention to whether that early forecast is borne out by later events.

[8] This provision refers to the common limitation on activities by other plaintiff lawyers (the IRPAs). Absent such limitations, an MDL proceeding might become unmanageable.

[9] This provision does not discuss appointment of lead counsel for defendants, though that may be vital in multi-defendant situations.

[10] As noted below in regard to bracketed (E), it may be best to deal with settlement issues solely as an aspect of appointment of leadership counsel.

(C) addressing methods for compensating leadership counsel [for their efforts that provide common benefits to claimants in the litigation];[11]

(D) providing for leadership counsel to make regular reports to the court — in case management conferences or otherwise — about the progress of the litigation;[12]

[(E) providing for reports to the court regarding any settlement of [multiple] {a substantial number of} [all] individual cases pending before the court;][13] and

---

[11] This provision deals with the issues addressed by Judge Chhabria in his recent *Roundup* opinion. Rulemaking on authority to create such funds probably should be approached cautiously. The use of common benefit funds in MDL proceedings has a considerable lineage, going back at least to *In re Air Crash at Florida Everglades*, 549 F.2d 1006 (5th Cir. 1977), less than a decade after adoption of the MDL statute in 1968.

The bracketed material might best be removed to avoid tricky issues about what efforts of leadership counsel actually confer benefits on the clients of other lawyers. For one thing, it is perhaps inevitable that in ordinary litigation of individual cases the efforts of Lawyer A, representing client A, may produce advantageous effects for Lawyer B, representing client B with a similar claim against the same defendant. It is a reality of individual litigation that this sort of effect can happen, and that does not routinely lead to Lawyer A having a right to part of Lawyer B's fee.

Another difficulty in the MDL setting is to account for the possibility that cases in state court may be handled under state court procedures like the Judicial Panel. California and New Jersey, for example, have such procedures, and it may sometimes be that state court cases aggregated and managed in this fashion outnumber the federal-court cases centralized by the Panel. The question which counsel are "benefitting" from the efforts of other counsel could be quite difficult in such cases.

It is unlikely that specific rule prescriptions would be a successful way to manage these questions, which probably depend too much on the facts of individual MDL proceedings.

[12] It seems likely that MDL transferee judges will often schedule case management conferences at regular intervals to supervise the evolution of the litigation. It may be that, beyond that, courts would desire regular written reports. One focus of this management, or of the original appointment order, might be the method used by leadership counsel to advise IRPAs and their clients about the progress of the litigation.

[13] The subcommittee has considerable uneasiness about a rule provision delving into settlement in this manner. It may be that the preferable approach would be include reference to developments on this front under (B) or (D).

Separately, it is worth noting that providing rule language to define which settlement proposals trigger this reporting obligation is tricky. Based on what we learned during the Emory conference in March, it appears that experienced MDL practitioners speak at least of "individual," "inventory," "continental," and "global" settlements. There are probably other permutations. Perhaps, if a rule provision along these lines is pursued, it would be best not to try to define in a rule which settlement developments must be reported to the court, leaving that to the court. But if so it might suffice to include that issue under (B) or (D).

[(F) providing a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement subject to Rule 16(b)(5)(E) to plaintiffs potentially affected by that settlement].[14]

The Rule 26(f) Corollary

If something like the foregoing were pursued, it seems valuable to have the parties get to work on the PFS/DFS sorts of issues at their Rule 26(f) conference and include a report about those efforts in their report to the Court before it enters its Rule 16(b) scheduling and case management order:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

(3) ***Discovery Plan***. A discovery plan must state the parties' views and proposals on:

* * * * *

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed~~; and~~

[14] Subparagraph (F) is retained in brackets. But the inclination of the subcommittee is that proceeding along these lines would invite considerable problems without providing considerable advantage.

For one thing, it is difficult to say how the court is to assess the settlement deal. As noted above, the court is really not in any position to evaluate what might be called the "merits" of the deal — whether it is a good deal or a bad deal. Instead (F) asks the court to assess the "process" by which it was reached. The 2018 amendments to Rule 23(e) settlement review in class actions recognized in the committee note that there is a difference between "procedural" and "substantive" review of a proposed class-action settlement. But trying to draw that dividing line in MDL proceedings may prove quite tricky. If the deal looks like a terrific win for the plaintiffs, should the court be overly concerned about the peculiar manner in which it was negotiated? On the other hand, if the deal looks totally worthless, benefitting only counsel, should court be satisfied that the process used to reach it seems upstanding?

Separately, the idea of providing notice to plaintiffs raised concerns. In a class action, the court may decide to accept or reject a proposed settlement as "fair, reasonable and adequate." Class members can object, but the court can approve the settlement over their objections. Objectors can then appeal. But under (F) it seems as though the court is offering something one might liken to an advisory opinion. Plaintiffs can take it or leave it. If they take the court's advice and reject the deal, they may lose at trial. If they take the court's advice and accept the deal while others do not, they may regret their choice if those who rejected the deal end up with sweeter deals. Those possibilities exist with class actions also, but the absence of judicial authority to approve or disapprove the settlement makes the MDL setting seem markedly different.

(F) In actions transferred for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407, whether the parties should be directed to exchange basic information about their claims and defenses at an early point in the proceedings; and

(GF) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

There may be many other topics the court would consider under something along the lines of new Rule 16(b)(5) above. But it does not seem that defendants have a rightful seat at the table to discuss those topics, such as selection of leadership counsel, creation of a common benefit fund, judicial oversight of the conduct of the litigation by leadership counsel, or settlement.

The Rule 23.3 Sketch

The following is the Rule 23.3 sketch that has been included in several agenda books in the past. As noted above, the subcommittee is not inclined to pursue this "high impact" approach at present.

Rule 23.3. Multidistrict Litigation Counsel

(a)(1) *Appointing Counsel*. When actions have been transferred for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, the court may appoint [lead][15] counsel to perform designated [acts][responsibilities] on behalf of[16] all counsel who have appeared for similarly aligned parties.[17] In appointing [lead] counsel the court:

(A) must consider:

(i) the work counsel has done in preparing and filing individual actions;

(ii) counsel's experience in handling complex litigation, multidistrict litigation, and the types of claims asserted in the proceedings;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to the proceedings;

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) SETTLEMENT DISCUSSIONS. If an order under Rule 23.3(a)(1)(D) authorizes lead counsel to discuss settlement terms that [will? may?] be offered to plaintiffs not represented by lead counsel, any terms agreed to by lead counsel:

(1) must be fair, reasonable, and adequate;[18]

(2) must treat all similarly situated plaintiffs equally; and

(3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.

(d) ATTORNEY FEES.

(1) *Common Benefit Fees.* The court may award fees and nontaxable costs to lead counsel and other lawyers from a common benefit fund for services that provide benefits to [plaintiffs? parties?] other than their own clients.[19]

(2) *Individual Contract Fees.* The court may modify the attorney's fee terms in individual representation contracts when the terms would provide unreasonably high fees in relation to the risks assumed, expenses incurred, and work performed under the contract.

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

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

Videoconference Notes
MDL Subcommittee
Advisory Committee on Civil Rules
August 23, 2021

On August 23, 2021, The MDL Subcommittee of the Advisory Committee on Civil Rules held a meeting via Zoom. Participating were Judge Robin Rosenberg (Subcommittee Chair), Judge Robert Dow (Advisory Committee Chair), Judge Joan Ericksen, Ariana Tadler, Joseph Sellers, Helen Witt, David Burman, Prof. Edward Cooper (Advisory Committee Reporter), Prof. Richard Marcus (Subcommittee Reporter), and Julie Wilson (Rules Office).

Before the meeting, Prof. Marcus had prepared a variety of alternative rule proposals. Two of them looked to adding a new provision in Rule 16(b) for "MDL" or "complex" cases. Another was the sketch of a Rule 23.3 that has been circulated in the past. Finally, there was a proposal to add a change to Rule 26(f) to add consideration of a possible provision for "vetting" or a plaintiff fact sheet, or a "census" during the Rule 26(f) conference of the parties, an item also proposed to be added to Rule 16(b) as a matter for possible inclusion in a scheduling order. It was also noted that the Discovery Subcommittee may be considering adding something about privilege logs to Rule 26(f) or Rule 16(b), which might raise a concern about those provisions becoming overly long "laundry lists."

The materials for the call presented what might be called "low impact" and "high impact" methods of explicitly addressing management of MDL proceedings, and perhaps some settlement review in such cases, in the rules. The Rule 16(b) approach might be seen as "low impact," just a sort of nudge. The Rule 23.3 sketch, on the other hand, is more aggressive. But the choice is not only between these two approaches. There is also the possibility that the subcommittee might conclude that any rule provisions along these lines are not needed and possibly risky, so one conclusion might be to shut down this aspect of the subcommittee's work. But if that were the sentiment, there might be reason to retain at least the prompt about early exchange of information.

An initial reaction to the basic choice between "low impact" and "high impact" approaches was that the Rule 16/26 approach seems more promising. Judge Chhabria's very thoughtful opinion about the common benefit fund issues in the Roundup MDL [*In re Roundup Products Liability Litigation*, 2021 WL 3161590 (N.D. Cal., June 22, 2021)] points up a lot of things that relate to our discussions. One important one is that he seems to think that he may not have fully appreciated the long-term implications of his early orders, in particular in regard to the common benefit fund, until well into the litigation. Particularly given the broader pool of transferee judges and lawyers getting involved in MDL proceedings, there is much to be said for having something explicitly about them in the rules.

Another initial reaction was that at the recent Emory Complex Litigation Institute event about this set of issues, there seemed to be pretty broad opposition to adopting rules on this set of topics. Does it make sense to push forward in the face of such broad-based opposition? It seemed that a majority of the judges involved in the session, and all of the plaintiff lawyers involved were opposed. If we are to go forward, we better have a reason for proceeding. It may be that the wisest course is to shut down this part of the subcommittee's work, with the possible exception of the "vetting" or "census" topics.

One reaction to this concern was that the only amendment ideas that were on the table at the time of the conference were the "high impact" Rule 23.3 sketch. It may be that some of the uneasiness resulted from the possibly broad implications of that sketch. A less ambitious approach, like the "low impact" one sketched in the materials for this meeting, might produce a different reaction.

Another reaction was that the most recent Emory conference included attention to some hot topics that are no longer on our immediate agenda, such as a special rule for interlocutory appeals. Regarding settlement review, there was at least some judicial uneasiness. On the other hand, it is a current reality that MDL proceedings constitute a very significant proportion of the civil docket of the federal courts (some say nearly half of the cases). There is something to the idea that it's peculiar that the Civil Rules nowhere mention anything about more than a third of the civil docket; neither "multidistrict" nor "MDL" appears even once in the rules.

Beyond that, it also seems that MDL practices are evolving rapidly. It could even be said that the resources the JPML offers are somewhat dated. And the most recent edition of the Manual for Complex Litigation is 17 years old. Contemporary MDL proceedings are arguably quite different from those of the late 20th century that probably formed an important backdrop for the fourth edition of the Manual. So some recognition of the particular challenges of this sort of proceeding, and guidance in the rules about how to approach it, may be very helpful to judges and lawyers, particularly if they are new to the process. That could also be regarded as a response to those who contend that MDL proceedings operate outside the rules.

At the same time, nobody wants a rule that is really prescriptive. One question was whether any rule provision would be needed or useful at all. A comparison was offered. When the most recent changes to Rule 23 were under consideration, that subcommittee held a miniconference with very experienced judges, and lawyers from both the plaintiff and defense sides. At that event, several participants doubted the value of adding what might be called the "low impact" features of the topics then under consideration for Rule 23. They said "we do all that already; we don't need a rule to tell us to do those things." But a problem was that there are lots of other lawyers appearing in our courts who are not so familiar with these issues. For judges and lawyers, it can be quite important to appreciate the many implications of an order appointing leadership counsel. A rule provision with accompanying committee note can provide important guidance.

Another member agreed. It is somewhat unsettling that MDL cases constitute such a large proportion of the civil docket but get no mention at all in the rules. There would be a benefit to having some prompts in the rule book, and it would also be desirable (in terms of recognizing the major categories of federal court civil litigation) to get MDL proceedings into the rule book. But something like the Rule 23.3 sketch would run into problems with its detail and prescriptive nature. So that argues in favor of a milder treatment in the rules.

A softer treatment is not necessarily undesirable. Having important topics listed in the rules is a way to get the parties to focus on them. A rule need not make judicial action mandatory, or prescribe the content of that judicial action, to achieve a useful objective. It is easier to get attorneys to focus on these topics because they are mentioned in the rules, and Rule 16 is a good place to do that.

A concern was raised: As Rule 16 becomes a "kitchen sink" rule, the more we may deprecate things that are left out. That could be an undesirable consequence of adding some of these ideas to Rule 16.

Another member shared those concerns. In addition, if a rule change is to be made to Rule 16(b), it seems odd to say this rule is only about "Scheduling," which is the title to Rule 16(b). Rule 16(b)(3)(A) is about scheduling, and is mandatory except in categories of actions excepted from scheduling by local rule. But these changes are for Rule 16(b)(3)(B) and add a new Rule 16(b)(5). Like other things in 16(b)(3)(B), they are not really about scheduling at all. Maybe it would be a good idea to change the title of Rule 16(b) to include case management. Others agreed with this suggestion.

The discussion then shifted to the particulars of the Rule 16 proposals before the subcommittee. The first one offered the following new Rule 16(b)(5):

> **(5)** ***[MDL] {Complex] Cases***. In addition to complying with Rules 16(b)(1) and 16(b)(3), a court managing [cases transferred subject to coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407] {a complex case} [may] {should} [must] consider entering an order about the following at [the first] {an early} pretrial conference [in mass tort proceedings]:
>
> > **(A)** directing claimants to provide basic information about their claims at an early point in the proceedings;
> >
> > **(B)** appointing leadership counsel to represent claimants' interests, including specifics on the responsibilities of leadership counsel and any limitations on the activities of other claimant counsel;
> >
> > **(C)** addressing methods for compensating leadership counsel for their efforts that provide common benefits to claimants in the litigation;
> >
> > **(D)** providing for leadership counsel to make regular reports to the court about the progress of the litigation;
> >
> > **(E)** providing for reports to the court regarding any settlement of [multiple] {a substantial number of} [all] individual cases pending before the court; and
> >
> > **(F)** providing a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement subject to Rule 16(b)(5)(E) to claimants potentially affected by that settlement.

There followed questions about a variety of issues that proceeding down this line might involve.

The discussion during the subcommittee conference ranged among many issues raised by the Rule 16 sketch.

Discussion began with the issue of scope. Should a new rule be for MDL proceedings or instead for "complex" cases. It has been remarked frequently that there are many varieties of MDL proceedings. Some MDL proceedings involve a relatively small number of cases, and do not seem to need the sort of thing contemplated by this rule sketch. And provisions suitable to "mega" MDL proceedings may also be useful in other cases, such as toxic exposure cases with hundreds of named plaintiffs joined under Rule 20. Yet even the Manual for Complex Litigation has found it difficult to define "complex" cases. Given that one motivation for adoption of this rule is to include some recognition of the importance of MDL proceedings in the Civil Rules, it seems simpler to have the rule itself focus only on those. A committee note may certainly recognize that some such provisions may be useful in cases not subject to a transfer under § 1407. So the tentative conclusion was that the rule ought be limited to MDL proceedings.

Another starting point is the verb. The draft says "consider" but offers choices among "may," "must," and "should." The first seems superfluous — current Rule 16(b)(3)(B)(vii) ("include other appropriate matters") already says that. To say that the court "must" consider also seems curious. Rule 16(b)(3)(A) lists things the court must include in the scheduling order, but this new provision is not of that nature. And it may be that these topics are not suitable for many MDL proceedings. For example, antitrust, securities fraud, or data breach proceedings may not benefit from early exchange of information in the same way it could provide benefits in other sorts of proceedings. It seems that "should consider" provides the suitable guidance.

Regarding paragraph (A) in the sketch, the first question was about the use of the word "claimants." That's not a term used much in the Civil Rules at present. Usually one might think of them as "plaintiffs." One response was to point to such things as a registry of potential plaintiffs, but as of the early stages in the MDL proceeding, they are not yet actually plaintiffs. Another point was that in MDL proceedings, courts have sometimes directed that defendants provide plaintiffs with information (such as when and where they distributed certain products that might prove useful in the initial refinement of claims asserted by plaintiffs). So referring only to "claimants" might seem one sided. As the discussion proceeded, a possible revision of (A) emerged:

> directing the parties to exchange basic information about their claims and defenses at an early point in the proceedings

This reformulation received support, and the reaction that it sounded somewhat like the initial disclosure now required by Rule 26(a)(1)(A). That drew the point that "basic information" is much more nebulous than the initial disclosure rule, which is fairly precise and prescriptive about what must be turned over. That nebulous generality was favored as avoiding intrusion into the design of what is required in a given MDL. On this point, the possible parallel amendment to Rule 26(f) to call for the parties to begin discussing what should be exchanged as they discuss the discovery plan for the court before the Rule 16(b) order seemed desirable; asking the court to devise such a list without guidance seems unwarranted. The lawyers should address it first and tell the court what they concluded.

That led to discussion of when this direction from the court should occur. The draft offered alternatives — "the first" or "an early" — pretrial conference. The first pretrial conference might be too soon in many MDLs. Perhaps even saying an "early" pretrial conference might seem to

hurry things. One possible analogy was the provision inserted into Rule 23(c)(1)(A) in the 2003 amendments — "an early practicable time."

But that idea prompted concern. The 2003 amendment to Rule 23 was focused on a very different set of problems. Operating under the prior rule, some courts had concluded that they had to resolve class certification before addressing anything else in the case. Some courts even refused to entertain defense Rule 12(b)(6) motions to dismiss on the ground that they could not get to the "merits" before first resolving class certification. In some districts, one result was a local rule prescribing very short tether (perhaps 90 days after suit was filed) on class certification, sometimes not taking into account the very substantial discovery needed to make the certification decision ripe. That really is not the scenario contemplated by this sketch.

At a minimum, therefore, it would seem that the rule should not say this order should come at "the first" pretrial conference. Indeed, (D) might often lead to recurring pretrial conferences, perhaps at regular intervals. Having the parties begin the discussion of exchange of information during their 26(f) conference, and pursue the topic as the MDL matured, is probably the best way to go. Perhaps "an early" is best, as it suggests there will be more than one such case management conference and also that this is something deserving early attention. Much could be left to the committee note.

Discussion shifted to (F), which suggested that the court could advise claimants of its assessment of the fairness of the process leading to a settlement proposal. One question was whether this was some sort of advisory opinion. How would the judge have an adequate basis for reaching such a conclusion?

A response was that this is not about the judge "approving" the settlement. The MDL transferee judge is not in a position to do that, in terms of the merits of a particular deal. It was noted that class actions are very different from MDL proceedings in this regard. In a class action, the named class representatives may reach individual settlements with the defendant (particularly before class certification), and the unnamed class members may certainly reach settlements with the defendant. The judge has no authority to command any plaintiff to accept or reject a settlement.

Class actions are qualitatively different. Rule 23 itself gives the judge the authority and responsibility to pass on the settlement proposal by asking whether it is fair, adequate, and reasonable. If the judge thinks it is not, the judge can refuse to approve the settlement and it will not bind members of the class. And if the judge concludes the proposed settlement deserves approval, dissenting class members have no absolute right to exclude themselves if the opt-out time has already passed. (Under the 2003 amendments to Rule 23, the judge can condition settlement approval on providing class members a second opportunity to opt out.) Dissenters can object to the proposed settlement and appeal approval over their objections. Under the 2018 amendment to Rule 23(e)(5), they can cut a "side deal" with class counsel only if the district court approves that side deal. So in class actions the court has a prominent role to play. MDL proceedings are different; most or all plaintiffs and prospective plaintiffs have their own lawyers, and the judge cannot insist that they are bound by a settlement they do not like.

Attention turned to the appointment order addressed in (B). That order can specify the authority of leadership counsel (perhaps a better term than "lead counsel," which appears in the

Manual), which can include authority to conduct settlement negotiations. Some such orders also say that settlement proposals emerging from such negotiation should be submitted to the court for its review. One feature of that review might be to include a plan of allocation of settlement proceeds. If the subcommittee is uncomfortable with (E) and (F) in the sketch above, regarding settlement, perhaps the best solution is to fold those topics into (B) on appointment of leadership counsel.

Another comparison to class actions was offered. Even for interim class counsel, those seeking appointment often must submit an overall intended case development plan. In addition, often the applicant is to provide fee arrangements or expectations. These sorts of things are disclosed up front in class actions; doing so in MDL proceedings may serve a similar purpose and also recognize some authority of the court in regard to these matters. Maybe (B) in the sketch is the right place (along with a suitable committee note) to discuss these issues.

That view was seconded by an emphasis, in the settlement context, on the distinction between the settlement outcome (the deal) and the process by which it was reached. It is hard to disregard the fact that often the order authorizing a range of activities by leadership counsel also includes other provisions that might be said to tie the hands of non-leadership counsel. In doing so, the court should have some responsibility for monitoring the handling of the case. That may be what (D) is about, but it is surely important. In terms of appointing leadership counsel, it may be useful to include reference in the committee note to the possibility of a term of appointment or the need to get re-appointed after a set period, perhaps a year.

Attention turned to (C), regarding methods to compensate leadership counsel. The subject of common benefit funds has recently received very thoughtful and somewhat critical attention from Judge Chhabria in his *Roundup* opinion, cited above. That opinion raises some serious questions about how far the common benefit concept really extends, and whether 19th century common fund decisions (in cases in which the litigation activities of the lawyer seeking compensation created an actual fund) also apply in mass tort litigation in which the "fund" consists of a large number of individual or inventory settlements, and the court orders the defendant to hold back a portion of the settlement amount and contribute that portion to create the fund.

This set of issues may need time to emerge or evolve, so this is another reason not to say in the rule that all these topics should be included in an order entered after the first pretrial conference. Indeed, it may be that the dimensions of the overall litigation are not entirely clear at the early point when the court issues the order appointing leadership counsel. For example, on occasion it may be that most of the individual cases are (or are later filed) in state court. Though the federal court may in some ways be a "leader" in the management of the overall outburst of litigation, it may also be that the state courts in some states (*e.g.*, California and New Jersey) themselves have procedures like the Judicial Panel, and that state court judges overseeing such collections of litigation also intend to provide for compensation of leadership counsel they appoint. Having all that set in stone in the federal MDL up front sounds difficult to justify in some instances. This set of decisions should not be hurried.

Indeed, it may be that (D) is the right focus — ongoing interaction between the court and leadership counsel. Often "mega" MDLs involve recurring pretrial conferences, perhaps every

month, in which a variety of pending matters can be reviewed. This does not mean the entire construct must be set in stone at the outset.

This comment drew agreement. The common benefit order should be addressed later, but it links back to the initial appointment of leadership counsel. Some initial attention to methods of compensation may be appropriate at the outset, but hard details should not be rushed. The timing is delicate. The rule sketch says the court ought to consider "addressing methods for compensating leadership counsel." That does not say that a precise order laying out those methods ought to be part of the initial management scheme.

This discussion called attention back to the headings of the subdivisions of Rule 16. Presently Rule 16(b) is entitled "Scheduling," though existing provisions surely go beyond that. Perhaps the heading should be expanded: "Scheduling and Case Management."

Perhaps alternatively, it was suggested, the new provisions we are discussing should be added to Rule 16(c), which seems broader. But a reaction was that (c) seems focused on later activities, and many of the matters we are currently discussing should be addressed up front. Many of the specifics in (c) are suitable for discussion much later, perhaps years later. Some specifically are about the management of the trial, such as (M) (ordering a separate trial), (N) (determining the sequence of presentation of evidence at trial), and (O) (establishing a time limit for presentation of evidence at trial). Getting leadership appointed, arranging for the early exchange of basic information, and beginning to address compensation of leadership counsel really should be up front or a long time before these other matters, which is what Rule 16(b) is about.

Returning to (C) in the sketch, it was observed that although addressing methods of compensating leadership counsel seemed important up front, it might be troublesome to add "for their efforts that provide common benefits to claimants in the litigation." As Judge Chhabria's order explores, it may often be difficult to be certain what efforts of leadership counsel in the federal MDL confer what benefits on the clients of other lawyers. In the Roundup cases, there were three verdicts against defendant, but two of them came from the California state courts, and one from the MDL proceeding before Judge Chhabria. Adding this phrase may be inviting trouble. The conclusion in light of the concern was that the phrase should be carried forward in brackets to make it clear that the subcommittee entertains concerns about whether something of the sort should be in a rule. Leaving it out does not mean that the problem will go away, but may be preferable to inserting it into rule language.

Attention turned to (D) in the sketch. This is pretty innocuous, but may be very important to effective case management. Perhaps it would be better to say the court should consider regular case management conferences, but the basic idea deserves mention. The rule sketch says the court "should consider entering an order" doing the things listed in (A) through (F). It does not say the court must do that, but only that it should consider doing that.

Returning to (E) and (F), regarding settlement proposals and the court's possible evaluation of the process used in producing those proposals, much support was expressed for folding those issues into (B), as a part the court's approach to settlement authority and the court's review more generally of the efforts of leadership counsel. Asking the court to offer plaintiffs an opinion about, in effect, whether to accept or reject a settlement in light of the process by which the proposal was

reached could backfire. Suppose the court advises plaintiffs that the settlement process looks "questionable," and most do not accept the settlement. If they then lose at trial, how does the court's role look to them? This could be dangerous territory. Instead, something in a committee note to (B) seems superior.

Moreover, this approach seems to come close to directing the federal courts to take the initiative in enforcing professional responsibility obligations imposed by state professional responsibility requirements, not the Federal Rules. Maybe some state courts have a greater role in supervising counsel before them and attending to compliance with state rules of professional responsibility. Federal courts are not at ease in taking on such responsibilities.

But these comments apply more forcefully to (F) than to (E), for the evolution and management of settlement is a natural part of overall case management, not only in MDL proceedings but in many cases. In the MDL setting, however, it comes freighted with the additional role of the court's imprimatur in appointing leadership counsel and (often) constraining the activities of other plaintiff counsel. It may be sensible to retain (E) in brackets, but drop (F).

Discussion shifted to the Rule 23.3 sketch. The subcommittee is clearly uncomfortable with something as ambitious as this sketch. But at least a part of it might be inserted into (B) of the Rule 16(b)(2) sketch: "lead counsel must fairly and adequately discharge the responsibilities designated by the court." That rule provision seems almost implicit in the appointment of leadership counsel.

Another suggestion was that it might be good for the rule or a committee note to (B) to say something about the role of leadership counsel as being to "represent claimants' [or plaintiffs'] interests." That might seem to step close to the line of a court appointment of a lawyer to represent people who already have their own lawyers. But the thought could perhaps be retained.

Discussion then turned to the proposal to add the early exchange of "basic information" to Rule 26(f) as well as to Rule 16(b). This provision requires the parties to discuss and advise the court of their views on what "basic information" should be exchanged. The idea is (a) that asking the court to address this set of issues under Rule 16(b) is likely dependent on the parties first discussing them, (b) that even though good lawyers would probably do this anyway, it is valuable to include this provision in a rule package, and (c) that the nebulous nature of "basic information" recognizes that the specifics for any MDL proceeding need to be tailored to that proceeding, and probably must be designed by counsel rather than imposed by the court. Finally, one could add (d) that such a provision is a prod for lawyers who might otherwise resist getting into this subject during the 26(f) conference. Current Rule 26(f) says the discovery plan "must state the parties' views" on the listed subjects. Adding this feature here is consistent with the idea that this provision is not just a screening mechanism but also a "jump start" for discovery.

The discussion returned to the delicacy of the court's role in appointing leadership counsel. This appointment may occur in MDL proceedings that also include proposed class actions. There may be an appointment of interim class counsel in regard to the class action features of MDL proceedings. Can that appointment be somebody different from leadership counsel? If leadership counsel are appointed and a motion to certify a class is later made, can that be somebody other than leadership counsel? Perhaps these provisions are joined at the hip.

Moreover, there may be a difference between the Rule 23 situation and the MDL proceeding. In a class action, class members can usually opt out. But there is no opt out in an MDL proceeding. Yet from the perspective of the lawyers not appointed to leadership roles, it may often be that they say "the client appointed *me*," not the lawyer chosen by the judge. Finally, with regard to class actions, we must keep in mind that the PSLRA itself imposes constraints on the court's appointment of class counsel and instead leaves that choice to the lead plaintiff, who is not selected by the court but chosen on the basis of having the largest claim. All in all, there is a serious risk of chaos in a case that involves all these moving parts. We cannot make that go away, but we should have it in mind going forward.

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The meeting concluded with the goal of presenting the initial thoughts of the subcommittee to the full Committee during the October 5 meeting. The March 24 Emory conference, and this Zoom meeting, have achieved a great deal in putting some ideas aside and identifying serious concerns about others. It has also identified some that seem potentially promising, while tentatively deeming others less promising.

Given the shortness of time before the agenda book materials are due for the full Committee's October 5 meeting, Prof. Marcus is to prepare a revised rule sketch. The Rule 23.3 sketch should be an Appendix to the agenda report, but the report should make it clear that the subcommittee is not inclined to pursue that more aggressive possibility. At the same time, as the extensive discussion during the meeting has disclosed, there are many other issues presented by even the "low impact" approach. Subcommittee members are likely not presently of one mind about all those issues, and they may express their views to the full Committee during the October 5 meeting.

TAB 9

9. REPORT: DISCOVERY SUBCOMMITTEE

The Discovery Subcommittee has been busy since the full Committee's April meeting. It has held two meetings via Teams, has received abundant comment on the privilege log issues it is considering, and has also received a research memo from the Rules Law Clerk on standards used in different circuits that bear on the other issue the subcommittee is considering — filing under seal in civil cases.

The appendix to this report includes the following:

- Notes of the subcommittee's August 26, 2021 videoconference
- Notes of the subcommittee's May 24, 2021 videoconference
- Invitation for comment on privilege log issues
- Summary of comments on privilege log issues
- Rules Law Clerk's memorandum on circuit standards for filing under seal (July 15, 2021)

On both the issues the subcommittee is currently considering, it is expecting to have more information by the time of the full Committee's October 5 meeting but does not have that information in time to include in the agenda book. Accordingly, this agenda report is an effort to acquaint the full Committee with the issues presented and also to identify some rule approaches that the subcommittee has discussed while awaiting further information. The subcommittee invites feedback from the full Committee.

Privilege Logs

The Committee received two strong recommendations that it revisit Rule 26(b)(5)(A), adopted in 1993, requiring that parties withholding materials on grounds of privilege or work product protection provide information about the material withheld. Though the rule did not say so and the accompanying committee note suggested that a flexible attitude should be adopted, the report was that many or most courts had treated the rule as requiring a document-by-document log of all withheld materials. One suggestion made was that the rule be amended to make it clearer that such listing is not required, and another was that the rule be amended to provide that a listing by "categories" be recognized as sufficient in the rule.

In May, the subcommittee concluded that it should seek more information about experience under the current rule. *See infra* notes of the May 24 videoconference. Accordingly, at the beginning of June, the invitation for comment included in this agenda book was posted. That invitation produced more than 100 thoughtful comments reflected in the summary included in this agenda book. In addition, the National Employment Lawyers Association organized an online discussion with its members for the subcommittee on July 6, 2021, which provided many valuable insights. One aspect of this commentary deserves mention here, though it should be apparent from a review of the summary of comments in this agenda book — there appears to be a recurrent and stark divide between the views of plaintiff counsel (who worry that a rule change could enable defendants to hide important evidence) and defense counsel (who stress the burdens of preparing privilege logs and say they are rarely of value).

As a result of all this input, the subcommittee now has a much improved understanding of the issues presented. But before the October 5 meeting of the full Committee, it expects to receive more input from two additional events:

- On Sept. 20, 2021, the Lawyers for Civil Justice will hold an online Symposium on the Modern Privilege Log that most subcommittee members hope to "attend"

- On Sept. 22-23, 2021, Jonathan Redgrave and retired Magistrate Judge John Facciola have organized a Symposium on the Modern Privilege Log that many subcommittee members hope to "attend"

It may well be that the members of the subcommittee who are able to attend these events will be able to provide reports on the additional input these events have provided. Since more input is coming, this report is necessarily tentative. Nevertheless, it is designed to introduce the issues as now understood.

The subcommittee's discussion on August 26 focused on a variety of rule change possibilities. Various subcommittee members expressed differing attitudes toward these ideas (as reflected in the notes included in this agenda book), so none of them is presented as a subcommittee preference.

Perhaps it is useful to begin by presenting the original proposed addition to Rule26(b)(5)(A) submitted by LCJ:

> If the parties have entered an agreement regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim of privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

In early August, LCJ submitted a more extensive proposal to amend the rule, which is included in this agenda book as an appendix to the summary of comments. For the present, it bears noting that the LCJ proposal focuses on party agreements, leading the subcommittee to focus on Rule 26(f) and Rule 16(b), which might be the natural place to locate a rule provision designed to consider such an agreement and call it to the court's attention.

<u>Rule 26(f)/16(b) Approach</u>

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties' discovery plan must state the parties' views on:

> (D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the method to be used to comply with Rule 26(b)(5)(A) and</u> — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the scheduling order may;

> (iv) include the method to be used to comply with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

These changes could support a committee note explaining that the parties and the court can benefit from early discussion, with details, of the method to be used for creating a workable privilege log. The note might also stress the value of early "rolling" privilege log exchanges and warn against deferring the privilege log exchange until the end of the discovery period. It might also stress the value of early judicial review of disputed privilege issues as a way to provide the parties with detailed information about the court's view on what privilege does and does not apply to. The parties can then govern their later handling of privilege issues with that knowledge.

This approach can be supported on the ground that it is desirable to prod the parties and the court to attend to the privilege log method up front. Several members of the subcommittee reported that serious problems can develop when privilege logs are not forthcoming until near the end of the discovery period, and disputes about them or about what was withheld therefore had to be addressed at that time. A prompt in a committee note in favor of production of a "rolling" privilege log might also be desirable.

One thing the parties might address in their Rule 26(f) conference, and the court might include in a Rule 16(b) scheduling order would be categories of materials that need not be listed. subcommittee discussion has suggested that often communications with outside counsel dated after the commencement of the litigation might be a category exempted from listing on a log. Another category that has been discussed within the subcommittee is that any documents produced in redacted form need not also be listed in the log since it will be apparent from the face of the redacted documents that portions have not been included.

This Rule 26(f) approach allows the parties to tailor any categorical exclusions or methods of reporting withheld materials to their case. It bears noting that some comments received asserted that some parties seem to route communications through in-house counsel, or copy them on communications, in situations in which no privilege really applies. Some who commented claim that this is a subterfuge designed to conceal evidence. Presumably that sort of misgiving could be explored in conferences of counsel

Another feature of this approach is that the nature of privileges may vary significantly in different types of federal court litigation. It may be that the original submissions to the Committee were principally concerned with what might be called commercial litigation. But comments submitted in response to the invitation for comment emphasized that very different issues often exist in other types of litigation. One example involves suits for violation of civil rights due to alleged police use of excessive force. Various sorts of privilege that may be invoked in such litigation — internal review privilege or informer's privilege, for example — are quite different from the attorney-client and work product protections. Another example is medical

malpractice litigation, which may involve peer review, confidentiality of medical records, and other privileges that do not often appear in typical commercial litigation.

Another topic that is mentioned in many of the comments and has come up in subcommittee discussions is the possibility that technology can facilitate creation of a log. It does seem that technology can now sometimes ease the task of preparing a log, perhaps even make it a "push the button" exercise to produce a "metadata log." But subcommittee members' experience has been that this possibility has not proved a cure-all for privilege-log disputes. To the contrary, attempts to use technology to generate logs too often produce disputes between counsel. After a period of disputing, the technology "solution" is abandoned in favor of document-by-document logs. All of this can generate more work for the court.

Perhaps, if the parties carefully considered this high tech possibility during their Rule 26(f) conference and presented the judge with either an agreed method or their contending positions on how it should be done the court could, early in the litigation, direct use of a method that seemed effective, and also direct that an initial logging report using that method be presented fairly promptly so that if further disputes occurred they could be addressed in a timely fashion.

All in all, then, it may be that adding this topic to the Rule 26(f) discussion may provide needed flexibility that takes account of both the nature of the privileges likely to be invoked and the nature of the litigation and the litigants. And calling the court's attention to it in relation to the Rule 16(b) scheduling order may pay dividends.

- Introducing a Categorical Approach into Rule 26(b)(5)(A)

We are told that many or most courts regard the current rule as requiring document-by-document listing. Some comments have urged that the rule be amended to state an explicit requirement of such a listing in every case. The subcommittee is not currently enthusiastic about that idea. But as noted above, there may fairly often be categorical methods to reduce the burden of satisfying the rule in light of the particulars of a given case. With or without amendments to Rule 26(f) and 16(b), it would be possible to amend Rule 26(b)(5)(A) itself to suggest alternative means of satisfying the rule. Here are sketches of some alternatives:

Alternative 1:

> (ii) describe for each item withheld — or, if appropriate, for each category of items withheld — the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Alternative 2:

(ii) describe the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. The description may, if appropriate, be by category rather than a separate description for each withheld item.

Alternative 3:

(ii) describe the nature of the categories of documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privilege or protected, will enable other parties to assess the claim.

Such rule changes would counter contentions that the rule requires an itemized listing in all cases, by introducing into the rule the alternative of a categorical listing. That could provide desirable flexibility for courts that feel they are currently compelled to require document-by-document logging.

Focusing first on Alternatives 1 and 2, these approaches leave at least two things uncertain. First, when one says that the rule can be satisfied by a listing by "category," it does not say anything about what would be a "category." Consider a "category" discussed during the subcommittee's Aug. 26 meeting: "materials protected by the attorney-client privilege or as work product." One could certainly say this is a category. But if it would suffice, it's difficult to see how it would differ from the pre-1993 "general objection" that "respondent will not produce any materials privileged under the attorney-client privilege or protected as work product." And one goal of the 1993 change was to move beyond that sort of Delphic general objection.

On the other hand, the amended rule would still say that the description must "enable other parties to assess the claim." Perhaps that rule provision suffices to avoid a return to the pre-1993 situation. But if the description is only by category it is difficult to see how that protects against untoward results.

And (unlike the Rule 26(f)/16(b) approach) this approach does not deal with the timing concern that the subcommittee has addressed. The amendment would not itself say anything about when the categorical privilege log was presented, or whether it should be done on a rolling basis. So this approach would not provide much protection against the appearance of a major dispute just as the discovery period was ending.

Alternatives 1 and 2 also do not say what does or does not constitute a "category." In a given case, the parties may be able to negotiate categories suitable to their case; however, standing alone, this rule change would seem to permit the responding party unilaterally to declare the categories it is using.

Finally, Alternatives 1 and 2 say a categorical approach is suitable only if it is "appropriate." That raises a serious question about who decides whether it is appropriate, and when. If it's the producing party, and the use of a categorical approach emerges only at the last

moment, that seems a recipe for disputes. Several comments asserted that, despite the current rule and the supposedly widespread interpretation that it requires document-by-document logs, many plaintiffs can't get defendants to provide any type of log until they file motions to compel, and then they are presented with categorical logs that they find inadequate. It is difficult to know how general this experience is, but the reports suggest there is something to the concern.

So making such changes might, standing alone, produce difficulties. But if the Rule 26(f)/16(b) changes were made, adding this change could create new problems that don't currently exist, or worsen problems that already exist, if it were treated as enabling the responding party to decide what to do unilaterally.

Alternative 3 goes farther yet. It says using a categorical approach satisfies the rule, though with the qualifier that it be done in a manner that will "enable other parties to assess the claim." It does not say the rule only permits this option when "appropriate." And it might undercut the Rule 26(f)/16(b) approach by declaring that categorical listing is presumptively sufficient.

- Adopt a Categorical Exclusion Approach in Rule 26(b)(5)(A) Itself

The discussion above assumes that the rules would not themselves specify what "categories" of materials are exempted from disclosure under Rule 26(b)(5)(A). One possibility might be:

Alternative 1:[4]

> (ii) describe the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. Communications between a party and its [litigation] {outside} counsel [[created} {dated} after the commencement of the action] need not be described, or materials produced in redacted form.

Alternative 2:[5]

> (ii) describe the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. But items created or dated after the filing of the first complaint in the action need not be described.

Such an approach could avoid some of the pitfalls produced by the invocation of the indefinite categorical approach suggested in the previous section of this report. It would specify

[4] This idea was included in the materials for the subcommittee's August 26 Teams meeting.

[5] This alternative is modeled on LCJ's submission in early August. It is not the same as the original LCJ proposal, and is offered solely for illustrative purposes.

what categories need not be listed in the rule, and therefore those categories would not depend on party agreement or unilateral action by the producing party.

Given the recurrent assertions in the comments in response to the invitation for comment from plaintiff lawyers saying that some companies routinely route materials through in-house counsel as a way to shield them from discovery, one might insist on limiting Alternative 1 to "litigation counsel." If there are in-house lawyers whose role is not limited to providing legal advice, it would not seem that all communications with those in-house lawyers should be per se excluded. That might be ameliorated by limiting this provision to "litigation" counsel. But perhaps in-house counsel are in fact handing the litigation, or partly handling the litigation. So perhaps one would limit this exclusion to "outside" counsel.

Both formulations focus on timing — in general regarding materials created or dated after the commencement of suit. One might phrase that in different ways. Alternative 2 might be hard to apply in an MDL proceeding with hundreds of cases. Alternative 1 might be susceptible to the same problem if discovery was sought in an action filed two years after the first filing centralized in the MDL. All the items pre-dating the filing of the most recent suit would seem to be caught up in this formulation.

Alternative 2 does not focus only on communications with counsel or involving counsel acting as such. Might there be a risk that a party would conclude that anything created after suit was filed is exempt from listing? Maybe it's reasonable to assume that everything created after suit is filed is somehow "in anticipation of litigation." But that seems unlikely in large organizations with regard to post-filing communications about the matter in suit. Consider, for example, email between supervisors about a discharged employee after the employee sued claiming the discharge was discriminatory. Since materials withheld on claims of privilege must to some extent be relevant (or they could be withheld as non-responsive), it seems odd to treat the fact they were created after the suit was filed as exempting them from disclosure. This could often prove to be overbroad.

Adding "or dated" to "created" might be challenged as inviting post-dating of materials. Though that may sound unlikely, it may be that a computer file is re-dated whenever it is opened and saved. Does that mean that it is exempted?

A different concern with focusing on whether the materials post-date the filing of the action is a possible pro-defendant bias. To comply with Rule 11, plaintiff lawyers are required to make a reasonable investigation before filing suit. If they do so, should they be required to list all the items they created, while defense counsel hired after suit was filed is protected from doing that due to the exemption? Perhaps that's just the way of the litigation world, but it might attract criticism in a rule. This concern can be overstated; defendants may often begin their litigation preparation before suit is filed.

This brief discussion probably only scratches the surface of the difficulties the subcommittee could face in devising rule descriptions to exempt materials from disclosure. As a subcommittee member put it during the Aug. 26 online meeting, it looks very difficult to identify categories that could be "baked into" the rule.

* * * * *

As noted at the outset, the subcommittee fully expects to receive valuable additional input about these issues during the symposia in the third week of September. But this report will hopefully identify at least some of the ongoing issues.

Sealed Court Filings

Several parties — Prof. Volokh, the Reporters' Committee for Freedom of the Press, and the Electronic Frontier Foundation — submitted a proposal to adopt a new Rule 5.3, setting forth a fairly elaborate set of requirements for motions seeking permission to seal materials filed in court.

The submission asserted that it is universally, or almost universally, recognized that the showing required to justify filing under seal is very different from the standard that supports issuing a Rule 26(c) protective order regarding materials exchanged through discovery. Research done by the Rules Law Clerk (included in this agenda book) confirms that report. Filings may be made under seal (unless that is required by statute or court rule) only on a showing that sufficiently addresses the common law and First Amendment rights of public access to court files.

Proposed Rule 5.3 also had a number of features that do not apply to most, or any other, motion practice. It seemed to propose that motions to seal be posted on the court's web site or perhaps on a shared website for many courts, rather than only in the file for the case in which the motion was filed. It provided that, unlike other motions, motions to seal could not be decided until at least seven days had passed since such posting had occurred.

The proposal also asserted that local practices on motions to seal diverged from district to district. That led to research about a "sample" of local rules — the ones applying in the nine districts "represented" on the Advisory Committee. There is no claim that these local rules are "representative" of local rules on sealing in other districts. But it is clear that the local rules in these nine districts differ from one another. It is also clear that many features of proposed Rule 5.3 differ from provisions in the local rules of at least some of these districts, and that if the proposed rule were adopted portions of the local rules in each of those districts would become invalid under Rule 83(a)(1).

As with the privilege log issues, a recent development suggests that this report can only introduce pending issues rather than presenting the subcommittee's views. The subcommittee has learned that the Administrative Office of the U.S. Courts (AO) has begun a study of sealed filings, but it does not have details on that study. It is hoped that by the time the Advisory Committee meets on October 5 there will be more information available.

There may be reason to defer thought of adopting a new Civil Rule if the AO is addressing sealing issues more broadly. Considering that one of the proponents of a new rule is the Reporters' Committee, one might suggest that media interest in filings in criminal cases might be stronger than the interest in civil cases. And sealing of matters related to criminal cases may be more pervasive. For example, a Federal Judicial Center (FJC) study of "sealed cases" about 15 years ago showed that a great many of those were miscellaneous matters opened for

search warrant applications that did not lead to a prosecution. Though technically they should not have remained sealed after the warrant was executed, they were not unsealed.

It also may be that — particularly to the extent sealing issues depend on the internal operations of clerks' offices — it may be more appropriate for a body other than the rules committees to take the lead on those issues. The Court Administration and Case Management (CACM) Committee comes to mind.

Thus, it seems that the matter now before this Committee might be divided into two somewhat discrete subparts — (a) adopting rule amendments recognizing in the rules the distinctive requirements for sealed filings in civil cases and distinguishing those requirements from the more general protective order practice, and (b) adopting nationally uniform procedures for handling motions for leave to file under seal.

Before turning to those two issues, it is useful to add some information provided by Judge Boal, who consulted informally with other members of the Federal Magistrate Judges Association Rules Committee, of which she is a member (and former co-chair), and from Susan Soong (our clerk liaison) based on some inquiry among court clerks. Both these reports were based on informal inquiries, but they may shed light on the issues presented here.

Judge Boal reported that the magistrate judges she consulted saw frequent motions to seal, but did not think they had seen notable increases in the frequency of such motions, though they also thought that there are too many of these motions. It appears that the various circuits have developed their own bodies of case law applying the common law and First Amendment standards in different sealing contexts. So circuit law is the source of guidance on the standards for deciding whether to grant a motion to seal. Though these circuit standards are not identical, they all differ from the "good cause" standard for a Rule 26(c) protective order. But there seemed no reason for rules to address these distinctive circuit approaches to the standards for sealing under the common law and First Amendment rights of public access. There was, however, some support for considering a uniform set of procedures for handling motions to seal. Those procedures vary widely under the local rules of different courts. The most productive rulemaking goal might be to focus on procedures for presenting sealing requests, notifying parties and non-parties, and providing a mechanism for objection to proposed filing under seal and for unsealing previously sealed materials. Though these reactions were informal (compared to the formal comments about privilege issues submitted by the FMJA), they were instructive for the subcommittee.

Susan Soong made informal inquiries of other court clerks, and found that the general view seemed to be that there is nothing about motions to seal that calls for any distinctive treatment of those motions. Indeed, it might be that singling out such motions for additional handling in the clerk's office would potentially burden court clerks. For example, these motions — like all motions — can be made available on PACER. That would not require any distinctive treatment in the clerk's office. Her inquiries also confirmed what others have said — that practices on motions to seal (and probably on other motions) vary among districts. It is not easy to say for certain why these differences exist; they may be a result of judge preferences, historical practices, the fact that different courts have caseloads of different types, and the different approaches of various courts to managing discovery. As with the informal reactions

from magistrate judges, these views were instructive for the subcommittee in regard to possible rulemaking addressing the procedures for motions to seal.

Recognizing the Different Standards

A relatively simple pair of rule changes could confirm in the rules what we have been told about actual practice:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(c) Protective Orders.

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(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

The committee note to such a rule could simply state that the standard for sealing materials filed in court is different from the standard for issuing protective orders under Rule 26(c)(1).

Uniform Procedures on Motions to Seal

The FMJA suggestions were that the standard for sealing remain as directed by the various circuits but that rulemaking attention should focus on adopting more uniform procedures for doing deciding motions to seal. It is relatively apparent that the procedures are not uniform now. Indeed, the N.D. Cal. has had an entirely new local rule changing its procedures out for comment during August.

More generally, it's likely that there are differences among districts on how to handle other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion papers to 25 pages in length, and provide specifics on what motion papers should include. Oppositions are due 14 days after motions are filed and also subject to length limitations. There is also a local rule about seeking orders regarding "miscellaneous administrative matters," perhaps including filing under seal, which have briefer time limitations and stricter page limits.

In all likelihood, most or all districts have local rules of this sort. In all likelihood, they are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal should be handled uniformly nationwide if other sorts of motions are not.

One reason for singling those motions out is that common law and constitutional protections of public interests bear on those motions in ways they do not normally bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files a motion for something the other side will oppose it. But it may sometimes happen not only that neither side cares much about the public right of access to court files, but that both sides would rather defeat

or elude that right. So there may be reason to single out these motions, though it may be more difficult to see why notice periods, page limits, etc. should be of special interest in regard to these motions as compared with other motions.

A different set of considerations flows from the reality at present that local rules diverge on the handling of motions to seal. At least sometimes, districts chafe at "directives from Washington." There have been times when rule changes insisting on uniformity provoked that reaction. Though this committee might favor one method of processing motions over another, it is not clear that this preference is strong enough to justify making all districts conform to the same procedure for this sort of motion.

Without meaning to be exhaustive, below are some examples of issues that might be included in a national rule designed to establish a uniform procedure:

Procedures for motion to seal: The submission proposes that all such motions be posted on the court's website, or perhaps on a "central" website for all district courts. Ordinarily, motions are filed in the case file for the case, not otherwise on the court's website. The proposal also says that no ruling on such a motion may be made for seven days after this posting of the motion. A waiting period could impede prompt action by the court. Such a waiting period may also become a constraint on counsel seeking to file a motion or to file opposing memoranda that rely on confidential materials. The local rules surveyed for this report are not uniform on such matters.

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that "confidential" materials be filed under seal? In at least some instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designated materials they produce "confidential" and subject to the terms of the protective order. It is frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

Provisional filing under seal: Some local rules permit filing under seal pending a ruling on the motion to seal. Others do not. Forbidding provisional filing under seal might present logistical difficulties for parties uncertain what they want to file in support of or opposition to motions, particularly if they must first consult with the other parties about sealing before moving to seal. This could connect up with the question whether there is a required waiting period between the filing of the motion to seal and a ruling on it.

Duration of seal: There appears to be considerable variety in local rules on this subject. A related question might be whether the party that filed the sealed items may retrieve them after the conclusion of the case. A rule might also provide that the clerk is to destroy the sealed materials at the expiration of a stated period. The submission we received called for mandatory unsealing

Procedures for a motion to unseal: The method by which a nonparty may challenge a sealing order may relate to the question whether there is a waiting period between the filing of the motion and the court's ruling on it. A possibly related question is whether there must be a

separate motion for each such document. Perhaps there could be an "omnibus" motion to unseal all sealed filings in a given case.

Requirement that redacted document be available for public inspection: The procedure might require such filing of a redacted document unless doing so was not feasible due to the nature of the document.

Nonparty interests: The rule proposal authorizes any "member of the public" to oppose a sealing motion or seek an order unsealing without intervening. Some local rules appear to have similar provisions. But the proposal does not appear to afford nonparties any route to protect their own confidentiality interests. Perhaps a procedure would be necessary for a nonparty to seek sealing for something filed by a party without the seal, or at least a procedure for notifying nonparties of the pendency of a motion to seal or to unseal.

Findings requirement: The rules do not normally require findings for disposition of motions. *See* Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or Rule 56). There are some examples of rules that include something like a findings requirement. *See* Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction). The rule proposal calls for "particularized findings supporting its decision [to authorize filing under seal]." Adding a findings requirement might mean that filing under seal pursuant to court order is later held to be invalid because of the lack of required findings.

Treating "non-merits" motions differently: The circuits seem to say different things about whether the stringent limitations on sealing filings apply to material filed in connection with all motions, or only some of them. (This issue might bear more directly on the standard for sealing.) The Eleventh Circuit refers to "pretrial motions of a nondiscovery nature." *See infra* Rules Law Clerk's memo at 5. The Ninth Circuit seems to attempt a similar distinction regarding non-dispositive motions. *Id.* at 4. The Seventh Circuit refers to information "that affects the disposition of the litigation." *Id.* at 3. The Fourth Circuit seems to view the right of access to apply to "all judicial documents and records." And another question is how to treat matters "lodged" with the court.

No doubt there are others. For the present, the basic question is whether the subcommittee should attempt to devise a set of procedural features applicable to motions to seal. One thing to be kept in mind on this subject is that doing these things could require more aggressive surgery on the current rules than the simple changes noted above. Depending on what they are, these sorts of procedures might have to be housed in a new rule on "Motions to Seal." Perhaps that could be added to Rule 7(b). There might also be some difficulty defining motions to seal in a rule.

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As should be apparent, the subcommittee remains near the beginning of its process of examining these proposals. But it has already made considerable progress in clarifying issues and working through them. It looks forward to hearing the views of the full Committee on the matters before it.

Videoconference Notes
Discovery Subcommittee
Advisory Committee on Civil Rules
August 26, 2021

On Aug. 26, 2021, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Teams. Participating were Judge David Godbey (Subcommittee Chair), Judge Robert Dow (Advisory Committee Chair), Ariana Tadler, Joseph Sellers, Helen Witt, David Burman, Susan Soong (clerk liaison), Prof. Edward Cooper (Advisory Committee Reporter), Prof. Richard Marcus (Subcommittee Reporter), and Kevin Crenny (Rules Law Clerk).

Judge Godbey opened the meeting by noting that there are basically two sets of issues before the subcommittee — privilege logs and filing under seal. Both topics are explored in materials circulated by Professor Marcus before this meeting. On the privilege log question, the subcommittee also received more than 100 comments summarized by Professor Marcus; the summary was circulated before this meeting.

Privilege Logs

Although the subcommittee has already received abundant input, further input is expected during the third week of September. On September 20, the Lawyers for Civil Justice has organized a Zoom event that most members of the subcommittee hope to "attend." LCJ made the original proposal to review privilege log issues. Then it submitted a different proposed rule change with its comments, which is included in this agenda book as an appendix to the summary of the comments.

In addition, Jonathan Redgrave, who had also submitted comments about privilege log issues and has long provided helpful advice to the Advisory Committee, has organized (along with retired Magistrate Judge John Facciola) an online conference on September 22-23. Many subcommittee members hope to "attend" this online event.

Though more information is expected, the subcommittee began preliminary discussions of the possible amendment ideas circulated by Prof. Marcus. What might be called a low impact idea was to augment the treatment of these issues during the Rule 16(b) process and the Rule 26(f) meeting of the parties to formulate a discovery plan, as follows:

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties' discovery plan must state the parties' views on:

> (D) any issues about claims of privilege or of protection as trial-preparation materials, including <u>the method to be used to comply with Rule 26(b)(5)(A) and</u> — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the scheduling order may:

(iv) include the method to be used to comply with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

An initial reaction by one subcommittee member to the comments received, as well as the possible amendment ideas, was that the input the subcommittee has received has been very helpful. It certainly seems that people have divergent views, and also that there is a distinct split between what one might call the plaintiff and the defense sides. It will be valuable to hear what the participants in the events in the third week of September have to say about these issues.

Turning to the Rule 26(f)/16(b) approach, this member found the idea of prodding or requiring early discussion of how the privilege logs will be handled valuable. One thing is particularly important — to direct attention to these issues early in the litigation. Too often the production of a privilege log is left until the discovery period is almost over, and then there is little time to deal with disputes that may arise. Getting the court involved can be particularly important in terms of adopting a schedule for production of the log, which is in keeping with the focus of Rule 16(b) on a scheduling order. Often a rolling production of the log is desirable. Then issues may be addressed, and the parties can approach later privilege questions with reference to how the court handled the initial issues.

Another member agreed that a rolling exchange is very important; don't put this off until the end of the discovery period. Though it is premature for the subcommittee to attempt to reach a formal conclusion before we have heard from all we will hear from in September, this concern will likely endure.

Another member agreed that timing is a concern. It's usually best to address this early on, with a deadline. Otherwise the parties may let the matter slide, and then have conflicts if the producing party insists on a categorical approach. If one wanted to consider categories that might exempted from logging, two would be post-filing documents and documents produced but in redacted form. Nonetheless, it is not likely that there are categories we would want to bake into a rule, and this member is skeptical that efforts to devise rule categories of this sort will bear fruit.

Another member agreed about the importance of timing. This member was also amazed at the stark difference in attitude from those on the "plaintiff" and "defendant" side. This member is not receptive to the suggestion in some comments that the rule should explicitly require document-by-document listing in all instances. But we need more information. In particular, we need more information about whether or when producing a log that provides metadata can do most of the job. From this member's experience, when that method has been attempted, the other side is always unsatisfied with the resulting log. It would be very helpful to know what technology can now provide.

Turning to the possibility of a categorical log, another member called attention to a possible amendment to Rule 26(b)(5)(A)(ii) in the materials for the call:

(ii) describe for each item withheld — or, [if] {when} appropriate, for each category of items withheld — the nature of the documents, communications

> or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

This formulation makes it clear that the rule does not forbid a categorical approach. At least if this were done along with the 26(f)/16(b) approach discussed earlier, it could be useful in the parties' discussion about how the rule should be satisfied in a given case.

This idea drew a statement of concern from another member — putting that into the rule will encourage parties to push for a categorical approach, and might be read by judges to indicate that the rule favors that approach. It can be noted that the question when it is "appropriate" may itself be contentious. May the producing party unilaterally decide this would be appropriate? And what exactly does it mean to say disclosure may be by "category" of items. How about the following category: "materials covered by the attorney-client privilege or protected as work product"?

Another member suggested that if this approach were followed, it should be accompanied by a strong prod to discuss and resolve these issues well in advance of the discovery deadline.

The concern about what is a "category" returned. Sometimes the parties can agree that post-filing communications between a party and its outside counsel could be excluded from any log. But there is a considerable risk that some will read such a rule as meaning "all documents related to this topic."

Another member cautioned that these questions are so case-dependent that it would be very undesirable to have a rule tip the balance one way or another. This member fully agreed about the desirability of addressing, and hopefully resolving, these issues early in the discovery process.

It was observed that it seems there is another divide among the comments we have received. Most who oppose any change to the rule seem to focus on smaller cases. In those cases, a document-by-document list probably works fairly well. But the greatest concerns are probably in cases involved very large amounts of discoverable material.

Another reaction to the comments was that some even opposed adding this topic to the list of things to be discussed up front at the Rule 26(f) conference. That was surprising; why would anyone take that position? A possible answer was that there has long been some resistance to the whole idea of judicial management of litigation, and some regard Rule 26(f) and Rule 16(b) as simply placing obstacles in the way of parties that want to get to trial.

On this point, it was also noted that the MDL Subcommittee has also focused on these rules as offering a place to address issues of concern to that subcommittee. There might be some resistance to expanding this "laundry list" of matters for consideration, but there's a good argument that privilege logs and the issues of concern to the MDL Subcommittee are sufficiently important to be added to the list.

Returning to the idea of using categories, one concern might be that if this method can be used only when the other side consents it will not be very useful. It seems that the rule should somehow offer encouragement to give this less burdensome approach a try. Perhaps it would

suffice to put the idea of categorical reporting into a committee note in the 26(f)/16(b) package, but to the extent some read the current rule as requiring document-by-document listing committee note encouragement may not be sufficient. The 1993 committee note tried to make the point that document-by-document listing is not always required, but we are told that the rule has often been taken to require exactly that.

A response was that if the parties cannot agree in the Rule 26(f) process, the judge can approve the use of a categorical method tailored to the case during the Rule 16(b) process. So building it into the early discussion does not mean that each side is at the mercy of the other side.

Another point was raised about the comments received — they were not limited to the attorney-client privilege and work product protection. Those may be the main concern of many "big case" litigators, but the comments emphasize that there are a number of other privileges that can be the focus of discovery disputes. In cases involving alleged use of excessive force by the police, or in medical malpractice cases, other privilege claims may loom large. It is important for us to keep in mind the fact that our rules cover all sorts of cases, not only the ones usually handled by the lawyer members of the Advisory Committee.

Given the expected injection of further information during the conferences in September, it seemed that the subcommittee had exhausted the subject for present purposes. The report in agenda book should identify the issues and explain the concerns, but the subcommittee is not in a position to be taking a firm position on how to proceed before hearing from the participants in those September events. The agenda book must be completed before those events occur, but perhaps the subcommittee can meet after those events and determine then how best to make its presentation about privilege logs during the Oct. 5 full Committee meeting.

Sealed Filings

This set of issues was introduced as involving two somewhat distinct sets of concerns — whether to specify in the rules that there is a higher standard for filing under seal than for a protective order applying to materials produced through discovery, and whether it would be desirable not only to recognize that more demanding standard but also to prescribe procedures for deciding motions to seal.

Discussion turned first to whether it would be important in the rules to recognize something that the courts seem already to recognize — that "good cause" to support a protective order that a party who receives materials through discovery may use them only for the pending litigation (and perhaps related litigation) does not itself also support filing under seal for items deemed "confidential." Fairly often such protective orders are entered on stipulation, and permit the parties initially to designate materials confidential and subject to the protective provision of the order without the need for further court review, but with a method for a party that wants to challenge such a designation to do so.

Most materials designated "confidential" by the parties probably never find their way into court. But filing under seal raises different issues from those presented due to exchange through discovery. Until 2000 some discovery materials were supposed to be filed in court routinely (interrogatory answers and depositions with their exhibits, but not materials produced in response

to Rule 34 requests). In 2000, Rule 5(d)(1)(A) was changed to forbid filing unless the materials are "used in the proceeding or the court orders filing."

Court proceedings are public processes, and access to court files has long been recognized under the common law and also due to the First Amendment as open to the public. The public is entitled to monitor what its judges do, and can't really do that if the materials on which the judges rely are sealed. The materials for the call offered a way to recognize this difference in the rules:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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(c) Protective Orders.

* * * * *

(4) ***Filing Under Seal.*** Filings may be made under seal only under Rule 5(d)(5).

The committee note to such a rule could simply state that the standard for sealing materials filed in court is different from the standard for issuing protective orders under Rule 26(c)(1).

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

* * * * *

(5) ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified despite the common law and First Amendment right of public access to court filings.

The Rules Law Clerk's research memo shows that there are some variations in circuit statements of the standard for filing under seal. The idea of this proposal is not that the rule would somehow supersede those stated standards, but instead use general terminology invoking the common law and First Amendment rights to public access and leave the application of a given circuit's standard in place.

The other issue is whether (putting aside the standard), the national rules should prescribe national procedures for handling motions to seal. The national rules leave much to local arrangements regarding the handling of most motions. For example, they do not prescribe a notice period for motions. But the original rule proposal included a nationally-uniform rule forbidding a decision on a motion to seal sooner than seven days after it was filed. Perhaps, given the public interest in these motions, national uniformity of this sort is more important than local latitude. But it is worth noting that such a national rule would seem to forbid even an order shortening time on such a motion to fewer than seven days. Furthermore, the original proposal included a right for

any "member of the public" to challenge the sealing of a court filing. Perhaps a national rule with that feature would make more rapid resolution of the motion to file under seal more acceptable, since it would permit "after the fact" re-examination of the question.

A preliminary reaction was that it seems that even though there may be relatively broad agreement about the difference between the standard for permitting filing under seal, the mechanisms for addressing that question vary greatly from court to court, and perhaps from judge to judge.

The Federal Magistrate Judges Association expressed some receptivity to pursuing national uniformity on a variety of topics that were also raised by the submission the Committee received. Right now, one could say that the practices vary a lot. That may be frustrating to lawyers who practice in multiple jurisdictions.

Outreach about these issues among court clerks has revealed that the AO seems to be inaugurating a more general study of sealing of court files. The prospect of an AO project may be a reason to pause the subcommittee's efforts pending action by the AO.

The possibility of AO action suggested that a more comprehensive approach to sealing (not limited to civil cases) might be developed. Though sealed filings in civil cases are surely important on occasion, the issues with regard to sealed filings in criminal cases may be prominent more often. Moreover, the AO may be better equipped to develop methods of dealing with these issues. There have been some guidelines from the AO in the past on these subjects, but some of them seem rather dated. One says, for example: "Sealed records must be maintained separately from other records, in a secure area." That advice may still be pertinent to hard copy filings, but it is unlikely that hard copy filings constitute a significant proportion of the materials filed in court.

More generally, the work already done by the Rules Law Clerk on an arbitrary set of local rules on sealing — the local rules of the various districts "represented" on the Advisory Committee — showed that there were considerable differences among them. But the research was limited to the local rules of about 10% of the districts. So it may be that there are many additional differences. For present purposes, one main point is that any set of national rules about the mechanics of handling sealing motions would likely override at least some, and perhaps many, local rules. That could produce push-back in some quarters. And highly specific national rules might not be adhered to by all judges, or even all courts.

Moreover, these local rules sometimes are changing. The Northern District of California, for example, has put out a brand new local rule on sealed filings, with comments due in early September. This rewrite of the prior rule was so extensive that it was published as a replacement instead of a redline showing changes in the old rule.

There may also be valid reasons why practices differ in different courts. That's a legitimate concern that should be kept in mind.

For the present, however, an immediate concern is determining what the AO is doing about these issues. Divergent paths between the AO and the rules committee should be avoided.

One specific illustration was mentioned — "provisional" filing. The D. Minn. local rule permitted such filing before the court ruled on the motion to seal. One question is — what happens if the motion is denied? Can the party that filed the material take it back? Is the filing automatically made public without more? One reaction was that if you want to take the document back unless the motion to file under seal is granted, you better be very clear about that in your motion to seal. But having to get the sealing order before filing the material may be a major headache for a lawyer facing a filing deadline. That concern could produce resistance to a requirement for a pre-filing ruling from the court, particularly if (as recommended in the original submission) there be a minimum notice period of 7 days before the court can rule on a motion to seal.

Another concern is the interest of third parties who may have produced materials (in response to a subpoena, for example) based on an agreement that they were confidential and would not be made public. Somewhat similarly, there may be nonparty interests that seek access to sealed filings — the media may seek such access somewhat frequently. It could be that the media would more often be interested in filings in criminal cases.

More generally, the materials for the call identified a variety of other matters raised in the original submission to the Committee, including the duration of the seal, whether parties may retrieve sealed materials after the case file is closed, whether redacted documents should be publicly filed if only part were eligible for sealing, whether the court has to make certain findings, whether there are some "non-merits" filings that do not invoke a public right of access, and others.

For the present, the goal is to present the full Committee with the range of issues that might be addressed in a national rule, if it were to go beyond recognizing the different standard for filing under seal and granting a protective order regarding materials exchanged in discovery. By October 5, we may have better information on what the AO is doing and, if so, can inform the full Committee then.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

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> **(5)** ***Filing Under Seal.*** Unless filing under seal is directed by a federal statute or by these rules, no paper [or other material] may be filed under seal unless [the court determines that] filing under seal is justified despite the common law and First Amendment right of public access to court filings.

The idea is to use a generalized statement that encompasses the stated standards for filing under seal that prevail in all the circuits. The committee note could say that the goal is not to displace any circuit's standard nor to express an opinion about whether they really differ from one another. Instead, the goal is to reinforce the point in proposed Rule 26(c)(4) that the standard is different from the standard for granting a protective order. On that, it seems, all agree.

There are statutes (the False Claims Act, for example) that direct filing under seal, so the introductory phrase recognizes such directives. The additional phrase "or these rules" might seem

to create a potential problem — it might seem to be circular — if a protective order entered in accordance with these rules were sufficient to fit within the exception. But that would seem to violate proposed Rule 26(c)(4). And there are other rules that do explicitly authorize or direct filing under seal. *See* Rules 5.2(d) (filing under seal to protect privacy); 26(b)(5)(B) (party that received information through discovery the other side belatedly claims to be privileged may "promptly present the information to the court under seal for a determination of the claim").

Making changes such as these likely would not conflict with whatever the AO is doing or may be doing about filing under seal more generally. To the extent that filing under seal is limited by the common law or the First Amendment, it may be difficult for an AO policy to make it easier. Perhaps for policy reasons, an AO policy might make filing under seal more difficult to justify. But if it could do that presently, it likely could do so if the Civil Rules were so amended.

Another consideration here might be to proclaim by rule a nationally uniform standard for applying the common law and First amendment rights of public access to court filings. A rule could, for example, declare that the party seeking sealing bear the burden of justifying it in the face of common law and First Amendment limitations. (That would be somewhat consistent with the approach to deciding motions for a protective order — the moving party bears the burden of establishing good cause with a fairly specific showing.) Under Rule 26(c), there is no specific rule provision about burdens of proof, and it is likely that if this seemed a suitable topic to address it could be addressed in a committee note. This is not to say that sealing must always be granted if not forbidden on common law or First Amendment grounds. Those preclude the entry of a sealing order; a court may well decide that even if sealing is not forbidden in a given case, it is not warranted.

But there may be a distinct limitation on the extent to which a rule can, or should attempt to, regulate these matters. The First Amendment, for example, applies as it applies without regard to what the rules say.

The basic question on this point is whether there is any real value in this sort of rule change. If it adopts what the courts are already doing, it might be regarded as somewhat "cosmetic."

Videoconference Notes
Discovery Subcommittee
Advisory Committee on Civil Rules
May 24, 2021

On May 24, 2021, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Microsoft Teams. Those present were Judge David Godbey (Chair, Discovery Subcommittee), Judge Jennifer Boal, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Susan Soong (clerk liaison), Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter of the Discovery Subcommittee), Julie Wilson (Rules Office), and Kevin Crenny (Rules Law Clerk).

The meeting proceeded through the issues identified in the materials circulated before the meeting.

Privilege Logs

The focus of the discussion was on (a) techniques for outreach about privilege log issues, and (b) contours of possible rule provisions on which to solicit input.

Focusing on outreach efforts, one model was what was done with the CARES Act Subcommittee. Within a fairly abbreviated time period over the summer of 2020, the Rules Office was able to gather over 100 comments about possible emergency rule ideas.

Another route (not inconsistent) would be to reach out particularly to various organizations that have provided useful comments in the past. A starting point was provided by a list in the materials prepared for this meeting:

American Association for Justice
ABA Section of Litigation
American College of Trial Lawyers
ABCNY (now New Your City Bar Ass'n?)
IAALS (at University of Denver)
Lawyers for Civil Justice
Magistrate Judges Ass'n
National Center for State Courts
National Conference of Chief Justices
National Employment Lawyers Ass'n
Sedona Conference

One might appropriately expand this list to include the state bar associations to which the Rules Office sends notices of publication of preliminary drafts. Moreover, there are also local bar associations in addition to the ones listed above that may have an interest. There is also the Federal Bar Council.

More generally yet, the Rules Office has a Twitter account that can be used to invite reactions. It also has an email list with about 20,000 names on it.

Some organizations also have conventions or similar gatherings in the near future that might provide an occasion for soliciting input. AAJ, for example, has helpfully gathered members during its conventions to discuss various issues with the MDL Subcommittee, the Rule 23 Subcommittee, and the Rule 30(b)(6) Subcommittee. Its convention is coming up in July, and might be an occasion for an exchange with representatives of the subcommittee. NELA also has a convention, this one in June. There should be no inconsistency between efforts to obtain insights from these groups and the more general invitation for commentary.

Another source would be people who have written on the topic. For example, Judge Facciola and Jonathan Redgrave wrote an article on privilege logs about ten years ago. Another promising candidate would be Megan Jones of Hausfeld. Quite a few other articles have appeared in recent years, and the authors of those articles might well be included on any list put together for this outreach.

A concern was raised about reaching the portion of the bar that is not involved in really big cases. One way of looking at it is to recognize that there are "terabyte cases" and "gigabyte cases" and what one might call "ordinary cases." There may be considerable differences in attitude among lawyers who handle cases at different points on this spectrum. One possibility would be to reach out to the ABA Section for solo or small law firm practitioners. At least one view was that the privilege log problem is important principally in the gigabyte and terabyte cases.

Broad outreach might be important to gain insights on whether privilege log problems are limited to a relatively small sliver of litigation in the federal courts. For smaller cases, the task of preparing a document-by-document privilege log might not be terribly burdensome, and the chore of jumping through more Rule 26(f) or 16(b) hoops might be discouraging.

This discussion prompted the suggestion that the outreach ought to invite respondents to describe their practices. That might even be done, it was suggested, by using some sort of drop-down list. But caution was emphasized; we are not seeking votes so much as informative reports on actual practical experience. Trying to quantify responses could backfire.

There was general agreement that broad outreach would be desirable. It would be better to hear things now that might not otherwise come out until the public comment phase if the process goes forward to that point.

Discussion shifted to the general content of the invitation for comment. One question that should be presented is to ask whether respondents have encountered significant problems complying with Rule 26(b)(5)(A). It might even be desirable to try to find out whether respondents regard themselves as handling big or ordinary cases, though inviting a report on the nature of a lawyer's practice might well suffice for that.

It did not seem useful to circulate the LCJ submission, as the subcommittee is not particularly inclined to do exactly what that submission proposed. On the other hand, the materials for the conference identified some possible rulemaking responses to concerns about privilege logs.

It would likely be useful to include some indication of the sorts of changes under preliminary discussion, but not useful to suggest specific possible rule language. As one participant said, we should not try to get "microscopic" on this outreach effort.

The consensus was the Professor Marcus would try to draft a suitable invitation for comment, and members of the subcommittee could think about additional names of organizations or individuals to be invited to comments.

Sealing Filings

This topic was introduced as involving different challenges for the subcommittee. The sort of outreach for practical experience that the privilege log topic calls for seems not to be useful for this topic.

One possibility might be to ask for library research to determine whether the standards for sealing filed documents differ significantly among the circuits. That was a feature of the Rule 23 Subcommittee's work on the Rule 23(e) amendments that went into effect in 2018. There the goal was to identify a shorter and more manageable list of criteria for evaluating proposed class-action settlements.

It's not clear that there is similar concern here about differences among circuits. With the Rule 23(e) topic, the question was whether different circuits were implementing the rule in divergent ways. On this topic, the underlying consideration is not rule-based, but based on the common law and the First Amendment. It's not clear that the rules process should be trying to affect determinations of that sort.

One reaction was that there may be a concern about representation for the public interest in access in these sorts of situations. As the Fourth Circuit pointed out in *Rushford v. New Yorker*, 846 F.2d 249 (4th Cir. 1988), there is a public interest in addition to the parties' private interests when matters are submitted to a court for its decision. In that case it was a summary judgment motion, but the principle is broader. And from the perspective, for example, of a plaintiff's lawyer, it may seem very inviting to agree to confidentiality and also not to oppose filing under seal. So one might say that sometimes none of the parties before the court will speak up for the public's interest in access.

One reaction might be to propose public notice of some special sort for such filings seeking sealing. One might call that "raising the red flag," and liken it to the idea in the submission from Prof. Volokh that there be special notice of such motions. That might also provide an adversary presentation rather than a one-sided one, on the issue of sealing.

Another member pointed out that individual judges seem to have significantly differing attitudes on requests to seal. Some judges emphasize that, despite the parties' agreement, there is a significant burden on the party seeking filing under seal to justify that treatment. Others may be more willing to accept a joint motion to seal.

A reaction was that this sort of difference of position does not seem to flow particularly from circuit law, and that library research on that law probably will not shed much light on the choices before the subcommittee.

Another view was that there are competing considerations at work here. On the one hand, there may be reason to provide a vehicle for competing presentations on the issue of sealing, perhaps by inviting nonparties to express views. On the other hand, the more litigation one must

endure to get a sealing order the more difficult it will be for counsel trying to meet filing deadlines. Particularly if there is a required delay between the submission of a motion to seal and the earliest date on which the court may rule on it, the difficulty for the lawyer trying to meet the filing deadline can be considerable. On that score, it's worth noting that the proposed rule submitted by Prof. Volokh would forbid decision of the motion to seal for seven days after notice of the motion is given.

A possible response seems to be offered by the D. Minn. local rule, which permits "temporary sealing" pending a ruling on whether filing under seal is to be allowed. A question was raised: How can something be "filed" but only "temporarily"? If the sealing order does not issue, can the party withdraw the document? How does that compare to "lodging," something that was formerly done with items (such as a proposed order) that could not be filed by the parties? These issues seem to present some difficulties in the clerks' offices.

The discussion showed that there are a number of issues to be addressed. It is not clear that a national rule is needed, or would be useful. It does appear that there would be some delicate questions to be addressed were a national rule pursued.

Meanwhile, the discussion introduced in the materials for this conference was focused on some fairly generic recognition that protective orders and sealing orders have different standards, and that there is as yet no consensus on whether there must be a court order before any filing under seal, or (perhaps) on who bears the burden to justify filing under seal, particularly when there is in force a protective order recognizing that the materials in question are entitled to protection on confidentiality grounds.

For the present, the goal will be to develop more thoughts about these issues. Input from the Magistrate Judges' Association and from court clerks would be helpful.

It will likely be necessary for the subcommittee to meet again before the Fall Advisory Committee meeting. That should likely happen after responses have been received about the privilege log issues. Meanwhile, thought can be given to the sealed filing issues.

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

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Invitation for Comment on Privilege Log Practice

The Judicial Conference Advisory Committee on Civil Rules has received a suggestion that rule changes be adopted to address difficulties in complying with Rule 26(b)(5)(A) in some cases. Its Discovery Subcommittee is in the early stages of considering possible changes to the rules responsive to these concerns, and now invites comments from the bench and bar about this topic. No decision has been made about whether any rule change should be formally considered, and the eventual conclusion may be that no rule change is needed.

Owing to the schedule of Advisory Committee meetings, it would be most helpful if comments were received by August 1, 2021. Comments should be submitted electronically to RulesCommittee_Secretary@ao.uscourts.gov.

Background

Before 1993, there was no requirement in the rules that any information be provided when materials were withheld on privilege or work product grounds during discovery. In that year, Rule 26(b)(5)(A) was added to the rules. It requires that, when a party withholds otherwise discoverable materials on such grounds, it must "expressly make the claim," and also describe the materials not produced in a manner that "will enable other parties to assess the claim." The committee note accompanying this rule change said:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

According to submissions received by the Advisory Committee, many courts have insisted on a document-by-document privilege log to satisfy Rule 26(b)(5)(A). With the growing centrality of digital material in discovery, the burdens of preparing such a log reportedly have increased. Furthermore, some say that the resulting logs (perhaps partly prepared by software) are often too

"generic," or rely on "boilerplate" explanations that do not serve the goals of the rule or enable the parties or court to assess the claim of protection.

The Current Invitation for Comment

The Discovery Subcommittee seeks input that will assist it in determining whether there are significant issues impacting the goals of just, speedy, and inexpensive resolution of litigation with current practice under Rule 26(b)(5)(A), and whether rule changes could have positive effects. In particular, it seeks input on two sorts of subjects:

1. Problems Under the Current Rule

It may be that problems under the current rule occur principally in what might be called "large document" cases, and not in most civil litigation in federal court. The subcommittee is therefore interested in whether those who comment have experienced problems in complying with the rule. If so, are those problems arising in all cases or only in some cases? Have similar difficulties occurred in state-court litigation, and do those state courts have rules similar to Rule 26(b)(5)(A)?

Specific examples of problems encountered (or not encountered) in litigation under the rule would be particularly valuable. Have the parties been able to work out methods of satisfying the rule that are not unduly burdensome? Has judicial involvement in developing those methods been useful? Could solutions of the sort parties and courts have devised in individual cases be usefully required for all cases by a rule revision?

In this connection, it would be helpful if members of the bar who comment can describe the general nature of their practice experience. For example, do they generally represent plaintiffs or defendants? Do they work in large firms, small firms, or in solo practice? Do they generally represent individuals or corporate or other entities in litigation? What areas of law do their cases involve?

2. Possible Rule Changes to Solve Problems

The nature of a rule change to solve a problem would depend upon the nature of the problem to be solved. But it seems useful now to invite comment also on whether those who have encountered problems under the current rule would regard possible rule amendments as potential solutions to the problems they have encountered. In the same vein, would those who have not encountered problems under the current rule expect that amending the rules could cause new problems?

Though this discussion is at a very preliminary point, at least the following possibilities might be considered:

- A revision to Rule 26(b)(5)(A) indicating that a document-by-document listing is not routinely required, perhaps referring in the rule to the possibility of describing categories of documents.

- A revision to Rule 26(f)(3)(D) directing the parties to discuss the method for complying with Rule 26(b)(5)(A) when preparing their discovery plan, and a revision to Rule 16 inviting the court to include provisions about that method in its scheduling order.
- A revision to Rule 26(b)(5)(A) to specify that it only requires parties to identify "categories" of documents. Alternatively or additionally, a revision to the rule might enumerate "categories" of documents that need not be identified.

Additional suggestions about possible rule changes are welcome. With any of these general amendment ideas, concerns include at least: (a) whether making such changes would resolve or reduce the problems that have arisen under the current rule, and (b) whether making any of these revisions would create difficulties or impose burdens in cases in which complying with the current rule has not proven difficult.

* * * * *

The Discovery Subcommittee has not made any decision about whether any rule amendments should be seriously considered, much less what focus would be best if some amendments seem promising. The possibilities mentioned above are intended only to focus comment. The subcommittee expresses its gratitude to all who comment.

Summary of Comments on Privilege Log Issues

The Discovery Subcommittee invited comments on suggestions to revise Rule 26(b)(5)(A). 103 comments were received. This summary attempts to convey the substance and ideas provided by the commenters.

As requested, most of the commenters indicated the nature of their practices, and an effort will be made to include that information in this summary. The invitation to comment asked about burdens and utility of current practice under the rule (often involving a "privilege log"). It also asked about the possibility of shifting toward using categorical rather than document-by-document descriptions in providing the information required by the rule.

Some recurrent themes emerge from the comments, and the following summary attempts to categorize them as follows:

(1) General reactions to possible change to rule

(2) Compliance with current rule

(3) Burden of preparation of document-by-document logs

(4) Value of document-by-document method

(5) Information needed by requesting party

(6) Consequence of changing to categorical descriptions

(7) Possibility of changing Rules 26(f) and 16(b) to prompt earlier discussion and court involvement with regard to Rule 26(b)(5)(A) requirements

(8) National uniformity regarding rule's requirements

The Rules Office assigned numbers to the comments (*e.g.*, PRIV-0001, PRIV-0002). Since they are all the same except for the last two or three digits, only those numbers will be used in this summary. The entire set of comments should be posted online. Some are lengthy. One attaches a 116-page transcript of a court hearing, for example.

(1) General reactions to possible change to rule

Ingrid Evans (04) (represents plaintiffs in individual and class action litigation): Leave the rule unchanged. In many of the cases I have litigated, it has performed an important function by protecting against the unjustified assertion of privilege.

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Rule 26(b)(5)(A) is relatively straightforward and easy to comply with. In my experience document-by-document privilege logs are essential, for it is nearly impossible to assess a privilege claim without one. The volume of documents involved means there are inevitably mistaken claims

of privilege. A categorical log would only make these problems worse by making the parties first fight over whether a document-by-document log was required.

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): In civil rights cases, plaintiffs start at a decided disadvantage, and must have access to documents possessed by defendants. The rule does not specify the nature of the information that must be provided in the privilege log, so often plaintiffs must litigate that. There should be no modification of the rule.

Lori Bencoe (09) (small firm mainly litigates claims against healthcare systems): New Mexico has a Review Organization Immunity Act governing the disclosure of documents maintained by hospital review organizations in the process of credentialing. We make claims only when there is a history of multiple prior serious legal actions, and focus on whether the hospital followed the processes set forth in its governing documents. The confidentiality of records bearing on these claims is defined fairly narrowly, and New Mexico's courts require the party seeking to prevent discovery to prove that the data was generated exclusively for peer review and for no other purpose. New Mexico law requires a privilege log that contains sufficient specifics to meet the burden state law imposes. Without a sufficient log, the court cannot determine whether the statutory protection applies. The proposed revisions to the federal rule would make them effectively useless, and give the responding party an immunity to discovery. We have received categorical privilege logs, but in New Mexico that can result in a finding of waiver.

D.J. Young (10) (partner in The Law Firm for Truck Safety LLP): We represent the victims in suits against interstate trucking companies. These companies believe that there is nothing wrong with violating discovery rules and hiding documents, and that the benefits of hiding documents outweigh the risks. We need exponentially more regulation of these trucking companies to protect public safety. I urge you not to make it even easier for corporations to escape accountability.

Samantha Heuring (012) (plaintiff lawyer in employment discrimination cases): In my practice, the defendant has the documents, not the plaintiff. Allowing defendants to avoid a document-by-document description and rely only on a categorical description would give an unfair advantage to defendants. Too often defendants lump discoverable materials into "categories" with privileged materials.

Gene Brooks (015): I write to support the current rule. It is necessary for prevention of non-production of relevant documents. The only way to know what documents are being withheld is a privilege log. With the log, we can tell what objections apply to which documents. Then the court can perform an in camera review when needed.

Lauren Bonds (19) (National Police Accountability Project): Our members litigate thousands of egregious cases of law enforcement abuse. We strongly urge that proposals to change this rule be rejected. The question whether a particular privilege should apply is often nuanced and fact-intensive. Even a party acting in good faith can incorrectly invoke privilege. The opportunity to assess details of each specific document ensures that the requesting party can challenge incorrect claims of privilege. We are deeply concerned that the proposed changes would significantly undercut the ability of civil rights plaintiffs to obtain relief through the federal courts.

Philip Davis (23) and Nicholas Davis (31) (identical submissions from father and son): As plaintiff's civil rights attorneys, we oppose any change. Changes might make sense in commercial litigation, but would profoundly undermine the goal of liberal discovery central to civil rights cases. The question of whether a privilege applies is always fact-specific, and without the ability to assess pertinent information about a particular document the ability to challenge the claim is nil. Moving to categories would make it virtually impossible for civil rights plaintiffs to obtain critical information through discovery. Police defendants often claim privilege to shield internal affairs records, use of force policies, and other information critical to plaintiff's case. Using a categorical approach will rarely illuminate the propriety of such claims.

Ian Bratlie (24): The proposed changes would greatly impact police litigation in a negative way. You should consider the impact of this proposed change on people of color. I hope that, after reflection, you reject this proposal.

Federation of Defense and Corporate Counsel (27): We support reforms because we are familiar with the burdens of the current privilege log requirement. Although the 1993 committee note did not say the rule required strict protocols for listing every document, in practice what has developed in some jurisdictions is a very strict protocol. In some cases, it is not possible to provide a document-by-document protocol. Thus, a task force of the New York State Supreme Court on Commercial litigation stated in 2012 that creation of privilege logs has become a substantial expense, but that the logs often are not reviewed or used in any way by the courts. Accordingly, we support a use of categorical rather than document-by-document listing excluding (a) documents prepared after the date suit was filed; (b) communications between a party and its trial counsel or work product of trial counsel; (c) documents produced with redactions; and also (d) explicitly encouraging cost shifting.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): In both the federal and the state courts in New Jersey, courts believe that document-by-document logs are required. Creating these logs is burdensome, and often leads to fights about privilege designations even when it is clear that the documents involved are not relevant to the case.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): I urge the Committee not to change the rule. A detailed document-by-document log is the best way for parties and courts to assess claims of privilege.

Stephanie Walters (39) (plaintiffs in complex litigation): Please leave the rule unchanged. Too often, large companies with in-house attorneys employ these lawyers in a business capacity but claim privilege for communications involving the lawyers. The current rule is necessary to reveal when this has happened.

Seth Carroll & Mark Dix (40) (civil rights plaintiff lawyers): We regularly face claims of "self-evaluative" and "investigative" privileges. Municipal and corporate actors attempt to shield records of harm-causing incidents to conceal information. Permitting them to use broad nondescript categories would further aggravate the imbalance against our plaintiffs in discovery. Specific and detailed logs are essential. The American public demands increased transparency by police, municipalities, and other governmental actors. The proposed changes would move in the wrong direction.

Mike Adkins (41): The vast majority of cases have no privilege issues of a nature that would require a privilege log. When a case does require one, the present rule is not unreasonable or burdensome in my experience. The number of privileged documents is usually not large, and going with categories would actually increase the burden in some cases. Using categories would also allow too much to be hidden.

Demian Oksenendler (44): There is no compelling reason to change the rule. The proposed change is one-sided, and would benefit large corporations. It will also increase the burden on the judiciary. The case management process in every case includes discussion of discovery planning.

Frank Verderame (46) (plaintiffs in all types of litigation): I oppose the proposed rule changes. Too often claims of privilege are made for documents to which they do not apply.

Jory Ruggiero (47) (primarily represents plaintiffs on environmental torts, personal injury, and defective products): This rule is a linchpin component of ensuring a fair discovery process. In one recent case in the Montana state courts, defendant withheld 3,778 responsive documents behind a privilege claim. After much effort, we learned that 99% of those documents were not privileged. Many involved no communications with lawyers at all. Many more were shared with outside third parties. But opposing parties can focus on such issues only with particulars about the withheld documents. Allowing parties to designate entire categories of documents as privileged will facilitate concealment of the most critical documents.

California Lawyers Ass'n, Litigation Section Committee on Federal Courts (49): The Committee circulated a survey of Section members. The respondents come from varied practice specialties. Regarding the effectiveness of current rules regarding privilege logs, about 30% said the rules were effective, while nearly 40% said the rules were not effective. Regarding various possible rule amendments, each possibility was favored by more than 50% but fewer than 60% of respondents.

Robert Fink (50): Allowing use of only categories would be a mistake. Unless each document is addressed, there will be no means to determine the propriety of the claim.

Mark Kosieradzki (51) (plaintiff personal injury attorney): I oppose any attempt to limit the requirement of a privilege log providing the basis for the claimed privilege as to every document. In my experience, allowing a broad designation by category without detail is ripe for abuse.

Jonathan Feigenbaum (52) (plaintiffs in ERISA cases): I oppose the changes. They will bring about more motion practice. Using categories will produce opaque listing.

Susan Craig (57): Defense attorneys are free to disregard rules, and they throw a litany of boilerplate objections at every discovery request. It is essential that we retain the privilege log requirement in the rules. Anything less would facilitate this obstructive behavior.

Peter Kohn (58) (complex case litigator): It is perfectly clear that privilege logging must be more detailed and granular, not less so. This proposal is in the wrong direction entirely. Using categories would be a tempting opportunity to conceal evidence. Even the detailed logs that pass Rule 26(b)(5)(A) muster these days rarely contain sufficiently detailed disclosures. "The problem

of privilege log abuse is bad enough as it is, and if there is a direction Rule 25(b)(5) should go, it is toward disclosure of greater granularity."

Linda Nussbaum & Peter Moran (60) (plaintiffs in complex class actions): The existing rule provides a clear, workable standard. At a bare minimum, information about a withheld document such as: who sent it, who received it, and the subject matter of the document is absolutely necessary. When defendants instead use boilerplate assertions of privilege, plaintiffs have no alternative but to challenge thousands of entries or risk being denied those documents that really matter. Amending the rule to permit categorical designations would jeopardize plaintiffs' discovery rights and increase the likelihood defendants would hide harmful documents.

Federal Magistrate Judges Association (61): The main problem with the current rule is that it has been interpreted to require document-by-document logs even though the rule itself does not state any such requirement. Changing the rule to say that document by document or categorical logs are permissible, depending on the circumstances, may be helpful. But another problem that exists now is vague descriptions in privilege logs that fail to give sufficient information to assess the claim of privilege. Actually, both categorical and document by document logs can satisfy the current rule, so an amendment expressly stating that either is acceptable may be helpful. But the rule should not be amended to require the parties to use a categorical approach. If used, the categorical descriptions must provide sufficient information to permit assessment of the claims.

Russ Chorush (62) (plaintiffs in patent, trade secret, and antitrust litigation): The current requirement for detailed privilege logs is an important feature of the rules. In one of my cases, those details facilitated a successful privilege log challenge that resulted in the production of one of the most important liability documents in the case. Amending the rule to provide less information, or to eliminate document by document listing, would undermine the ability of litigants to challenge privilege assertions.

John Radice (63) (plaintiffs in complex litigation): The rule as currently written has been an invaluable component of our practice in ensuring that defendants cannot improperly conceal evidence of their liability. The standard is clear and workable, and when disputes do arise the parties in our experience can generally resolve the issues without court involvement. Changing the rule would allow parties to provide less information and strip plaintiffs of their right to meaningfully challenge privilege claims. Changing the rule would prompt more disputes about privilege.

Steve Shadowen (64) (plaintiffs in antitrust and other complex litigation): It is essential that the rule provides a clear, workable standard for privilege logs. These logs prevent parties from improperly concealing important evidence. Amending the rule to provide less information, and to forgo a document by document analysis, is a recipe for squandering judicial resources.

Sharon Robertson (65) (plaintiffs in complex litigation): Privilege logs are an important tool for evaluating whether documents were properly withheld. The information that the rule currently requires has allowed us to successfully challenge numerous privilege assertions and secure key documents.

Public Justice (66): We strongly oppose jettisoning the current privilege log process. That would harm the evidence-adducing function of discovery and also increase the burden on federal judges. The current provision of names, dates, and subjects on privilege logs provides a mechanism for challenging over-broad or improper privilege claims. Time and again, the ability to examine the details of a privilege log has permitted intelligent meet and confer sessions at which designations were either dropped or a more focused challenge could be presented to the court for review.

Jeffrey Kodroff (67): There has been an increase in use of claims of privilege as a method to avoid production of harmful information. The current rule provides a clear, workable standard. Amending it would provide less information, particularly if broad categories are substituted for the current document by document approach.

Donna Evans (68) (plaintiff antitrust class actions): Absent the minimal information currently required, which is usually discernable from the face of the document, plaintiffs will have virtually no information to assess the propriety of privilege claims. The proposed changes also promote inefficiency.

National Employment Lawyers Association (69): The current rule requires little if any change. The root of the problem with privileged documents does not lie with how the rule is written. Disputes arise when there is insufficient information in the log. But the proposed amendment is to limit the information on the log. Without the information on a current log, determining whether privilege was properly invoked would be impossible.

Lori Fanning (71) (complex litigation plaintiffs): Privilege logs are an important tool intended to prevent improper concealment of relevant evidence. The rule provides a clear, workable standard. Amending the rule to provide less information or to forgo a document by document analysis in favor of broad categories will jeopardize the substantive right of plaintiffs by depriving them of a meaningful opportunity to challenge privilege designations. That would make disputes over privilege broader, not narrower.

Thomas Sobol (72) (complex litigation plaintiffs): We strongly oppose any amendment that would direct courts away from the common practice of requiring the party asserting privilege to provide a document by document log. Given the scale and nature of the cases we litigate, privilege issues are endemic and widespread. The current rule works well.

George Tolley (73) (medical malpractice plaintiffs): There are many distinctive privilege issues in litigation about medical services. But in my cases, there is almost never a need for a formal privilege log. Counsel meet and confer regarding claims of privilege, and almost always the discovery issues are resolved. Accordingly, for the kind of cases I handle, there is no need to change the rule.

Dan Litvin (784): The current rule is necessary to protect against overbroad assertions of privilege. The burden is on the party asserting privilege to support that claim. Shifting to "categories" of documents would permit the responding party to class together documents that are really different, at least in terms of privilege protection. Any burdens of dealing with logging under the current rule are a result of efforts by some parties to evade the rules' requirements.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Although a document by document approach may have made sense in 1993, when the current rule was adopted, it does not make sense in the Digital Age. The size, complexity, and cost of a privilege log at present — which can easily reach tens of thousands of log entries and cost more than a million dollars — has rendered this 1990s approach unworkable. In light of this epochal change, the Committee should modernize Rule 26(b)(5)(A) by doing at least the following:

- Adopt a clear rule that document-by-document logs are presumptively unnecessary.
- Adopt a presumption that a withholding party may submit a categorical or metadata privilege log.
- Adopt a clear rule that redacted documents do not need to be included on a privilege log when the document provides sufficient information to the requesting party to assess the privilege claims.
- Adopt a clear rule that if document-by-document logs are required only one log entry is needed for each substantive communication (i.e., threading of email/chat communications is presumptive allowed).

Rather than being preoccupied with the minutiae of the privilege log, the courts should focus only on whether the process of privilege review was handled in a responsible way.

Joseph Fried (78): I have too often seen opposing parties initially claim a privilege and then back off when pushed to provide more details to support the privilege claim. When I push back and insist on a privilege log, counsel often relents and produces the documents that should have been produced to begin with. The shift to categorical privilege logs will foster this sort of behavior.

Frank Bailey (80) (plaintiffs with catastrophic injuries): I have found privilege logs to be critical and seen many efforts to limit their scope and ultimately limit access to evidence. We oppose any limit on the effectiveness of privilege logs.

Leonard Bennett (81) (plaintiffs in large document cases): Clear requirements for privilege logging protect efficiency and fairness, while categorical logging does not conserve resources. Instead, it invites disputes, and permits abuse involving unilateral withholding of relevant information based on questionable claims of privilege.

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): Detailed privilege logs are an essential tool for proper discovery practice. They provide the most reliable way to identify and challenge improper claims of privilege, especially in high-volume document cases. The rule is presently working as it should. If a party claiming privilege were not required by rule to disclose the specifics about the withheld documents, receiving attorneys would have little recourse to challenge such designations. A change to the rule would create new problems. Moreover, the situation is different in cases not involving a large number of documents, but defining in a rule when its requirements apply or are softened due to the volume of material would be impossible.

Kenneth Wexler (83) (plaintiffs in complex litigation): The current rule provides a clear, workable standard. The information required allows plaintiffs to identify the subset of documents that may have been improperly withheld, and thereby narrows the range of potential disputes.

EDRM (Electronic Discovery Reference Model) (84) (volunteer, multidisciplinary organization including plaintiff and defense lawyers, present and former judges, paralegals, e-discovery analysts, privacy, security, information governance, and other professionals): There is a broad consensus among attorneys and judges that current practices for privilege logging are not optimal for many cases. With large productions, traditional preparation of a privilege log is burdensome and frequently not particularly useful to the requesting party. Responding to these concerns, the EDRM Privilege Log Team drafted the attached Privilege Log Protocol. It includes broader use of Fed. R. Evid. 502(d) orders, advance identification of "gray area" issues, removing any need to log certain kinds of documents (including those prepared after the litigation began and any produced in redacted form), and reliance on metadata-generated logs for ESI, with an opportunity for the receiving party to request and obtain additional information about a sample of documents. It also encourages more communication between the parties and the use of special masters to resolve privilege issues if needed. The protocol was presented by a panel of judges during the Georgetown Advanced E-Discovery Conference in November 2020 and received broad buy-in. A subsequent survey received 115 responses from professionals, mostly from the U.S. About 70% of those responding favored amending the rule, but the vast majority believe that a privilege log of some format generally improves accountability. 88% said the parties have usually been willing to negotiate alternatives to traditional document by document logs. Attached to the comments are approximately 60 pages of reports on the survey and examples of protocols.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): The move to weaken the rule contravenes a fundamental principle of American jurisprudence — privileges must be narrowly construed. We favor access to facts, not privileges to withhold information. The current rule is flexible enough to work in complex litigation and less complex litigation.

Anthony Irpino (86) (plaintiffs in MDL proceedings; often primary plaintiff counsel responsible for handling privilege claims): Document by document listing is privilege logs is necessary. I have direct experience with the "category" approach, and it does not work well. The categorization process itself is too subjective, and often over-inclusive. It can require more work of the parties and the court.

Eric Weisblatt (88) (patent litigation, both plaintiff and defendant): I practiced from 1982 to 2018. I did privilege review in the hard copy days, and again in the Digital Age. The process is very similar, though the quantity of material is different. From the beginning, my mentors taught me that we wanted the court to order detailed privilege logs, for they are critical in patent litigation. We did use "generic" descriptions on occasion. But we urged judges to check these by reviewing a random sample of documents so designated. And if the judge concluded that the reviewed documents were not really privileged, that meant that the privilege was waived as to all documents with that designation on the log. So if categorical listing is authorized under an amended rule, I suggest that patent cases be excluded and remain subject to a document by document logging requirement.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): In the last five years, I have seen an increasing effort by defense counsel to shift to "categorical" privilege logs. They usually stress that the rule itself does not require document by document listing. But categories do little for me in terms of assessing the privilege claim. I always object to

this procedure, and find that judges usually side with me. It is critical that the rule continue to require that the log permit the court and the other side to "assess the claim."

Paul Bird (90) (plaintiff product liability, collision, medical malpractice): We encounter privilege log issues in nearly every case. These seem to arise more frequently in larger cases, but sometimes in smaller cases as well. Any change (such as using categories) that would make it easier for defendants to hide behind privilege designations would unbalance the playing field. When large corporations slap "privilege" on a document without having to provide specifics, that can effectively disguise the document to the point that it may never be found.

Bhavani Raveendran (91) (plaintiffs in personal injury and civil rights claims): Summarizing information into categories would not provide the information the receiving party needs to assess the claim.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): The rule should not be amended in a way that would permit defendants to claim privilege without reviewing the actual documents. In MDL 2573, we found that some 150,000 documents that were characterized as within a category exempt from discovery had never been reviewed by the withholding party. The courts have found that vague categorical objections make document by document logs necessary.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): The current rule provides a workable standard. The issues are critical to proper litigation outcomes. Though some describe resolution of privilege claims as "satellite litigation," these issues are central to litigation. The documents withheld improperly can often go to the heart of the case. Shifting to categories makes no sense. The nature of the document is rarely critical to whether a privilege applies.

Dena Sharp (94) (plaintiff side in complex cases): I have first-hand experience with the importance of document by document identification of withheld materials. The current rule offers far more solutions and empowers the parties to tailor their privilege processes to the particular case. For example, in *In re Restasis* (the same case that yielded the 116-page hearing transcript submitted with comment no. 72), the initial privilege log contained tens of thousands of entries. But our questioning of these claims led to defendant's withdrawing thousands of the documents from the list and producing them to us. In this case, the court eventually called for preparation of a "Redfern chart," which identified each document. Eventually, the parties were able to apply the court's rulings in a largely self-executing process. This is not to suggest that the Redfern process should be adopted widely, but only that in this case there eventually was an effective solution because it was tailored to the issues of the case.

Joseph Meltzer (95) (plaintiff complex litigation): I strongly recommend that the Committee leave the rule unchanged. Privilege logs are an important tool to prevent improper assertions of privilege. They require a baseline amount of information. If the rule were amended to require less information, there would invariably be more challenges to assertions of privilege and more work for the courts.

Lisa Clay, NELA-Illinois (96) (representing employment law plaintiffs): We agree with LCJ that privilege logs frequently fail to assist parties or courts to resolve privilege issues. But we completely disagree about why this is true. The problem is that defendants are not doing a conscientious job in preparing their logs. The rule should not be weakened. Instead, it should be strengthened. The rule is too milquetoast. It should specifically enumerate what is required to be provided about each withheld document.

Manfret Muecke (97) (plaintiff consumer, employment, investor claims): The current rule is paramount to enable plaintiff lawyers to evaluate claims of privilege. If it were revised in a way to permit wholesale categorized claims of privilege, that would be harmful. Already, reliance on AI and discovery software has diluted the value of the log. A rule change could make it worse.

William Rossbach (98): Although there is much in the real world practice of privilege logs that needs improvement, the changes suggested to this Committee would harm, not improve, the practice. The rule as written should be sufficient, because it says the description must of itself show that the privilege applies. But the reality is that counsel often fail to abide by the requirement. The best thing would be to amend the rule to provide greater specificity about what must be included.

Rebekah Bailey (99) (plaintiff side employment, consumer, civil rights and qui tam): Although the rule does not say so explicitly, it is widely interpreted to require document by document privilege claims. These logs are highly valuable to use in litigating our cases. (The letter offers examples for ERISA, FLSA, Qui Tam, and individual employment litigation.)

Robert O'Hare (100) (plaintiff personal injury, wrongful death): There has been a movement to default to categorical logging. But I have personally seen parties using this approach to bury non-privileged materials under broad subject matter headings.

Thomas Henson (101) (plaintiff attorney): I have encountered countless obstructionist tactics by defendant companies. One of the most important things I have in my arsenal is this rule, because it gives me a tool to demand more from recalcitrant defendants. The current language in the rule eventually forces defendants to play fairly. I cannot overstate its importance. Any change that allows defendants to describe "categories" of documents would strike a fatal blow to the rule.

Rachel Feurst (102) (plaintiff attorney): Any attempt to limit the basic requirement of this rule should be rejected. I started out as a defense lawyer and learned then that it was easy to cover up harmful documents by laying down blanket assertions of privilege. I would estimate that more than 65% of all contested document listed on a privilege log are found to be non-privileged by the court. Allowing parties to simply broadly label documents as privileged will likely result in more improperly withheld documents.

Lawyers for Civil Justice (1023): We have revised our proposal, and believe that the revised proposal should be adopted. (The revised proposal is attached, in full, as an appendix to this summary of comments.) The revised proposal reverses the de facto rule presently applied and requiring document by document privilege logging. Instead, it creates a presumption in favor of categorical logging, which the court may alter as needed. It would also "codify" the presumption

that no logging is required for privileged or work product materials created after the complaint is filed.

CLEF (Complex Litigation eDiscovery Forum (104) (plaintiff complex litigation): CLEF is an advocacy organization representing the plaintiff complex litigation bar. (Two members of its Board of Directors submitted comments of their own — Rebekah Bailey (no. 99), and Lea Bays (no. 45).) In this 24-page submission, the group urges that no change be made to the rules. It contests the notion that document by document logs are unduly burdensome, in light of the software now available to assist. And the use of "categories" is inherently unreliable and can breed more disputes and motion practice. It urges that notions of proportionality not be introduced into the privilege logging discussion.

Joseph Neale (105) (plaintiff lawyer): It is my fervent position that the current rules about privilege logs are appropriate and should not be modified. Any change that weakens them will embolden corporate defendants to hide evidence. The rule was added in 1993 because, without it, there was no practical method for parties to test claims of privilege. The rule works when there is a detailed document by document privilege log. Moreover, the burden of logging is not great in most cases. In most cases, there are only a few entries, if a log is produced at all. Moreover, Rule 26(f) requires the parties to develop a discovery plan and also focuses on privilege issues. The alternative of adopting categorical exclusions from the logging requirement will not make litigation more efficient, but will instead impose a new burden on plaintiffs and, at one remove, on the courts called upon to resolve privilege disputes.

Michael Neff (106) (plaintiff lawyer): The rule works. A detailed privilege log that identifies each document withheld is the best way for parties and courts to assess claims of privilege. Claims of burden are overblown. In most cases privilege logs include only a few entries.

Minnesota State Bar Ass'n Court Rules and Administration Committee (this comment does not have a docket number as it was received after the August 1 deadline): We believe that the rule should be strengthened as follows in Rule 26(b)(5)(A)(ii) and that a new (iii) should be added:

> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the claims. Describing the nature of the documents, communications, or tangible things not produced or disclosed by category shall not be sufficient. The withholding party must describe each document, communication, or tangible thing, and identify the claim to privilege or protection; and
>
> (iii) Upon the request of the receiving party, iteratively meet and confer as soon as practicable whereat the receiving party may request further information about specifically identified withheld documents, communications, or tangible things, and the withholding party must provide sufficient information to allow the other party to review the claim of privilege or protection.

(2) Compliance with current rule

Brandon Peak (014): I routinely handle large, document-intensive cases. I regularly see parties attempt to evade legitimate discovery by claiming privilege or protection for documents that are not protected. Requiring parties to log the documents they contend are privileged many times facially reveals that the documents are clearly not privileged. changing the rule will cause more discovery obfuscation. Please do not change the rule.

Robert Cobbs (017) (Cohen Milstein): In large document cases, like the antitrust cases I litigate regularly, defense counsel routinely assert claims or privilege over documents even though these claims are indefensible. Defense side privilege reviews are typically performed by contract attorneys operating on short-term contracts with loose oversight. Reviewing attorneys are encouraged to over-designate.

Narne Mkrchyan (22): As a civil rights attorney, I vehemently oppose this proposal to change to categories. In most cases, the city withholds many documents on grounds of privileges that are normally overruled. But if the city could avoid specifying the documents withheld and provide only a generic description, we would never learn what records exist, and the city could suppress material records. I have had this experience when the city provided only a generic description of records that prevented the assigned magistrate from deciding how to rule on our requests. The result was that we did not get records we needed.

Nicole Andersen (26) (wrongful death and personal injury): In product liability cases, it is rare that defendants provide a privilege log to accompany privilege objections on the first go-round. And when produced, the logs rarely comply with the rule's requirements. Instead, they are usually merely categorical claims of privilege to justify boilerplate objections. The result is lengthy meet and confer sessions, followed by expensive motion practice, leading often a compromise "split the baby" judicial response.

Howard Friedman (32) (civil rights plaintiffs): Defendants frequently respond with boilerplate objections. They also frequently claim privileges, sometimes without even providing a privilege log. I have had to file motions to compel privilege logs.

Matthew Sims (34) (plaintiffs in catastrophic injury and other complex matters): Defendants routinely assert claims of privilege and confidentiality as a reason to withhold information. Invariably, when we pursue and succeed on a challenge to privilege, we find damning documents of the highest order were improperly withheld. Under the current rule, a cat-and-mouse game exists, with great efforts expended trying to conceal the most relevant documents.

F. Inge Johnstone (36) (personal injury plaintiffs, insurance policyholders, and small businesses): The biggest problem is the over-claiming of privilege and the failure to provide sufficient information in a privilege log to permit me to make a determination as to whether something is privileged. Relaxing the rule would worsen matters.

Frederick Longer (37) (plaintiffs in pharmaceutical, medical device, and product liability MDL proceedings): Many lawyers misunderstand or misapply the privilege, and sometimes the outright abuse it. Examples abound where counsel have attempted to attribute to a relevant and discoverable document attorney client privilege status through false or improperly applied criteria.

The only means to hold that in check is to require fundamental information in a detailed privilege log. For example, in the Vioxx MDL, there was a privilege log listing 30,000 documents. The court did an in camera inspection and found that only 491 of the 30,000 documents were actually privileged.

Stephanie Walters (39) (plaintiffs in complex litigation): Large corporations often direct employees to copy corporate counsel on every communication, and then use this technique to avoid discovery of internal business communications. Only document-by-document listing permits us to ferret out this sort of thing.

Altom Maglio (42) (product liability plaintiffs): Many corporations have attorneys working in all aspects of the business. They try to shield documents involving only business decisions and no legal advice by having these in-house lawyers involved.

David Arbogast (43) (plaintiff side antitrust, banking lending and business torts): Commonly, key documents are withheld and buried in a privilege log. Most of the key documents in complex cases are rarely produced without a motion to compel. Using categorical logs would facilitate this sort of behavior. Invariably, defense counsel attempt to bury the most critical of 'hot" documents in a pile of purportedly privileged materials. Far too often, defense attempt to withhold documents as privileged is revealed to be baseless.

Timothy Lange (53) (plaintiffs in catastrophic injury cases, usually involving commercial motor carriers): Privilege logs have been used consistently to abuse the litigation process and keep potentially damaging discoverable information from litigation opponents. For example, work product is routinely claimed as to photographs, video, statements, obtained by the defense during the active investigation of the case. I have even had evidence belonging to my client stolen from the scene of a crash, sent to a defense expert, and kept from me in litigation, only later to find that it was discussed by the defense expert in emails that appeared on the privilege log. Logs should require more information, not less.

Carma Henson (55) (medical malpractice and nursing home plaintiffs): Categorical logging will promote the practice of evasive responses and delay the completion of discovery. In 95% of the nursing home abuse cases I handle, defendants fail to produce relevant documents while making categorical statements that the material is privileged. In almost every case, they fail to produce a privilege log or provide specific information necessary to allow me to verify the claim. When I press the point, defendants invariably withdraw many of their privilege claims and produce relevant documents.

W. Ellis Boyle (56) (personal injury and medical malpractice plaintiffs): Corporate defendants and insurance companies rarely produce a privilege log when initially responding to discovery requests. Instead, they make a pro forma blanket objection based on privilege and produce no qualifying or descriptive information to support the privilege claim. Our experience is that the courts do not find that this behavior waives all privileges. Instead, we must press the defense to give us more information. Without eventually getting a privilege log, we would have to file a motion every time a defendant claims privilege.

Ashley Billiam (59) (plaintiff personal injury and medical malpractice): In the rare cases in which defendants actually provide a privilege log, they rarely comply with the requirements of the rule. They are merely categorical claims of privilege to justify boilerplate objections. "The result of the current rule, and how it is followed in practice, is lengthy meet and confer scenarios, often followed by expensive and time-consuming motion practice."

Public Justice (66): Organizations have become savvier about routing communications through attorneys, or including attorneys on them, to provide cover for a privilege log.

Bart Cohen (70) (plaintiff class actions and other complex litigation): Privilege disclosures are exceptionally important. Defendants routinely seek legal advice regarding antitrust and patent issues. That justifies some assertions of privilege. But they routinely over-designate in virtually every case, and frequently to an alarming degree.

Frank Bailey (80) (catastrophic injuries): We have found the use of boilerplate objections to be very common, and that efforts to protect crucial information under the guise of privilege are to be expected in most cases.

Leonard Bennett (81) (plaintiffs in large document cases): A recent case is illustrative of problems we encounter. In litigation involving Apple Corp., Apple sought to claw back three documents it claimed were privileged. In each case, the email was copied to an in-house Apple attorney, which Apple claimed made the email privileged. The court rejected the claim, noting that some of the emails presented "a clear example of businesspeople including a lawyer in an email chain in the incorrect belief that doing so makes the email privileged."

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): "AAJ members have almost universally shared one main issue that arises in such situations: when a General Counsel or other legal counsel is improperly added to an email or part of a discussion for the sole purpose of attempting to protect items that are not otherwise privileged."

William Rossbach (98): The rule's standard, while well meaning, is too vague. Many of us are accustomed to receiving blanket, boilerplate privilege claims with little more information that they date of the document and descriptions no more revealing than "work product." One of my colleagues described a case in which over 100,000 documents were withheld as privileged. Yet opposing counsel admitted at oral argument that they never actually reviewed these documents.

Thomas Henson (101) (plaintiff attorney): Here is my normal experience today. I serve a document request. Responses are served, replete with baseless objections and assertions of privilege. No privilege log is provided. I must then request such a log multiple times, in writing with threats of motions to compel. Eventually, I get a privilege log, but the vast majority of those logs do not provide the necessary information. So I have to file a motion to compel anyway. On the day before the hearing of that motion, the defense will provide a more detailed log. Then we can review that log with care, and identify scores of documents that should not have been withheld. And then these scores of documents are finally produced.

(3) Burden of preparation of document-by-document logs

Sharon Markowitz (02) (litigation partner): Preparing privilege logs is a lot of work. I can electronically generate the metadata of each withheld document, including To/From/CC info. the date, and the document title in minutes. But to prepare a narrative for each document like "communicating legal advice regarding X," but the X has no impact on whether the document is privileged. If it's legal advice, it's privileged. The solution would be to authorize parties to produce privilege logs with metadata only, and allow opposing counsel to follow up about specific documents. It is also desirable to leave redacted documents off the log if the metadata appear on the redacted document. (Attaches a protocol for a privilege log in a case)

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Corporate defendants have produced privilege logs created entirely by computers with no attorney oversight. These boilerplate attempts almost never work to permit the opposing party to assess the claim of privilege. They contain generic coded verbiage. But categorical logs are often worse, and lead to endless meet and confer sessions.

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): It cannot be an undue burden to prepare a proper privilege log. Defense counsel must go through each document, exercising due diligence, to determine whether it is indeed privileged.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): In my experience, preparation of a document-by-document log has not presented any major difficulties. It seems to me that discovery disputes are generated partly by lawyers who make money off them. Extra-large businesses complain about discovery burdens that are a function of their size. But this is akin to "coming to the nuisance." Businesses that choose to become very large should recognize that some difficulties can result from that size. The FRCP should not give them preferential treatment based on their choice to become and remain large.

Tab Turner (25): Concerns about the costs of creating privilege logs are self-serving and simply inaccurate.

Roberta Liebenberg (28) (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): The burden of preparing privilege logs is often self-imposed. Multiple mechanisms are already available to reduce the burden and cost of doing so. Experienced counsel frequently agree in advance to a privilege log protocol.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): Claims of burden are overblown. Our firm frequently handles cases in which defendants produce millions of pages of material. Not once in my experience has any defendant contended that providing a document-by-document log was excessively burdensome.

Matthew Sims (34) (plaintiffs in catastrophic injury and other complex matters): Claims of privilege are qualitative, meaning that a trained attorney should have looked at a document and made a subjective call on whether it may be withheld. If a document must go through this process for the assertion of privilege to occur, then the minimal amount of time savings from permitting using categories rather than a document-by-document listing is not worth introducing the

temptation to hide documents not eligible for privilege protection behind privilege. I strongly oppose any rule change that will eliminate the need for a document-by-document listing.

Stephanie Walters (39) (plaintiffs in complex litigation): In fact the assertion of privilege and associated logging of documents is not a "burden," but a responsibility associated with withholding documents from discovery. Parties who complain of "burden" tend to wildly over-designate documents as privileged. Most of the time, when there are detailed logs, a secondary review causes the other side to de-designate a large percentage of logged documents. If withholding parties are concerned about the time spent creating privilege logs, they should institute a stricter privilege review system. There is software that will enable them to minimize the burden of both review and log creation.

Altom Maglio (42) (product liability plaintiffs): Most document review and production platforms today make generating and producing privilege logs incredibly quick and efficient, done at the touch of a button. With the use of metadata for document sets coupled with essential document review, most of the necessary information for the privilege log is already there, and system simply uses it to generate the logs.

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): If done properly, document-by-document privilege logs are not actually burdensome to prepare. The process is no longer manual. Since ESI has become the ordinary form for production, it has become common practice for the parties to come to an agreement on fields to be included in the privilege log that can be auto-populated with corresponding metadata extracted from the document. The only fields that typically require "manual" input are (1) privilege asserted, and (2) privilege description. Those fields should not be burdensome to prepare either.

New York State Bar Ass'n Commercial and Federal Litigation Section (54) (cross-section of practitioners): A common complaint is that document-by-document privilege logs may involve hundreds of thousands of documents. Preparing them is time consuming and expensive, and they are a frequent subject of discovery disputes. In run-of-the-mill cases, such logs may impose little burden to prepare. In many states, including New York, local rules address these burdens. But in complex litigation the total cost of producing a document-by-document log can dwarf its value to the recipient. Even when advanced technologies are used, the reality is that — absent party agreement on purely metadata-driven logging — the output of those technologies invariably requires extensive review, cleanup, and supplementation, largely offsetting any cost savings technology might promise.

National Employment Lawyers Association (69): Many ESI platforms specifically include the efficient and easy creation of privilege logs. This is a selling point for the marketers of platforms. It is also a reason to doubt that preparing the log is necessarily a great burden.

Thomas Sobol (72) (complex litigation plaintiffs): Modern ESI methods, used by both sides, allow for most of the contents of a log to be populated with ease. This discovery is virtually always done electronically. With a few keystrokes, the software will generate a spreadsheet listing potentially privileged documents and associated metadata, which ordinarily includes the date, the title of the document, the document type, the sender, all recipients, subject line, and attachments.

Bryce Gell (75) (plaintiff attorney): We find that those who complain most about burden are also the parties who make the most improper designations. The burden is not really great. In large document cases, the parties use document review platforms such as Relativity or Everlaw. These platforms enable quick redactions and also make it easy to create privilege logs. In smaller cases where document review platforms are not necessary, there are far fewer privileged documents.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): In my experience, the rule is ignored more than it is followed. This tendency places the burden on the courts to determine privilege claims because no proper log was provided.

Leonard Bennett (81) (plaintiffs in large document cases): Modern electronic discovery tools and vendor applications greatly reduce the difficulties of logging privileged documents. Documents can be electronically culled and segregated, and logs created by software permit detailed descriptions to be added with minimal effort. Such programs are commonplace if not ubiquitous.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): E-Discovery platforms allow parties to prepare privilege logs more efficiently than ever before. We manage cases with libraries that house millions of documents. Our eDiscovery software allows us to analyze conversation strings concurrently and to organize privilege reviews in an effective and cost-conscious manner. As a consequence, we can complete a privilege review and also prepare to provide a log. E-discovery platforms render the disclosure of withheld materials easier, by permitting parties to generate reports capturing key metadata upon which privilege claims depend.

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions, mass torts, data breach and cybersecurity litigation): The burden of privilege review does not depend on the method of privilege logging if the review is done properly. It must be a multi-faceted review to allow the responding attorney to attest that any assertions of privilege are meaningfully reviewable by opposing parties. In cases involving ESI, litigants and their counsel who are sufficiently technologically savvy have begun using software or cloud-based systems to quickly and efficiently identify responsive and relevant documents. These systems also allow the parties on both sides to negotiate ESI protocols that allow the universe of documents to be confined to a mutually agreed scope.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): I have found that defense claims of undue burden fall on deaf judicial ears due to the advent of technology in the modern litigator's arsenal which provides the ability to organize huge amounts of data (and metadata) efficiently and easily.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): A majority of the information on privilege logs is derived from metadata, so the task of gathering this information is not burdensome. But merely looking to the metadata is not sufficient; a review of the actual document must be conducted to determine whether the privilege actually applies.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): Modern litigation technology has relieved much of the burden of preparing a privilege log. The content of most of the things needed on the log can be extracted from metadata.

Rebekah Bailey (99) (plaintiff side employment, consumer, civil rights and qui tam): Although it is true that the proliferation of ESI has expanded the sheer quantity of discoverable information, document management tools and analytics have also greatly improved to meet this challenge. Now most parties extract metadata from document review platforms into Excel or other sorts of fields to be further populated for a privilege review. The metadata provide the reader with critical information, and in our experience produces fewer disputes than occurred in the past.

(4) Value of document-by-document method

Ingrid Evans (04) (represents plaintiffs in individual and class action litigation): A detailed privilege log is indispensable to discovery. In consumer insurance cases I have handled, the carrier defendants were forced by the rule to provide the information I needed. Without that information, I would not have been able to compel disclosure. "I cannot overstate the importance of the Rule. * * * A single document may be critical to a plaintiff's case, so a document-by-document disclosure of the purported privilege grounds is critical."

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): Rather than opting for "categories,' a better revision would be some explicit statement that a document-by-document log is normally required, but that the parties and the court can relax that requirement.

Robert Cobbs (017) (Cohen Milstein): Plaintiffs must rely on the descriptions of the documents to assess whether a claim of privilege is legitimate. Grouping privilege claims into categories eliminates plaintiffs' ability to assess the claim.

Lauren Bonds (19) (National Police Accountability Project): The question whether a particular privilege should apply is often nuanced and fact-intensive. Even a party acting in good faith can incorrectly invoke privilege. The opportunity to assess details of each specific document ensures that the requesting party can challenge incorrect claims of privilege. The rule also empowers a party to quickly identify and challenge bad faith invocations of privilege.

Lori Andrus (20) (handles broad range of complex cases): The importance of a detailed privilege log cannot be understated. In complex cases, where defendants produce millions of pages of documents, corporations inevitably withhold thousands, or even tens of thousands, of documents based on assertions of privilege. Once plaintiffs scrutinize the privilege log, scores of documents that were improperly withheld get produced. For example, in one recent MDL proceeding the privilege log grew to more than 100,000 documents. But more than 3,500 of them had third parties as recipients, on nearly 6,000 the attorney was merely "cc'd", and another 5,700 had no attorney involvement at all.

Maria Diamond (21) (represents plaintiffs in product liability, medical negligence): In complex products cases, defendants often produce many thousands and even millions of pages of documents, invariably withholding a substantial number based on privilege claims. Once

plaintiff's counsel carefully reviews the privilege logs and challenges improper privilege claims, many documents that were improperly withheld get produced.

Tab Turner (25): Document productions have grown exponentially over the years. A document-by-document listing of allegedly privileged materials has become the norm. We need the general subject matter of the document, the date of the document, and such other information as is sufficient to identify the document, including author, addressees, custodian, and any other recipient, and, where not obvious, the relationship of the various participants to each other. Having this information serves efficiency and fairness.

Howard Friedman (32) (civil rights plaintiffs): Privilege logs are an important tool to promote transparency and ethical discovery practice in civil rights cases. I have received proper logs that contain enough information to assure me that the withheld information is indeed privileged. I have also received logs that show information being improperly withheld. Most of the time, I can resolve issues by having a conversation with defense counsel. Without a proper privilege log, I would not know enough to begin a conversation.

Altom Maglio (42) (product liability plaintiffs): Privilege logs have played an increasingly crucial role in obtaining essential discovery. Some large corporate defendants have become increasingly brazen about evading production of problematic documents. But a privilege log will often provide a clue to the existence of the needed documents. Although they are not perfect, the logs are very important. They often lead to "smoking gun" documents.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Despite often costing a huge amount of money, a document-by-document privilege log of tens or hundreds of thousands of entries is not really useful to the requesting party. The majority of individual privilege log entries are never reviewed by the receiving party or its attorneys. It simply is not possible for them to review so many entries.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): Privilege logs are critical to my practice because insurance company "Rapid Reaction Response Teams" are often at the wreck scene before my clients can be taken to the hospital. They thus get irreplaceable evidence. I often have to pierce work product to obtain photographs, measurements, and other facts that the defendants' agents obtained while the police were still present. Having an adequate log helps me determine if the privilege requirements have been met. An inadequate log requires that the whole matter be thrust onto the court.

(5) Information needed by requesting party

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): Lots of courts provide specifics on information that should be included on a log — such as Bates number, author, recipients, cc recipients, date, subject, title, attorney status, file name, type of communication, basis for privilege claim. Changes to the rule might codify those requirements.

Douglas McNamara (38) (Cohen Milstein): The District of Maryland practice guidelines set out what a log should contain:

> (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) such other information as is sufficient to identify the document, including, where appropriate, the author, addressee, custodian, and any other recipient of the document, and, where not apparent, the relationship of the author, addressee, custodian, and any other recipient to each other.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): The repeated lack of a privilege log has prompted me to refine my Rule 34 request, to insist that if anything is withheld on grounds of privilege the following information should be provided:

(a) The Title of the Document
(b) The author(s), all recipients, and to whom the document was shown
(c) The Authors and recipients' capacities/roles/positions
(d) The document's date
(e) The purpose/subject matter of the document
(f) The nature of the privilege asserted, and why the particular document is believed to be privileged
(g) The question (number) to which the document is responsive

Leonard Bennett (81) (plaintiffs in large document cases): In the E.D. Va., where I practice, a document-by-document approach is demanded. Some districts have local rules setting out these requirements. The District of Maryland requires (i) the type of document; (ii) the general subject matter of the document; (iii) the date; (iv) other information sufficient to identify the document, including the identity of the author and each recipient.

(6) Consequence of changing to categorical descriptions

Nora Graziano (01) (Florida paralegal): Though using categories might be quicker, it would not be a suitable format and might prompt more discovery. It is better to narrow down with information on the date, the to/from information and subject.

Sharon Markowitz (02) (litigation partner): I do not think categorical privilege logs are the answer. Categorical logs would require me to do all the work of identifying the subject matter of the documents (irrelevant to whether the document is privileged) and do not communicate to the opposing party who was part of the communication (highly relevant).

Mike Moore (06) (solo practitioner rep. plaintiffs in civil rights cases): Any change in the rule to permit simple "categories" to suffice will dramatically impact the plaintiff lawyer's ability to intelligently argue that the privilege does not apply.

Thomas Beck (07): I would not be pleased to get a privilege log from the defense that allows generic descriptions. I have been litigating police misconduct cases for 42 years, and my experience is that the defense does not use privilege logs or does not use them routinely. To allow a generic "personnel record" description to satisfy the rule would defeat its purpose, because some such records are unimportant, but others contain essential information. As a solo plaintiff lawyer, I find that I seldom withhold anything sought in discovery on grounds of privilege.

Frances Carpenter (11): As a seasoned litigator, I have seen firsthand email that would have been discoverable lumped into a category and then I might ask the court to do an in camera inspection. I believe it is important to list each document with great specificity and clarity so that the courts are not burdened, and so that the outcome is consistent with truth and transparency.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): I have never had anyone try to use this "categorical" approach. I think there would be too much incentive to "hide" something in a broad category that does not really belong there. On the other hand, there may be a reason to exempt from logging post-commencement communications. There is often a large number of such communications related to the litigation but they often have little legal value to the other side. It seems impossible at a practical level to enumerate appropriate categories. And vague and generic descriptions invite abuse of the rule.

Brandon Peak (014): I routinely handle large, document-intensive cases. The job of making privilege determinations usually falls on young lawyers or contract lawyers with little experience or knowledge of the case. If the junior lawyers are permitted to designate documents as falling into a "category" there will never be an occasion for a senior lawyer to review the initially designated materials.

Jasper Abbott (16): Simply listing "categories" would not provide any useful information to challenge a privilege claim. It would instead increase the likelihood of motion practice. I attach an example of a "categorical" privilege log I received in a case in Georgia state court. The result was multiple hearings with the court, which forced the court to do an in camera review of the documents. A document-by-document log would have avoided these costs.

Robert Cobbs (017) (Cohen Milstein): Allowing reviewers and their supervisors to advert to a preapproved list of descriptions encourages them to mischaracterize documents to fit into approved safe harbor categories.

Sean Domnick (018) (representing victims of catastrophic injury): A privilege log gives the other side sufficient information to make a determination whether to challenge the claim of privilege. Allowing for categories of information will frustrate that purpose. It will allow wrongdoers to be more able to hide relevant, damaging materials. In my experience, when the other side has responded with categorical rather than document-by-document reports, that has led to motion practice leading to a more specific response that showed that many of the withheld documents were not properly withheld.

Lauren Bonds (19) (National Police Accountability Project): Allowing use of "categories" instead of a document-by-document listing will make it much more difficult for litigants in general, and particularly for civil rights litigants, to obtain information they need to support their cases. In civil rights litigation, a detailed privilege log is necessary to engage in case-specific and fact-specific balancing of interests. Claims of privilege are persistent features of civil rights litigation. Often there are claims of internal affairs privileges, executive privilege, and confidential informer privilege. The propriety of each of these privilege claims would rarely be obvious from a categorical description. Without the benefit of a document-by-document description, plaintiffs have no way to know which of privilege are improper.

Lori Andrus (20) (handles broad range of complex cases): Categorical logs tend to obscure rather than illuminate the nature of the materials withheld. To be useful, such a log must include sufficient detail, including dates, recipients, sources and a detailed description of the reasoning underlying the supposed application of the claimed privilege. Formally recognizing categorical logs in the rule would encourage those desiring a minimalist approach (whether for economic reasons or to avoid scrutiny) and make it harder for improper claims of privilege to be identified.

Maria Diamond (21) (represents plaintiffs in product liability, medical negligence): Changing the rule to allow categorical privilege logs will exacerbate the challenge plaintiffs already face when defendants seek to hide harmful documents under the guise of privilege. What happens is that documents are discovered and produced due to the logging requirement would have to be sought through increased motions practice if a categorical approach were used.

Nicole Andersen (26) (wrongful death and personal injury): Using a categorical approach will only result in more meet and confer sessions. In my practice, manufacturer defendants will take unfair advantage of such a rule and routinely lists such categories as "financial documents applicable to the model fuel pump." Such categories are incredibly vague.

Roberta Liebenberg (280 (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): Shifting to a categorical approach would invariably lead to more satellite litigation because the requesting party would not have sufficient information to validate the claims of privilege. Over-designation for privilege is a significant problem, and document-by-document logs are the only way to root out improper claims of privilege. Privilege logs using a categorical approach are incapable of providing the needed level of specificity.

Drew Ashby (29) (plaintiffs in serious injury cases): My experience with a categorical approach is limited to one matter, but it was a bad experience for everyone involved. As a result of this approach, we wasted months of the discovery window. I had to file a motion to compel with virtually no knowledge of what was withheld. We won the privilege fight on over 98% of the challenges that we made. Explicitly allowing categorical listing will create additional incentives to try to hide harmful information.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): The NY State Court Commercial Division has established a preference for categorical privilege logs. It also provides possible cost shifting when one party insists on document-by-document logging. The New York City Bar prepared a guidance document regarding categorical logs, attempting to provide guidance on what a court might deem adequate in such a log. Local Rule 26.2 of the SDNY and EDNY provides somewhat the same thing. For example, the suggestion is that a categorical log may be preferred when the privilege designations are voluminous (e.g. 3,000 documents are not unduly burdensome).

Howard Friedman (32) (civil rights plaintiffs): If defendants could merely describe "categories" of documents, I would not be able to tell if the documents were improperly withheld. Vague descriptions could mean that judges would have to do more in camera review to determine whether documents are privileged.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): It is not my experience that parties request a log listing communications with outside counsel or listing outside counsel's work product related to the case. "My own firm's instructions for discovery requests expressly state that the receiving party need not log communications with outside counsel or any work-product related to the case."

Raeann Warner (35) (asbestos, employment, civil rights, and personal injury plaintiffs): Shifting to a categorical approach would increase the need for judicial intervention became parties would be more likely to ask the judge for in camera review.

Douglas McNamara (38) (Cohen Milstein): I have been involved in litigation in which categorical logging was used, and have found it inefficient and ineffective. In one MDL proceeding, the parties met and conferred on categorical logging for months, unable to agree on the scope and descriptions of the categories. Special Master John Facciola eventually recommended proceeding with traditional logging. Eventually defendant produced some 13,000 "de-privileged" documents. These important documents would probably never have seen the light of day in the litigation had only a categorical approach been used. The belated production pushed privilege fights to the end of the discovery period, which is counter-productive.

Stephanie Walters (39) (plaintiffs in complex litigation): I often see a push from defense counsel to shift to "categorical" privilege logs. Defense counsel tries to use broad categories but that undermine the objectives of the rule. Reying on "categories" permits corporations to avoid producing case-critical non-privileged documents by sweeping them into withheld categories.

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): Changing the rule to require only categorical logging would likely result in costly re-dos and unnecessary disputes. Though the submission favoring this approach speaks of "burdens," it does not describe how exactly categorical logs resolve this presupposed problem. A document-by-document log is often the most efficient way to provide the needed information. Categorical logs do not provide adequate information for the opposing party or the court to assess the claim of privilege. And preparing such logs would require a largely manual process, while mining metadata enables a largely "automatic" preparation of a log.

Ilyas Sayeg (48) (medical device and pharmaceutical claims for plaintiffs): Generally categorical designation obfuscates fact-finding because it hinders rather than enables assessment of the privilege claim. Any rule that would standardize this hindrance invites injustice. Already the committee note makes clear that a document-by-document designation may not be called for in every circumstance. But privilege logs already suffer from boilerplate designations. Ultimately, the solution to these problems must come from the parties themselves, and emerging technologies should help.

New York State Bar Ass'n Commercial and Federal Litigation Section (54) (cross-section of practitioners): The Section recommends clarifying the Federal Rules to say that there is no presumption that document-by-document logs must be used. The rule should instead allow for flexibility, including attention to the relative resources of the parties, the amount in controversy, and proportionality. The committee note to the 1993 amendment had it right. Our position conforms to a portion of the New York Commercial Division Rules. Similarly, the local rules of

the SDNY and the EDNY say that "efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end."

Federal Magistrate Judges Association (61): Actually, both categorical and document by document logs can satisfy the current rule, so an amendment expressly stating that either is acceptable may be helpful. But the rule should not be amended to require the parties to use a categorical approach. If used, the categorical descriptions must provide sufficient information to permit assessment of the claims. Examples of possibly excluded categories include (a) emails involving outside counsel after the commencement of the litigation; (b) emails involving in-house counsel when they are providing legal advice rather than business advice; emails involving a governmental agency for which a government privilege is asserted; (d) emails regarding internal investigations. Other categories could be based on date restrictions. Producing metadata logs containing certain information about withheld documents may alleviate burden problems. At least in some very complex cases document by document privilege logs may be cost prohibitive.

Thomas Sobol (72) (complex litigation plaintiffs): The biggest time drags for judges occur when a party creates privilege logs by having reviewers pick from a pre-programmed drop-down menu of a few static choices. Without the information about who created the document, when, to whom it was sent, and the subject matter of the communication, the plaintiffs cannot focus the dispute on key documents;. In these circumstances, judicial intervention on a larger scale may be required due to the "categorical" designations. For example, in one recent MDL (116 page hearing transcript from EDNY attached), defense counsel explained that they relied on plaintiff counsel to point them toward the privilege designations they should review with care. Defense counsel should not rely on plaintiff counsel to satisfy their own review obligations. In this litigation, the parties spent almost year disputing the sufficiency of the privilege logs. These sorts of problems would increase tenfold if the rule were changed to permit "categorical" designations to suffice.

Frank Bailey (80) (catastrophic injuries): Amending the rule to permit use of categories will invite abuse. We have found that broad categorization of withheld documents often leads to packaged forms of protection that include improper designation of privilege for essential evidence. This is especially true for emails and internal documents, which are usually improperly grouped into the category of "attorney communications" or claimed to be "work product in anticipation of litigation."

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): Categorical logging does not allow the parties to address the issues of whether a document is truly protected. And requiring less information in the log will make it easier for a party to hid key documents. AAJ heard anecdotally from members that a case in which categorical logging was attempted resulted in months of disagreement about how those categories should be defined, only to lead at the end of this effort to traditional document by document listing. Moreover, any attempt in a rule to describe categories that are not to be logged is not likely to work. The Committee will likely get bogged down in trying to provide the details of those categories, but those details are critical to a fair rule.

Katherine Charonko & Brian McAllister (85) (complex mass tort, MDL, antitrust and products liability, plaintiff side): Changing to a categorical reporting method will not make the task easier. Human review is, without question, the most burdensome aspect. It will necessarily

occur if the proposed shift to "categorical" reporting is adopted. Producing privilege logs by summary classifications will not obviate the need for document by document human review.

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions mass torts, data breach and cybersecurity litigation): Uniform adoption of categorical logs will not work. A minority of defendants try to extend "categorical" claims to an extreme extent, without meaningful negotiation with opposing counsel. In one major litigation on which we worked, partly due to suggestions from the special master, we tried to adhere to the Facciola-Redgrave Framework. But we could not negotiate appropriate categories. Defendants insisted on proposing categories that were facially overbroad and inconsistent. Eventually, the special master told the parties that if he had known that categorical logs would cause so many problems he would never have suggested them. The eventual "resolution" was to do a document by document privilege log.

Jonathan Orent (92) (plaintiff counsel in MDL personal injury, product liability litigation): The federal courts have frequently had to address the obfuscation that results from categorical privilege logs. For example, In *In re Aenergy*, 451 F.Supp.3d 319, 326 (S.D.N.Y. 2020), the court concluded that the categorical log provided "did little to communicate the potential basis for its privilege assessments." Increasing the use of categorical logging will naturally result in the expansion of deficient privilege logging.

(7) Possibility of changing Rules 26(f) and 16(b) to prompt earlier discussion and court involvement with regard to Rule 26(b)(5)(A) requirements

Kate Baxter-Kauf (005) (complex litigation; both plaintiff and defense side): To the extent rule changes would be helpful, I think the D. Minn. has a good approach. The judges routinely include privilege logs in their Rule 16 conferences, including requirements to meet and confer about the logs, deadlines for log production, dates to cabin privilege claims after a complaint was filed. This practice allows the parties to set themselves up in advance to understand where a dispute might lie.

Dennis Murray (08): I have been litigating for 58 years, and I oppose the constant addition of required mechanics to present cases. These added burdens will reduce or eliminate counsel from small firms. We need to stop adding complicated "dance steps" or else very few will be left to represent the extremely large proportions of citizens that from time to time need legal representation.

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): I am opposed to such a rule change. The problem is inappropriate privilege claims. A better revision would be some explicit statement that a document-by-document log is normally required, but that the parties may relax that.

Sean Domnick (018) (representing victims of catastrophic injury): Having the parties discuss compliance with the rule seems an odd requirement when the existing rule is clear on its face as to objections.

Lori Andrus (20) (handles broad range of complex cases): Having written extensively on privilege logs, I would not support any significant change to the rule. I would, however, support

the addition of a requirement that the parties negotiate the scope, format, and timing of the exchange of privilege logs as part of the requirements of Rule 26(f)(3)(D). It is incumbent on the parties to come to an agreement early in every case on the scope, timing, and format of privilege logs. Without such negotiation, costly disputes will arise later. Privilege logs should be produced early, and on a rolling basis.

Federation of Defense and Corporate Counsel (27): We support requiring Rule 26(f) discussion about the entry of privilege non-waiver orders as well as the timing of privilege logs.

Roberta Liebenberg (280 (Fine Kaplan & Black) (antitrust, class actions, complex commercial litigation): Experienced counsel frequently agree in advance to a privilege log protocol. For example, in *In re Generic Pharmaceuticals Pricing Antitrust Litigation*, MDL No. 2724 (E.D. Pa.), the protocol gave defendants the option to either (i) log every lesser-included email in a chain, or (ii) log a single entry for the entire chain and produce a redacted version of the entire email chain. Not one of the forty defendants elected to use option (ii), even that would have enabled them to avoid having to log every email.

Jeffrey Greenbaum (30) (complex business litigation and class action practice): The guidance notes for the new approach to privilege claims in the NY State Court Commercial Division state that parties are required to discuss the scope of privilege review and details of the log in a meet and confer session at the outset of the case. But that may be too early for a productive discussion. It may be that the parties can identify categories of documents that can be excluded from the log altogether. For example, communications with litigation counsel both before and after the commencement of litigation could be left off the log. Similarly, redacted documents might be left off.

Rob Snyder (33) (product liability, personal injury, and whistleblower plaintiffs): The rules already provide several ways for the parties to reach agreement to minimize the burdens of privilege review and logs. For example, Rule 26(f)(3)(D) already calls for discussion of any issues regarding clams of privilege. Failing agreement, the court can resolve disputes about privilege logs before discovery starts. "Recently, reaching agreement about the format of privilege logs has become part of our discussion of ESI protocols in our initial planning conferences." The meet and confer process in federal court is sufficient to permit parties to explore the possibility of using a categorical approach to the log. It is not my experience that parties request a log listing communications with outside counsel or listing outside counsel's work product related to the case. "My own firm's instructions for discovery requests expressly state that the receiving party need not log communications with outside counsel or any work-product related to the case."

Raeann Warner (35) (asbestos, employment, civil rights, and personal injury plaintiffs): "In my experience parties have been able to resolve issues themselves and judicial involvement is not necessary."

Lea Malani Bays (45) (Robbins Geller) (complex class action plaintiff side litigation): Only one of the three possible rule changes identified in the Invitation for Comment may have a positive impact. Although it is already a common practice in large-scale litigation, it is often beneficial to have early discussions with opposing counsel regarding privilege logs. If the Committee concludes that revisions to Rule 26(f)(3)(D) could encourage this practice, this would be a welcome change.

In the "large document" cases on which I work, the parties frequently address issues regarding privilege early in the case. These discussions often occur during negotiation of an ESI protocol. Often an agreement includes both the substance and format of the privilege log. Based on a review of some of the recent ESI Protocols my firm has entered into, here are some of the recurrent provisions about logs:

- Categories of documents that do not need to be logged at all (e.g., communications with trial counsel that post-date the filing of the complaint; internal communications in a law firm or exclusively within a legal department that post-=date the filing of the complaint; communications and work product from related litigation.
- The specific fields that should be included in a privilege log (most of which correlate to metadata fields that the party is already collecting and producing in the regular document production, which an be automatically extracted from the document metadata and put into a log.
- The manner in which "family documents" should be logged.
- The timing of production of privilege logs.
- The manner in which email chains should be logged.
- The file type in which the privilege log should be produced (e.g, Excel).
- How counsel should be identified in the log (e.g., list of names, use of asterisk).
- Whether or not redaction logs should be provided.
- Whether and what types of documents may be logged categorically.

New York State Bar Ass'n Commercial and Federal Litigation Section (54) (cross-section of practitioners): At the outset, parties should meet and confer in a meaningful way about the scope of any privilege review, the manner in which privilege claims will be asserted, and what information should be included in the privilege log. The form and content should be a topic of the parties' discussion when formulating their discovery plan under Rule 26(f)(3)(D). An amendment to Rule 16(b)(3) would be helpful as well. Specifically, we favor the following amendments:

- Rule 26(b)(5)(A)(ii): "describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner proportional to the needs of the case and that, without revealing information itself privileged or protected, will enable other parties to assess the claims.
- Rule 26(f)(3)(D): any issues about claims of privilege or of protection as trial-preparation materials including the scope of privilege review, the nature and amount of information to be included in the privilege log, and applicability of cost-effective privilege log variations, and — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.
- Rule 16(b)(3)(B): add a new (iv) saying define the scope of privilege review, the nature and amount of information to be included in any privilege log, and any cost-effective methodology to be used in any privilege log; and, in addition, add the following to current (iv) (redesignated as (v)): or that define the format of any privilege logs.

Federal Magistrate Judges Association (61): The committee members agreed that continued discussion should focus on a potential revision to Rule 26(f)(3)(D) to include, as part of the duty to meet and confer, the topic of how privilege logs should be drafted based on the needs in a particular case under Rule 26(b)(5)(A). If a rolling production of documents is anticipated, the discussion should also address the need to update the privilege logs within one or two weeks of each production. The results of that discussion could be incorporated into the court's scheduling order under Rule 16.

Sharon Robertson (65) (plaintiffs in complex litigation): The current rule has allowed the parties to successfully resolve disputes without court intervention. The parties meet and confer before and after privilege logs are produced, and can challenge assertions of privilege where necessary.

Public Justice (66): The rule affords parties and courts the ability to tailor compliance with the needs of each case. The rule allows the parties and the court to do their jobs.

National Employment Lawyers Association (69): To the extent the Committee wishes to modify the rule, NELA endorses the idea of adding a requirement that litigants discuss privilege logs during the 26(f) conference, as well as identifying it as a topic to be addressed by the court during a Rule 16(b) scheduling conference. Such an approach is an efficient and tailored way to allow parties to raise concerns and questions prior to the start of discovery. At a minimum, it could permit the court to design methods to resolve any disputes that later develop.

Thomas Sobol (72) (complex litigation plaintiffs): The current rule works well. In practice, the parties meet and confer before and after privilege logs are produced. The receiving party homes in on the key documents it believes may have been improperly withheld. The parties resolve most, if not all, of their differences. When logs are done well, and negotiations are meaningful, any dispute landing before a judge has ben pruned back. In complex cases, the structure, contents, and exemptions for privilege logs are carefully negotiated. The parties work through, up front, the timing for producing logs. These agreements are often embodied in a privilege log protocol approved by the court. "The ground rules are clear from jump street." Under the current rule, the parties have unconstrained latitude to negotiate specific issues in each case that may warrant approaching a privilege log differently. This enables the parties to use their experience and expertise to craft a process that works for the case.

Lawrence Anderson (77) (represents people against institutional opponents): This proposal represents yet another example of imposition of informal conferences and loosened standards. Rather than resolve conflicts, these rules merely prolong conflicts and end up shifting the burden from those who seek to avoid discovery to those who seek to enforce discovery,

Leonard Bennett (81) (plaintiffs in large document cases): I find stipulations useful to limit difficulties in logging documents. In my cases, we regularly agree with opponents that no discovery requests should be interpreted as seeking attorney-client communications since the attorney was retained in the litigation. Then those do not need to be logged.

American Assoc. for Justice (82) (largest plaintiff attorney organization in country): The problems cited to justify changing the rule are all of a type that can be (and often are) easily worked out by the parties.

Kenneth Wexler (83) (plaintiffs in complex litigation): The parties now meet and confer before and after privilege logs are produced. They are able to resolve most disputes most of the time, in part because the rule requires the responding party to provide needed specifics. Amending the rule to provide less information in favor of broad categories will jeopardize plaintiffs' discovery rights.

Anthony Irpino (86) (plaintiffs in MDL proceedings; often primary plaintiff counsel responsible for handling privilege claims): This possible amendment is a good idea. "It is particularly helpful for parties to discuss early in the litigation the method for complying with Rule 26(b)(5)(A)."

Adam Levitt, David Straite, Bruce Bernstein, Amy Keller & James Ulwick (87) (plaintiff side in class actions mass torts, data breach and cybersecurity litigation): We are experienced litigators, and frequently negotiate the scope, frequency, method, and form of ESI and document discovery before, during, and after litigation. We find that most defendants are willing to negotiate a discovery protocol that allows for certain categories of documents to be presumptively protected by a privilege categorization. These arrangements allow defendants to save time and money by limiting the review necessary to smaller universes of documents than they otherwise would have to review. It also assists plaintiffs, as it is far less likely that the defendants will just "dump" every possible document on the plaintiffs and expect the plaintiffs to sort it out.

Eric Weisblatt (88) (patent litigation, both plaintiff and defendant): The parties ought to discuss whether a log is necessary during the preparation of the discovery plan. Indeed, in patent litigation privilege logs should be mandatory.

John Whitfield (89) (plaintiffs in personal injury, products liability and bad faith claims): I am supportive of dealing with compliance with the rule in discovery plans and including a discussion in a Rule 16 conference if necessary. In fact, I have made it a point to insist in any document plan that categorical descriptions of documents claimed to be privileged not be used, which is many instances is agreed to by the other side. I have also found that courts are very receptive to managing a plan to obtain the necessary information for the privilege log to permit me to assess the privilege claim.

Paul Bird (90) (plaintiff product liability, collision, medical malpractice): We have had some modicum of success resolving some minor issues with privilege logs amongst counsel, but we often must seek court intervention. Requiring the parties to discuss compliance with the rule when preparing their discovery plan and potentially including a discussion in a Rule 16 conference would seem to encourage transparency and prevent some abusive uses of privilege logs.

Berger Montague (93) (firm represents plaintiffs in a full spectrum of complex litigation): The parties should meet and confer as early as practicable to reach agreement on how privilege assertions will be handled. The rule recognizes that there is no one-size-fits-all approach that works for every case. Our firm has utilized different combinations of techniques depending on the case

to lessen the burden of privilege logging. This has, on occasion, included categorical logging for certain types of documents. Parties should be encouraged to work through these issues through meet and confer sessions to come up with a tailored approach. If the parties do this in good faith, the court will not need to be burdened with these issues later. On occasion, a protective order is a good solution to problems in this area.

Dena Sharp (94) (plaintiff side in complex cases): If rule changes are pursued, the right way to do it would be to focus on frontloading. Revising Rule 26(f)(3)(D) to expressly require the parties to discuss their methods for complying with the privilege log requirement when preparing their discovery plan, and a companion revision to Rule 16 to invite the court to address privilege log issues early in the litigation could help alleviate privilege-associated burden. It could require the parties to get on the same page about logging early on, thus heading off delay and expense later on due to multiple rounds of "do-overs." The parties may also agree to production of privilege logs on a rolling basis. These arrangements might even include some categorical logging provisions. For example, the Northern District of California Model Stipulated Order re ESI discovery includes this possibility.

Lisa Clay, NELA-Illinois (96) (representing employment law plaintiffs): We do not believe that requiring discussion does much to further underlying compliance in the absence of more concrete guidance in the rule on what is required. Discussion about the existing rule will do little to address the concerns of this organization. We need specific requirements in the rule itself.

William Rossbach (98): It could be helpful to require the parties to discuss compliance with the rule when they are preparing their discovery plan and potentially add that issue also to the Rule 16 conference. However, more is needed to improve compliance.

CLEF (Complex Litigation eDiscovery Forum (104) (plaintiff complex litigation): In the complex cases CLEF members handle, it is already standard practice to engage in discussions up front about privilege log (and a lot of other) discovery issues. The specifics of agreements emerging from such discussions vary greatly for various cases, and are highly case-specific. They may include tailored exclusions from logging obligations, but those are not appropriate in every case and must be designed to suit the unique elements of the pending case. They also often address the timing of privilege log production, and the content and form of the privilege log. It is not true, for example, that metadata logs are appropriate in all cases. Most privilege logs also set forth a procedure for privilege challenges, calling for both informal discussions and formal in-court action when necessary.

(8) National uniformity regarding rule's requirements

Austen Zeuge (13) (intellectual property litigation for both plaintiffs and defendants): There are some problems under the rule, including different standards applied by different district courts. The requirements for privilege logs vary too much from district to district. Problems arise when counsel overlook unusual local requirements. Some district-to-district variations have to do with ESI, particularly how to designate natively or near-natively produced ESI on a privilege log versus those produced on paper or in PDF format, or how attachments should be treated. "If the rule addressed minimum (and perhaps maximum) privilege log requirement in a way that was nationally uniform that would seem to promote justice."

Federation of Defense and Corporate Counsel (27): Presently there are many unwritten protocols that vary from district to district. As a result, there is confusion among the federal courts as to what is required under the rule. We encourage reforms to ensure that the rule is complied with uniformly across all federal courts.

W. Ellis Boyle (56) (personal injury and medical malpractice plaintiffs): One thing that would be helpful would be uniform guidance about the minimum requirements for a privilege log. I think a log should include, at least: (1) who created the document; (2) when it was created; (3) the format of the document; (4) every person to whom it has been sent; (5) a brief, typically generic description of the document; and (6) the type of privilege claimed.

Federal Magistrate Judges Association (61): A nationwide rule would allay the current problem lawyers face in trying to comply with varying rules among the federal district courts.

Thomas Sobol (72) (complex litigation plaintiffs): There are few guidelines for categorical privilege logs. As a result, federal district courts have all adopted different standards, creating a lack of uniformity, inevitably leading to more judicial intervention and involvement to provide guidance.

Robert Keeling (76) (co-chair of Sidley eDiscovery team): Local rules create inconsistency among the standards governing the adequacy of privilege logs across federal practice.

Morgan Adams (79) (plaintiff lawyer representing catastrophically injured): I think that the court should have a form privilege log for uniformity. Currently the requirements depend on case law and must be researched jurisdiction by jurisdiction.

Frank Bailey (80) (catastrophic injuries): We have found that clear, detailed, concise, and enforceable guidelines for privilege logs are a method for combatting malicious attempts to hide evidence.

Revised Rule Proposal from LCJ
(included with submission 102)

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must identify and describe the information not produced and the basis for withholding the information, except as the parties agree or the court orders that the identification and description of that information is not required or the information is excluded from this requirement by subdivision (D) of this rule.

(B) *Identification and Description of Information Withheld by Category.* A party withholding items shall identify and describe the items withheld by category, as the categories are defined by agreement of the parties or court order, that:

(i) describes the type or subject matter of the documents, communications, or tangible things not produced and the basis for withholding based on categories such as types of communications and/or subject matter of the items–and do so in a manner that will enable other parties to assess the claim; and

(ii) may include the identification, by number or otherwise, of each item withheld.

(C) *Identification of Information Withheld by Item.* The parties may agree, or a party may move the court, to require individual item identification of withheld information on the grounds of substantial need, undue hardship, or prejudice. If a motion is brought, the court shall consider whether an identification by item is proportional to the needs of the case as set forth in subdivision 26(b)(1) of this Rule and, if the motion is granted, may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(D) *Information Withheld Excluded from [Not Subject to] Identification.* Absent a showing of substantial need, undue hardship, or prejudice, a party withholding privileged or trial-preparation materials is not required to identify categories of items or each item withheld that are created or dated after the filing of the first complaint in the action. If the court orders identification of such items, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(E) *Use of Technology for Identification of Withheld Materials.* A party may use search terms or other technologies to identify potentially privileged and trial-preparation materials and rely upon those search terms or technologies for withholding as privileged or protected as trial-preparation materials. Upon a showing of substantial need, undue hardship, or prejudice by any other party, the court may order that search terms or technologies be modified or another procedure for identification such materials be employed. If the court orders a modification or other procedure, the court may order that the additional costs of describing each item be shared by the parties or allocated in full to the moving party.

(F) *Motions to Compel Production of Withheld Items.* If a party moves under Rule 37(a) to compel the production of items withheld on the grounds privilege or protected as trial-preparation material, the procedures shall require:

(i) if the motion is to compel production of a category or categories of items:

(a) the responding party shall provide a description of a reasonable sample of the items setting forth the basis of the claim and sufficient to permit the court to assess the claim;

(b) the court may order the responding party to provide a description of each item in the category as set forth in subdivision (C) of this rule; and

(c) the court shall order the production of items only upon determining that each item to be produced is not subject to withholding on the basis of privilege or as trial-preparation materials.

(ii) items shall not be submitted to the court for in camera review except where the court has determined that the basis for withholding cannot be assessed by the description provided by the responding party and that such review is necessary for the court to adjudicate the issue; and

(iii) a party may move for an order to compel another party to provide descriptions of categories or items which comply with subdivisions (B) or (C) of this rule. An order to compel descriptions of categories or items shall require only the withholding party provide descriptions in compliance with this rule and, where good cause is shown, award reasonable fees and costs to the moving party.

(G) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material,

the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified and provide the identity of the person(s) or entity(ies) to whom the information was disclosed; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved. If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

MEMORANDUM

To: Professor Cooper, Professor Marcus
Reporters, Advisory Committee on Civil Rules

From: Kevin Crenny, Rules Law Clerk

Date: July 15, 2021

Re: Circuit Standards for Filing Under Seal

This memo summarizes the different standards used in the Courts of Appeals for filing material under seal. It focuses on the standard applied when a court considers a motion seeking to seal material to which the public has a common law right of access. Most often this means material connected with a summary judgment or other dispositive motion. Different, lower standards apply when a party seeks to seal material subject to a protective order issued under Rule 26(c). This memo does not focus on those types of motions. The memo also does not focus on the standards applied when a party seeking to prevent sealing argues that it has a First Amendment right to access court filings.

The memo summarizes each circuit's standard briefly. The standards are, for the most part, fairly similar. The Seventh, Eleventh, and D.C. Circuits phrase their standards in the most distinct ways, but I am not sure that the Eleventh or D.C. Circuits' are meaningfully different in terms of substance. The Seventh's might be.

I have also collected longer block quotations from the relevant cases in each Circuit, but did not include them in this memo. Please let me know if these, or any follow-up research would be helpful to you.

Kevin

The **First Circuit** says that "only the most compelling reasons can justify non-disclosure of judicial records that come within the scope of the common-law right of access." *CardioNet, LLC v. InfoBionic, Inc.*, No. 1:15-CV-11803-IT, 2015 WL 13696787, at *1 (D. Mass. Dec. 23, 2015) (quoting *United States v. Kravetz*, 706 F.3d 47, 59 (1st Cir. 2013)); *see also F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410–11 (1st Cir. 1987) (calling the presumption of public access "strong and sturdy"). Courts are instructed "to weigh the presumptively paramount right of the public to know against the competing private interests at stake" and the burden is on the party seeking to prevent disclosure. *Standard Fin. Mgmt. Corp.*, 830 F.2d at 410–11.

The **Second Circuit** has said that "[t]he weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Lugosch v.*

Pyramid Co. of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006). The presumption is strong for "documents . . . used to determine litigants' substantive legal rights." *Id.* (citing United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995)). A court cannot seal material without making "specific, on the record findings . . . demonstrating that closure is essential to preserve higher values [than disclosure] and is narrowly tailored to serve that interest." *Bronx Conservatory of Music, Inc. v. Kwoka*, No. 21CV1732ATBCM, 2021 WL 2850632, at *3 (S.D.N.Y. July 8, 2021) (quoting *Lugosch*, 435 F.3d at 120).

The **Third Circuit** has a relatively recent opinion detailing the "distinct standards" it applies "when considering various [types of] challenges to the confidentiality of documents." *In re Avandia Mktg., Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 670 (3d Cir. 2019). For "pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith," there is a "presumptive right of public access." *Id.* at 672 (quoting *Goldstein v. Forbes (In re Cendant Corp.)*, 260 F.3d 183, 192–93 (3d Cir. 2001)). The Circuit described the standard it applies for these materials as follows:

> [T]he common law right of access is "not absolute." "The presumption [of access] is just that, and thus may be rebutted." The party seeking to overcome the presumption of access bears the burden of showing "that the interest in secrecy outweighs the presumption." The movant must show "that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure." The "strong presumption of openness does not permit the routine closing of judicial records to the public."
>
> To overcome that strong presumption, the District Court must articulate "the compelling, countervailing interests to be protected," make "specific findings on the record concerning the effects of disclosure," and "provide[ ] an opportunity for interested third parties to be heard." "In delineating the injury to be prevented, specificity is essential." "Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." "[C]areful factfinding and balancing of competing interests is required before the strong presumption of openness can be overcome by the secrecy interests of private litigants." To that end, the District Court must "conduct[ ] a document-by-document review" of the contents of the challenged documents."

Id. at 672–73 (citations omitted)

The **Fourth Circuit** requires that a court considering a motion to seal must "(1) provide public notice of the notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000). "The common-law presumptive right of access extends to all judicial documents and records, and the presumption can be rebutted only by showing that 'countervailing interests heavily outweigh the public interests in access.'" *Doe v. Public Citizen*, 749 F.3d 246, 265–66 (4th Cir. 2014) (quoting *Rushford v. New Yorker Mag., Inc.*, 846 F.2d 249, 253 (4th Cir. 1988)). "The trial court may weigh

'the interests advanced by the parties in light of the public interests and the duty of the courts.'" *Rushford*, 846 F.2d at 253.

The **Fifth Circuit** also recognizes the "common law right to inspect and copy judicial records." *Bradley on behalf of AJW v. Ackal*, 954 F.3d 216, 224 (5th Cir. 2020) (quoting *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993)). The Fifth Circuit agrees with most others that this right yields "a presumption of public access to judicial records." *Id.* at 225 (quoting *Van Waeyenberghe*, 990 F.2d at 848). However the Fifth Circuit "has not assigned a particular weight to the presumption[,] [n]or has [it] interpreted the presumption in favor of access as creating a burden of proof." *Id.* (citing *Van Waeyenberghe*, 990 F.2d at 848 n.4 and then citing *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr.*, 913 F.3d 552, 450 (5th Cir. 2019)). A court has discretion and "must balance the public's common law right of access against the interest favoring nondisclosure," treating the presumption in favor of access as only "one of the interests to be weighed on the [public's] side of the scales." *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848 and then quoting *Belo Broad. Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. Unit A. Aug. 1981)).

The **Sixth Circuit's** standards for filing under seal were described in detail in 2016 by Judge Kethledge. *Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305–06 (6th Cir. 2016). He wrote that "[u]nlike [for] information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'" *Id.* at 305 (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983)). There is "a 'strong presumption in favor of openness' as to court records." *Id.* (quoting *Brown & Williamson*, 710 F.2d at 1179). "The burden of overcoming that presumption is borne by the party that seeks to seal them." *Id.* (quoting *In re Cendant Corp*., 260 F.3d 183, 194 (3d Cir. 2001)). That burden is "heavy" and [o]nly the most compelling reasons can justify non-disclosure of judicial records." *Id.* (quoting *In re Knoxville News–Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). The court's application of this standard requires some balancing, as "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Id.* (citing *Brown & Williamson*, 710 F.2d at 1179).

In the **Seventh Circuit**, a couple of cases from the 1980s contain the language we see repeated in most circuits, about how "a common law right of access creates a 'strong presumption' in favor of public access." *United States v. Corbitt*, 879 F.2d 224 (7th Cir. 1989); *United States v. Edwards*, 672 F.2d 1289, 1293–94 (7th Cir. 1982). But this language does not seem to show up as consistently as it does in other circuits. Instead the Seventh Circuit's rule is that "[i]nformation that affects the disposition of litigation belongs in the public record unless a statute or privilege justifies nondisclosure." *United States v. Foster,* 564 F.3d 852, 853 (7th Cir.2009). "[V]ery few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed." Baxter Int'l, Inc. v. Abbott Lab's, 297 F.3d 544, 546 (7th Cir. 2002). At least some lower courts have descried the Seventh Circuit as "tak[ing] a 'strict position' regarding public access to court documents." Sutherlin v. Phoenix Closures, Inc., No. 17-cv-489, 2018 WL 4620269, at *1 (S.D. Ind. Sept. 26, 2018) (quoting Swarthout v. Ryla Teleservices, Inc., Case No. 11-cv-21, 2012 WL 5361756, at *2 (N.D. Ind. Oct. 30, 2012)).

The **Eighth Circuit** also recognizes the "common-law right of access to judicial records," *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013). It also agrees with other circuits that

"[t]his right of access is not absolute, but requires a weighing of competing interests." *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). However, "[w]hen the common law right of access to judicial records is implicated, [the Eighth Circuit] give[s] deference to the trial court rather than taking the approach of some circuits and recognizing a 'strong presumption' favoring access." *Id.* (quoting *United States v. Webbe,* 791 F.2d 103, 106 (8th Cir.1986)); *see also, e.g.*, *Mays v. Bloomington Police Dep't*, No. 20-cv-0568, 2020 WL 4284138, at *1 (D. Minn. July 27, 2020), report and recommendation adopted, No. 20-cv-0568, 2020 WL 5077422 (D. Minn. Aug. 27, 2020) (following *Webster Groves Sch. Dist.* on this point); *Sec. Nat'l Bank of Sioux City, Iowa v. Abbott Lab'ys*, No. 11-cv-4017, 2014 WL 12603512, at *1 (N.D. Iowa Mar. 3, 2014) (same).

The **Ninth Circuit** follows the standard "strong presumption in favor of access to court records." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003)). "[A] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the 'compelling reasons' standard." *Id.* (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006)). Material can only be sealed if the court "finds 'a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture.'" *Id.* at 1096–97 (quoting *Kamakana*, 447 F.3d at 1179). "What constitutes a 'compelling reason' is 'best left to the sound discretion of the trial court.'" *Id.* at 1097 (quoting *Nixon v. Warner Commnc'ns, Inc.*, 435 U.S. 589, 599 (1978)).

The Ninth Circuit has drawn the same distinction seen in most circuits between materials filed as part of a dispositive motion, for which the strong presumption of access and compelling reasons standard applies, and the lower "good cause" standard of Rule 26(c) that applies to discovery material attached to non-dispositive motions. *See id.* at 1098. The Ninth Circuit has scrutinized this distinction a bit more than most circuits, though, and has concluded that "nondispositive motions are not always unrelated to the underlying cause of actions" and that when "a nondispositive motion [is] directly related to the merits of the case," the higher standard for sealing may apply. *Id.*at 1098–99 (citing *Kamakana*, 447 F.3d at 1179).

The **Tenth Circuit** issued an opinion last year summarizing its caselaw on sealing court records:

> "Courts have long recognized a common-law right of access to judicial records." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012) (quotation marks omitted); *see* *1293 *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997) ("It is clearly established that court documents are covered by a common law right of access."); *see also United States v. Hickey*, 767 F.2d 705, 706, 708 (10th Cir. 1985) (applying the common law right of access to "the details of [a defendant's] plea bargain").[3] Although this common law "right is not absolute," *Colony Ins.*, 698 F.3d at 1241 (quotation marks omitted), there is a "strong presumption in favor of public access," *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007). This strong presumption of openness can "be overcome where countervailing interests heavily outweigh the public interests in access" to the judicial record. *Colony Ins.*, 698 F.3d at 1241 (internal quotation marks omitted); *see McVeigh*, 119 F.3d at 811. "Therefore, the district court, in exercising its

> discretion [to seal or unseal judicial records], must 'weigh the interests of the public, which are presumptively paramount, against those advanced by the parties.'" *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)).
>
> "Consistent with this presumption that judicial records should be open to the public, the party seeking to keep records sealed bears the burden of justifying that secrecy, even where, as here, the district court already previously determined that those documents should be sealed." *Id.*

United States v. Bacon, 950 F.3d 1286, 1292–93 (10th Cir. 2020). The case is a criminal one but the standards it states apply equally to civil cases. *Bacon* summarizes both civil and criminal precedents and recent civil cases have relied on it. *See, e.g.*, *Snyder v. Acord Corp.*, 711 F. App'x 446 (10th Cir. 2020); *Ryan v . Correctional Health Partners*, No. 18-cv-956, 2020 WL 6134912 (D. Colo. Oct. 19, 2020).

The **Eleventh Circuit** has a "good cause" standard for sealing that sounds somewhat lower than the prevailing standard for similar motions in other circuits. In 2007 the circuit adopted language from a Third Circuit opinion identifying, in the common law, "a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith." *Romero v. Drummond Co.*, 480 F.3d 1234, 1245–46 (11th Cir. 2007) (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir.1993)). However, this presumptive right "may be overcome by a showing of good cause, which requires balancing the asserted right of access against the other party's interest in keeping the information confidential." *Id.* at 1245. Courts in the Eleventh Circuit are instructed to "consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents." *Id.* at 1246.

The **D.C. Circuit** has a six-factor test developed in *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980). The factors are:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

Nat'l Children's Ctr., 98 F.3d at 1409 (citing *Hubbard*, 650 F.2d at 317–22). The D.C. Circuit recently issued some more detailed guidance on how each factor should be applied. *Cable News Network, Inc. v. Fed. Bureau of Investigation*, 984 F.3d 114, 118 (D.C. Cir. 2021).

The **Federal Circuit** does not appear to have any law of its own governing motions to seal.

TAB 10

10. PROGRESS REPORT: APPEAL FINALITY AFTER CONSOLIDATION JOINT CIVIL-APPELLATE SUBCOMMITTEE

The Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee (also known as the *Hall v. Hall* Subcommittee) was appointed to study the effects of the final judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S. Ct. 1118 (2018). Implicitly choosing among the four approaches that had been taken by the courts of appeals, the Court ruled that complete disposition of all claims among all parties to what began as a separate action is a final judgment no matter that other parties and claims asserted in originally independent actions remain undecided. The Court also suggested that if this rule creates problems, solutions may be found in the Rules Enabling Act process.

Subcommittee work began with an extensive and elaborate FJC study of appeals in consolidated actions filed in 2015, 2016, and 2017 that was described in the report to the October 2020 meeting. That work was followed by an informal effort that asked judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about experience with *Hall v. Hall*. Each circuit routinely screens incoming appeals for timeliness. No occasion to dismiss appeals as untimely under the *Hall v. Hall* rule was recalled in the Third, Seventh, Ninth, or Eleventh Circuits, either on staff screening or on motion to dismiss. The Second Circuit did find occasion to dismiss appeals in *McCullough v. World Wrestling Ent., Inc.*, 827 F. Appx. 3 (2d Cir. 2020). The setting was complicated, as described in the subcommittee's April report. No general lessons can be drawn from this example.

The subcommittee met again in June. Notes of the meeting are attached. The FJC has launched another study, using a different and less burdensome approach. After that work is completed, the subcommittee will consider any lessons it may yield. Even if the results do not suggest any problems in practice, the subcommittee will turn to the question whether it would be wise to consider rules revisions that extend the valuable partial final-judgment provisions of Rule 54(b) to better align the interests of the district court, the court of appeals, and the parties with final-judgment appeal doctrine. It may be that it is better to treat an action formed by consolidating initially separate actions under Rule 54(b), just as it would be if the same action had been formed from the beginning as a single action.

Attached as an appendix to this report are the notes from the subcommittee's June 28, 2021 conference call.

Conference Call Notes
Hall v. Hall Subcommittee
Advisory Committee on Civil Rules
June 28, 2021

The joint *Hall v. Hall* Subcommittee met by telephone conference call on June 28, 2021.

Judge Rosenberg began the meeting with a brief review of recent activity. The comprehensive FJC survey of appeals in a sample of all actions consolidated in the district courts over a period of three years showed no opportunities to appeal lost under the rule established by *Hall v. Hall*. She undertook an informal survey of a few circuits for anecdotal information that revealed only one case that involved appeal opportunities lost. Some circuits provide explicit notice of the rule in their appellate handbooks, and the rule is among the factors considered in court staff screening for appeal jurisdiction. That has been reported to the Civil Rules Committee, and to the June 22 Standing Committee meeting.

The question now is whether to pick up an opportunity for a different kind of FJC survey. Emery Lee reports that it was a great deal of work to develop a three-year district court data base of consolidated cases, and similar work would be required to extend that kind of survey to later years. But a lower-cost survey may well be possible through the existing data base for appeals. Criminal cases could be excluded, and also civil actions filed by prisoners. The remaining civil appeals cases, including MDL proceedings, could then be tied back to the district court proceedings to determine how many of the appeals followed consolidation in the district court. The denominator would be district court cases in which an appeal is filed, not the far larger number of all district court cases.

One initial question was whether the new study could be completed in time for the subcommittee to deliberate and prepare recommendations for the October 5 Civil Rules Committee meeting. That cannot be done. But it was agreed that it is not important to look for committee action in October. The questions raised by *Hall v. Hall* are long range. The initial FJC study yielded valuable information about consolidation practice that may prove useful in later deliberations. Whatever information may be learned by a second study, it is likely to be pretty much limited to the risk of lost appeal opportunities.

A narrow question was raised: it would be possible to frame the search by beginning with a narrow part of the appeals data base that identifies appeals dismissed for lack of appeal jurisdiction or improper appeal procedure (most likely late notices of appeal). This approach might readily yield comprehensive information about the risk of lost opportunities to appeal. But Dr. Lee replied that working with the data base in this way is likely to prove an uncertain endeavor. It is better to begin with the broader universe. It seems likely that there will be something like 700 to 800 cases per year with appeals following consolidation. Identifying those cases is not likely to involve a massive amount of work.

After identifying the consolidated cases with appeals, the hard part will follow. "Manual" review of a sample of cases will be required. There is a lot of "noise" in the way these cases are recorded in CM/ECF; it is hard to know how often mistakes happen. So if no appeal is filed — as

perhaps after belated recognition that the time to appeal has expired under *Hall v. Hall* — the case will not appear in the search results.

A more pointed question was asked: Why include MDL proceedings, a distinctive type of consolidation that, even before *Hall v. Hall*, had a settled rule that final disposition of a single case is a final judgment for appeal purposes? The MDL Subcommittee has been told repeatedly that there are few appeals at any point in MDL proceedings, and considered long and hard before deciding not to act on pleas for expanded appeal opportunities. But a plaintiff who loses a bellwether trial has a final appealable judgment. Dr. Lee responded that he would be surprised to find many MDL appeals; if a problem emerges, it can be dealt with.

Further discussion concluded that it will be useful to launch the first phase of the study, identifying appeals in consolidated actions. Then it will be appropriate to seek an estimate of the extent of the more arduous task of exploring the district court records. It may be possible to decide to go ahead without needing a formal subcommittee meeting.

The final step looked to the prospect that further deliberation, long or short, will be appropriate even if further study bears out the prospect that *Hall v. Hall* has not defeated many opportunities to appeal. The Court invited the rules committees to consider the possibility that its approach will generate problems. One example ties directly to the lost-appeal concern: lawyers may expend a great deal of effort, across the universe of consolidated cases, in making sure of the application of *Hall v. Hall* at various points as the case proceeds through a series of steps and orders. A different rule that reduces that cost could be useful even if those efforts are not needed to avoid loss of appeal opportunities.

A more general prospect also remains. The relationships between trial court proceedings and appeals courts may be improved by bringing consolidated cases into the sweep of the partial final judgment provisions of Civil Rule 54(b). The purposes of Rule 54(b) are likely to be advanced as much when initially separated actions are consolidated into one as when a single action presented the same array of claims and parties from the beginning. The district court, acting as "dispatcher," can make a case-specific determination whether an immediate appeal would disrupt continuing proceedings on the claims and parties that remain in the action, whether an appeal would arise in a context that would provide as full a record as needed for sound disposition, and whether a present appeal would risk burdening the court of appeals with later appeals that require repeated consideration of much the same record. The court of appeals can benefit for the same reasons. And even a party who wants appellate review at some point may prefer to delay an appeal that, under *Hall v. Hall*, must be taken now or never. These issues will remain on the subcommittee agenda for possible future discussion.

TAB 11

11. PROGRESS REPORT: E-FILING DEADLINE JOINT SUBCOMMITTEE

This progress note repeats the note in the April agenda, which was borrowed from the memorandum prepared by Professor and Reporter Edward Hartnett for the Appellate Rules Committee.

Information continues to be gathered to help inform whether to propose any change to the midnight deadline for electronic filing.

In particular, the FJC is continuing to analyze data regarding what time of day filings are made in federal courts. This process is now more than half complete. In addition, the FJC is looking at both local rules of federal courts and states' rules for topics such as filing times and whether pro se litigants can use electronic filing.

A survey of attorneys, clerks, and judges is on hold for now due to the pandemic.

Later, the FJC may undertake a comparison of filing patterns for a few courts pre- and post-pandemic to get a sense of whether the pandemic changed time-of-day patterns.

TAB 12

12. RULE 9(b) SUBCOMMITTEE

Dean Spencer has submitted a proposal to amend Rule 9(b) based on his article: A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 Cardozo L. Rev. 1015 (2020). *See* Suggestion 20-CV-Z. Although not much time was available to discuss this proposal at earlier meetings, it has become apparent that powerful competing arguments weigh both for and against the proposal.

To ensure that full and careful consideration is provided, a Rule 9(b) Subcommittee will be appointed soon after the new Committee members become official members on October 1. A research memo on the role of Rule 9(b) before the *Iqbal* decision has been prepared to orient the subcommittee in its work. The goal will be a full report for consideration at the April 2022 meeting.

TAB 13

13. IN FORMA PAUPERIS PRACTICES AND STANDARDS

The draft April Minutes reflect a plan to gather more information to support further consideration of the persisting question whether it makes sense to attempt to draft a rule to regulate some aspects of practice in ruling on requests for in forma pauperis status. The April agenda description is copied here, followed by a brief recount of some new information. The topic does not yet seem ready for drafting possible rules, nor is it ready for a decision to defer to other bodies the responsibility to develop possible means to achieve more uniform standards and practices.

Professors Zachary D. Clopton and Andrew Hammond have submitted Suggestion 21-CV-C (attached to this report) urging that the Committee renew its consideration of the standards and procedures for granting petitions to proceed in forma pauperis.

Similar issues have been considered by the Committee in October 2019 and April 2020, and briefly in October 2020.

The most extensive discussion occurred at the October 2019 meeting, prompted by an extensive submission by Sai and informed by Professor Hammond's article, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478 (2019). Three main issues were discussed: the great variations in standards employed to qualify for i.f.p. status, both as among different districts and as among judges in the same district; the ambiguity of the terms that shape the disclosures required by the national federal court forms, AO 239 and AO 240; and the intrusiveness and asserted irrelevance of much of the requested information. Committee members agreed that "these are big problems," in large part because many factors enter into the determination, too many to capture in any formula of the sort that might exert much pressure toward uniformity. Doubts also were expressed as to the role of the Rules Enabling Act process in addressing questions that at least veer close to matters of substance under the in forma pauperis statute. Some comfort was found in information that the Court Administration and Case Management Committee had taken an interest in these issues, and that the Department of Justice would inquire into the possibility that some other groups might be found to address some of these questions. The topic was removed from the agenda.

A new submission by Sai brought i.f.p. issues back to the agenda at the April 2020 meeting. This suggestion elaborated the argument that the national federal court forms and Appellate Rules Form 4 demand information that not only is irrelevant and intrusive, but is so intrusive as to invade the constitutional rights of nonparties whose information is required. Examples include a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; spouse's employment history; spouse's cash and money in bank accounts or in "any other financial institution"; a spouse's other assets; and persons who owe money to the spouse and how much. These questions were held for further consideration as advised by the Appellate Rules Committee's examination of Appellate Rules Form 4.

The new submission adds further details to support the proposition that seems to be accepted on all sides: there are wide variations in the information gathered to support decision of petitions to proceed in forma pauperis, and few courts provide any guidance to individual judges.

Nor are uniform standards to be found. The result is wide variation in the results, both between districts and within districts.

The most important part of the new submission is the challenge: "IFP procedure should be on this Committee's agenda." The Committee could craft a Civil Rule. Or it could provide "guidance." The goal should be national i.f.p. standards. The standards "should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts."

In forma pauperis standards have been carried forward on the agenda for some time now. This submission renews the familiar questions. The most likely question for present discussion is whether the time has come to undertake development of a new Civil Rule, or, failing or postponing that, to search more vigorously for other bodies that might advance the cause of uniform and good practices to guide judges facing petitions for leave to proceed i.f.p.

Judge Rosenberg has gathered additional information from the AO regarding i.f.p. practices. A short summary includes these items: Many courts do not have specific standards for approving or denying i.f.p. status. Most courts require that plaintiffs submit the national federal court i.f.p. form. Grants and denials are entered in form or text orders, or in templates. Requests are handled in many courts by pro se law clerks, but others use the clerk's office staff and find that this both streamlines and expedites the process.

A few interesting added bits of information from the AO give a feeling of the reports from various districts.

Most of the reported practices relate to habeas corpus petitions and to prisoner civil rights actions, distinguishing between them. The focus on habeas corpus petitions suggests that the Criminal Rules Committee might be brought into this topic if the work moves toward drafting rules proposals.

The District of Massachusetts reports that it has no numerical definition of "poverty"; "judges make decisions based on all information disclosed." The Eastern District of New York reports no "particular standards," and the Southern District of New York reports no "clear standards." The Central District of Illinois says that "the standard for indigency from a prisoner perspective is within the judge's discretion." The Middle District of Georgia "does not have any set standards for determining when IFP should be granted." The Northern District of Illinois suggests that indigency usually is found when a prisoner has less than $25 in the prison trust fund. The Northern District of Indiana has an elaborate method of calculating partial filing fees, using "the monthly periodic payment minimum of 20% of $10 as a practical guideline." The District of Minnesota, on the other hand, sets the "standard for financial eligibility [at] 200% of the federal poverty guideline." The Northern District of California grants i.f.p. status if a habeas petitioner has less than $50 in a prison trust account. The Northern District of Alabama says that an initial partial filing fee generally is not required "if the amount is less than $1.00," but does not describe the method used to determine whether a partial filing fee is required.

In addition to differences in the roles assigned to pro se law clerks and to the court clerk, the District of New Mexico notes that the pro se clerk's recommendation to grant i.f.p. status is reviewed by a magistrate judge, while a recommendation to deny is reviewed by a district judge.

The Appellate Rules Committee continues to study i.f.p. matters in connection with the detailed Form 4 "Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis" attached to the Appellate Rules. They expect to complete a survey of practice that should be available in time for presentation on October 5.

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January 19, 2021

Rebecca A. Womeldorf, Esq.
Secretary, Standing Committee and Rules Committee Chief Counsel
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room 7-300
Washington, DC 20544

Dear Ms. Womeldorf,

We write to recommend that the Advisory Committee on Rules of Civil Procedure consider adding to its agenda the issue of petitions to proceed *in forma pauperis* (IFP).

This letter makes three points. First, there is wide variation in the procedures used by the 94 federal districts with respect to IFP petitions. Second, there is wide variation in the grant rates for IFP petitions across and within districts. Third, IFP is a proper subject of study for this committee.

[1] There is wide variation in IFP procedures.

In *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478 (2019), Professor Andrew Hammond at the University of Florida cataloged IFP procedures for the 94 district courts. At the time of writing, Hammond found that 22 districts accept form AO 239, 37 districts accept AO 240, and 46 districts have developed their own forms. *Id.* at 1496. Among the bespoke forms, there is substantial variation in information requested and depth required. Simple explanations such as geography do not account for this variation. *Id.* at 1496-1500.

Federal judges receive little guidance on how to evaluate the data included on these forms. According to Hammond, "All the forms currently in use in the federal courts—the AO 239 form, the AO 240 form, and the district-court-specific forms—leave judges with no benchmark for deciding how much income is sufficiently low, how many expenses or debts are sufficiently high, and how many assets are sufficiently few. With no articulated threshold on any in forma pauperis form, judges must identify some means test (such as the federal poverty guidelines) or create their own. Few federal courts provide any guidance for judges presented with an in forma pauperis motion." *Id.* at 1500 (internal notes omitted). This status quo makes IFP determinations labor intensive for judges and unpredictable for litigants.

[2] There is wide variation in IFP results.

Professor Adam Pah and colleagues have used data-science algorithms to evaluate the IFP grant rates for districts and judges. Two findings merit attention here.

First, Pah and colleagues found wide variation in the grant rate for IFP petitions across districts. Looking at cases filed in 2016, Pah and colleagues found that federal district courts that received at least 25 IFP petitions had a mean grant rate of 78%, with a standard deviation of 15% and a range of 68 percentage points. *See* Email from Pah to Clopton, Jan. 15, 2021 (on file). This inter-district variation could be justified on any number of bases. We present it without judgment for this Committee's information.

Second, Pah and colleagues also found wide variation in the IFP grant rate *within districts*. According to their recent article, "At the 95% confidence level, nearly 40% of judges—instead of the expected 5%—approve fee waivers at a rate that statistically significantly differs from the average rate for all other judges in their same district. In one federal district, the waiver approval rate varies from less than 20% to more than 80%." *See* Adam R. Pah, et al., *How to Build a More Open Justice System*, SCIENCE (July 10, 2020), https://science.sciencemag.org/content/369/6500/134.full.

[3] IFP procedure should be on this Committee's agenda.

The ability to have one's day in court is a fundamental aspect of the American justice system. Filing fees put a price tag on that right, but the right to petition to proceed *in forma pauperis* should ensure that those who cannot pay can still access our federal courts.

The administration of the IFP procedure is within the mandate of this committee. First, this Committee could propose a Federal Rule of Civil Procedure related to IFP, consistent with the Rules Enabling Act of 1934. Second, without adopting a rule amendment, this Committee could offer guidance to local rules committees in hopes of encouraging convergence on a consistent approach. Third, this Committee could work with the Administrative Office to revise the existing forms to provide guidance to federal judges.

When considering these tasks, we would encourage this Committee to keep in mind two sets of considerations. First, we think there is value is standardization across and within districts. A Federal Rule or guidance from this Committee would go a long way in that direction. Second, we encourage this committee to consider the procedural and substantive values at stake when proposing national IFP standards. IFP standards should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts. *See generally* Hammond, *supra* (describing these values and offering potential standards).

* * *

For the foregoing reasons, we encourage this committee to add IFP to its agenda. If we can be helpful, we would be delighted to assist this Committee on its work on this and other important issues. Please direct any correspondence to Professor Clopton at zclopton@law.northwestern.edu.

Sincerely,

Zachary D. Clopton
Professor of Law
Northwestern Pritzker School of Law

Andrew Hammond
Assistant Professor of Law
University of Florida Levin College of Law

cc: Hon. Robert M. Dow, Civil Rules Committee Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

TAB 14

14. RULE 41(a)(1)

Rule 41(a)(1) governs voluntary dismissals without court order:

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

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

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

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

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) ***Effect.*** Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Rule 41(a)(2) governs dismissal at the plaintiff's request by court order. Suggestion 21-CV-O (attached to this report) raises a question as to Rule 41(a)(1) only. Related questions under Rule 41(a) may be considered as well. But there is no apparent reason for taking on Rule 41(a)(2).

The suggestion was submitted by Judge Jesse Furman, a member of the Standing Committee, and his S.D.N.Y. colleague, Judge Philip Halpern. It points to the disagreement in the cases over a single word in Rule 41(a)(1)(A), which provides for dismissal of an "action." Different answers are given to the question whether the unrestricted right to dismiss without prejudice conferred by Rule 41(a)(1)(A) allows dismissal of some part, but not all, of an action. The part may be a "claim," or a party. At least for the most part, the decisions turn on the familiar "plain meaning" principle. Should the rule be read to reflect a judgment that a plaintiff should have a right, even in the early stages of an action, to dismiss only if nothing is to remain? Or may there be reasons to allow early dismissal without prejudice of a claim or party, retaining the rest of the action, when the initial joinder choice comes to seem undesirable?

Some guidance may be found in the origins of Rule 41. Before 1938 the Conformity Act directed federal courts to adhere to local state practice. State practices varied, but the opportunity to dismiss without prejudice might persist far into the action as it progressed toward judgment. *See* 9 Wright & Miller, Federal Practice & Procedure Civil 4th, § 2362. Establishing

discretionary court control relatively early in the action, as Rule 41(a)(2) does, is attractive. But paragraph (a)(1) reflects sympathy for a plaintiff who has second thoughts before the court and defendant have invested much in the action.

Beyond that starting point, the central feature of Rule 41(a)(1) is that it provides for dismissal without prejudice. Filing the action and then dismissing it leave the plaintiff free to bring the same action, or an action somehow related to it, without penalty for imposing whatever burdens have been imposed on the court and defendant up to the moment of dismissal. The questions are not at all the same as support the right to a voluntary dismissal with prejudice that establishes preclusion to the same extent as a judgment on the merits in the same action.

The question whether the right to early voluntary dismissal without prejudice should extend to only part of an action includes the prospect that changes might instead be made by amending a complaint under Rule 15 or seeking an order dropping a party under Rule 21. Those alternatives are commonly invoked in the cases that limit Rule 41(a)(1)(A) to dismissal of an entire action. Since Rule 41 cuts off the plaintiff's right to unilateral dismissal with an answer, Rule 15(a)(1) would allow amendment once as a matter of course only for 21 days after serving the complaint; after that an amendment to drop a claim or party would require the court's leave. That is an advantage if reason can be found for distinguishing partial dismissals from complete dismissals. Rule 21 seems to require a court order, with the same potential advantage. And neither Rule 15 nor Rule 21 expressly address the "prejudice" question.

Whatever the better rule is, the long-continued division of opinion in the lower courts may be reason enough to consider a clarifying amendment. Drafting would be a bit trickier if the decision is that Rule 41(a)(1)(A) dismissal should be limited to an entire action, since several courts find this to be the clear present meaning. But drafting can be done.

Any reasons for distinguishing between complete and partial early dismissals must be found in experience. Rule 41 reflects sympathy for a plaintiff who comes to believe that it is better to abandon the action entirely, for whatever miscalculation of preparedness, choice of court, and aggregation of claims and parties. Experience may show that this sympathy is well deserved. But is it less deserved when the plaintiff comes to regret only part of the decision to sue? And are the defendant's countervailing interests weightier when only part of the action is dismissed?

A plaintiff may have second thoughts before an answer or a motion for summary judgment without any prompting from the defendant. Filing the action, and service sooner or later, may occur in the middle of developing fact information, framing the information as evidence, and further learning in the law in the abstract or as applied to the apparent facts. Improved knowledge may show that more work is needed to determine whether the action should be pursued at all, or that the needs of proof or even choice of law are better handled in a different court. Perhaps some deference is due even to the interest in abandoning a particular court when preliminary clues suggest it may not be as favorable as another court. In some ways, there may be greater reason to support dismissal in reaction to these concerns when the new knowledge about the choice of time and forum affects only part of the case, whether claim or choice of defendants. A fraud claim joined with a breach of contract claim, for example, may

require difficult proof of different aspects of the same transaction and facts that may not even bear on the breach claim.

Balanced against these interests of the plaintiff are the interests of the court and the defendant. Dismissal without prejudice leaves them subject to the risk of duplicative effort and, for the defendant, continuing anxiety and perhaps preparation for litigation that may never ensue. The litigation may be revived on terms less favorable as to court, time, claims, and other parties. These costs may increase with dismissal of only part of the present action, requiring court and defendant to continue to litigate and offering no protection against extended and duplicative effort in a later action. On the other hand, the dismissed parts of the first action may never be revived, reducing the burden of present litigation and saving the costs — if not the fear — of renewed litigation. And claim preclusion may bar the dismissed parts after judgment on the parts that remain.

A least two additional concerns are relevant. One is that limiting the right to voluntary dismissal without prejudice to dismissing all of an action may encourage greater care in decisions about when and where to bring the action, what parties to join, and what claims to pursue.

A further wrinkle is raised by Rule 41(a)(1)(A)(ii). It authorizes dismissal without prejudice by a stipulation signed by all parties who have appeared. Should dismissal by stipulation of all parties be made available for parts of an action, even if not for unilateral dismissal by the plaintiff?

A second concern is often tangential to the central joinder concerns. A party that is disappointed by a ruling in the action may seek to generate a final appealable judgment by a voluntary dismissal of what remains. This opportunity is likely to require court permission under Rule 41(a)(2) because an answer or motion for summary judgment has been filed, but might arise under (a)(1), most likely on a ruling on a motion made before an answer is filed. Courts of appeals generally refuse to allow appeal finality to be manufactured by a voluntary dismissal without prejudice. This concern probably should not shape consideration of the questions raised by the proposal.

The direct question whether to include partial dismissals in the plaintiff's voluntary right ties directly to the events that cut off the right. As the rule stands, an answer or a motion for summary judgment terminate the right. A motion to dismiss does not. Vast energies may be devoted to litigating a motion to dismiss, including discovery, conferences with the court, extensive briefing, and so on. Long ago, the Second Circuit ruled that an extensive hearing leading to denial of a preliminary injunction, finding a low probability of success on the merits, cut off the right to dismiss by notice even though no answer or motion for summary judgment had been served. The court noted that Rule 41 was amended in 1946 to add the cutoff by motion for summary judgment. The 1946 committee note explained that "such a motion may require even more research and preparation than the answer itself." So literal application of the rule "would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a suit has been reached." *Harvey Aluminum, Inc. v. American Cyanamid Co.,* 203 F.3d 105, 108 (2d Cir. 1953). The plain language of the rule, however, has deterred most

courts from adopting this extra-, and apparently counter-textual, view. *See* 9 Wright & Miller, § 2363, pp. 501-510.

Other questions may be raised as well, although there is no apparent perturbation in the cases. Rule 41 addresses only voluntary dismissal by a "plaintiff." But, perhaps confusingly, it speaks of dismissing before "the opposing party" answers or moves for summary judgment: does that imply that "plaintiff" means any party making a claim? Should the text expressly include any claimant? A defendant may think better of a counterclaim, a crossclaim, or a third-party claim. If the right to dismiss extends to fewer than all parts of an action, why not extend the right to other claims, recognizing that dismissal of a compulsory counterclaim may extinguish the claim under Rule 13(a), and that an exception must be made for a claimant in an interpleader action? It could be urged that a defendant has a stronger claim for freedom to dismiss claims from an action in which it did not choose the court, time, or combination of claims and parties. Amending the answer might work to withdraw a counterclaim or crossclaim, but can a third-party complaint be withdrawn by a self-styled amendment? It may be better to let these question lie.

Draft rule language can be sketched to illustrate some of the possibilities for amendment.

Dismiss Part of Action: (a)(1)(A)

* * * the plaintiff may dismiss an action <u>or a claim or party from the action</u> * * *

Various issues could be addressed in the committee note. Likely it would be useful to suggest that the definition of "claim" for this purpose reflects Rule 18(a), without attempting to venture into the world of claim preclusion. If the rule is intended to allow voluntary dismissal of all claims by one of plural plaintiffs, that could be made clear; if not, the opposite should be stated. Probably it would be wise to avoid any commentary on the meaning of "without prejudice."

If greater freedom is to be allowed for dismissal by stipulation of all parties, the rule should be restructured to change the relationship between items (i) and (ii):

(i) the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) all parties who have appeared may sign and file a stipulation of dismissal.

What Terminates Plaintiff Dismissal

Adding to the events that cut off the plaintiff's unilateral right to dismiss might take a cue from Rule 15(a)(1)(B). Rule 15 was amended in 2009 to eliminate a distinction similar to that drawn by Rule 41. An answer cut off the right to amend once as a matter of course. A motion to dismiss did not. The amendment responded to concerns expressed by defendants and courts. Defendants protested that often great work was required to frame and litigate a motion to dismiss, educating the plaintiff to the shortcomings of the case. Courts fretted that the motion to

dismiss might be fully argued, taken under advisement, and then mooted by an amended complaint on the brink of decision. So it may be for Rule 41. As a first effort, the same provision could be added to Rule 41(a)(1)(A)(i):

> (i) a notice of dismissal before the opposing party serves ~~either~~ a motion under Rule 12(b), (e), or (f), an answer, or a motion for summary judgment; * * *

21-CV-O

From: Jesse Furman
Sent: Monday, June 21, 2021 9:36 AM
To: Robert Dow; Edward Cooper; Richard Marcus
Cc: John Bates
Subject: Suggestion for the Civil Rules Advisory Committee: Rule 41(a)

Dear Bob et al.,

With my S.D.N.Y. colleague, District Judge Philip Halpern, I have a suggestion for consideration by the Civil Rules Advisory Committee: whether Rule 41(a) should be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. At present, courts appear to be divided on the question. *Compare, e.g.*, *CBX Res., L.L.C. v. ACE Am. Ins. Co.*, 959 F.3d 175, 177 (5th Cir. 2020) ("Rule 41(a) should not be available to dismiss only some claims a plaintiff has against a defendant."), *and Taylor v. Brown*, 787 F.3d 851, 857 (7th Cir. 2015) ("Since we give the Federal Rules of Civil Procedure their plain meaning, Rule 41(a) should be limited to dismissal of an entire action." (internal quotation marks, citation, and alterations omitted)), *with Azkour v. Haouzi*, No. 11-CV-5780 (RJS) (KNF), 2013 WL 3972462, at *3 (S.D.N.Y. Aug. 1, 2013) (Sullivan, J.) (joining "other courts in [the Second] Circuit in interpreting Rule 41(a)(1)(A) as permitting the withdrawal of individual claims" (citing cases)). In case you are interested, the issue is discussed in my opinion in *Alix v. McKinsey & Co.*, 470 F. Supp. 3d 310, 315 (S.D.N.Y. 2020), although I ultimately avoided the issue on which courts are split by concluding that the notice of dismissal there was with respect to the whole action as the only other claim (a federal RICO claim) had already been dismissed. If the Committee takes up the issue, it may also want to consider whether the Rule permits dismissal of an action as to one defendant in a multi-defendant case. My impression is that most, if not all, courts have held that it does - in which case there may be no need for amendment - but it might make sense to do a more comprehensive survey of the case law than I've done.

Please let me know if I should submit this suggestion through more formal channels and/or if you need anything else from me.

Many thanks,
Jesse Furman

Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York
40 Centre Street
New York, NY 10007
Office: 212-805-0282

TAB 15

15. RULE 55(a) AND (b): CLERK AUTHORITY TO ENTER DEFAULT AND DEFAULT JUDGMENT

Questions about the clerk's authority to enter a default, and in some circumstances to enter a default judgment, have been raised for the purpose of exploring the reasons that may support making this a formal agenda item.

Rule 55. Default; Default Judgment

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

(b) Entering a Default Judgment.

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

* * * * *

Entering a default is quite different from entering a default judgment. Under Rule 55(c), the court may set aside an entry of default for "good cause," and the traditional dislike of entering a judgment without trying the merits disposes most courts to forgive a default on even a tenuous showing of good cause. Under Rule 54(b), even a default judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." That point was cemented by the 2015 amendment that added one word to Rule 55(c): the court "may set aside a final default judgment under Rule 60(b).

The clerk's role under Rule 55(a) thus must be distinguished from the role assigned by Rule 55(b). There may be good reasons to maintain Rule 55(a) without change, while revising Rule 55(b).

The questions that bring these issues to the fore arise from the belief that some courts assign responsibility even for entering a default to a judge, and more — perhaps many — courts require that any default judgment be entered by a judge, not the clerk.

Preliminary questions may arise from Rule 77(c)(2), but do not seem to guide the inquiry:

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

* * * * *

(c) Clerk's Office Hours; Clerk's Orders.

* * * * *

(2) ***Orders.*** Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may:

* * * * *

(B) enter a default;

(C) enter a default judgment under Rule 55(b)(1);

* * * * *

The provision that the clerk "may" enter a default or default judgment stands in strange contrast to "must" in Rule 55(a) and (b). This may be another artifact of the 2007 Style Project. Before 2007, Rule 55 used the ambiguous "shall"; "must" was substituted, but was "intended to be stylistic only." Before 2007, Rule 77(c) jumbled together several "motions and applications in the clerk's office," including "for entering defaults or judgments by default," and provided that they "are grantable of course by the clerk * * *." Life would be simpler if Rule 55(a) and (b) were changed to "may."

Rule 77(c)(2) also might be the basis for a hypertechnical argument that the court may not direct the clerk not to do what Rule 55 says the clerk must do. It only authorizes the court to undo what the clerk has done — "the clerk's action." If Rule 55 is to be amended, it may be useful to clean up this quirk. And if Rule 55 is amended to withdraw the clerk's authority, more likely the authority to enter judgment by default, Rule 77(c)(2) would have to be amended to parallel the revised Rule 55.

The direct question raised by Rule 55(a) may be split. One question is whether the clerk should have any power to enter a default. The second is whether, if the power persists, it should remain mandatory — "must enter" — or be made discretionary.

Entry of a default might be seen as a simple ministerial act. It might be described as nothing more than the Clerk's certification that the defendant has failed to appear in the case after being properly served with a summons and complaint." Although Rule 55(a) says the clerk "must" enter default, it seems unlikely that the clerk will act without a party's request or — a seemingly unusual event in many courts — direction by a judge. Even in that role, the clerk is responsible for determining that the defendant was properly served, as "shown by affidavit or otherwise." A formal proof of service might suffice; that seems reassuring, but the practice of "sewer service" has not entirely disappeared.

But things are not so simple. Rule 55(a) speaks of default "for failure to plead or otherwise defend." A defendant may, without answering, "otherwise defend," and a variety of acts may count. A motion to dismiss on any of the grounds provided by Rule 12(b) is a clear example. Other conduct — a letter to the plaintiff's attorney protesting that the named defendant is the wrong person? — might count. Should the clerk be responsible for learning of any act that might amount to otherwise defending, and evaluating its effect? Or, on the other hand, a defendant may file an answer denying the allegations of the complaint and then go silent. There is a strong argument that this situation is not a failure to otherwise defend, but a circumstance that should be evaluated by the court, leading to dismissal only as a sanction for failure to engage in later pretrial procedures. Short of dismissal as a sanction, the denials may require a trial that demands proof by the plaintiff.

It may be that the "must" part of Rule 55(a) is not followed in practice. A clerk may well turn to the court in any but the clearest cases of failure to engage in the process after a clear showing of proper service. That is itself a fair ground for inquiry.

Entry of judgment by default without bringing in a judge may seem attractive in some circumstances. Debt collection cases might be an example of "a sum certain or a sum that can be made certain by computation." The Rules Law Clerk did a preliminary study of four "nature of suit" codes that may reflect debt collection actions — Overpayments and Enforcement of Judgments; Overpayments under the Medicare Act; Recovery of Defaulted Student Loans; and Recovery of Overpayments of Vet Benefits. It does not seem likely that these represent all the actions that might fairly be characterized as debt collections. However that may be, for the six years from 2016 through 2021, there were 6,018 cases in these categories, leading to default judgments in 1,545. If the amounts due are indeed beyond reasonable dispute in most of these actions, there might be some advantage in providing a clerk-administered procedure for judgment.

Requiring that a judge, not the clerk, order a default judgment even in actions that seem to involve a sum certain could have advantages. One advantage is the reassurance that a practiced judicial eye has examined the papers that seem to show a certain amount due. Reassurance, moreover, may be more than a matter of appearance. The papers that show a certain amount also may raise questions whether the amount is due.

For both default and entry of a default judgment, reliance on the clerk reduces the burden on judges. If the action is truly ministerial, however, the burden may be slight, particularly if the clerk presents the judge with the materials and reasoning the clerk would rely on. Further speculation could be fascinating, but not as helpful as other kinds of inquiry.

It would be interesting to explore the reasons that led to adopting Rule 55 as it is. Whatever the reasons were, it will be more important to explore the range of present actual practices across the districts. There are indications that more than a few courts have chosen to involve judges in the default process more extensively than Rule 55 indicates. Even without further explanation, that would be an important datum. And finding out the reasons that lead to departures from Rule 55 will be still more important.

The question is whether to undertake this task. It could lead to still further questions about Rule 55's provisions for default judgment, but the task need be complicated further only if substantial reasons appear.

TAB 16

16. RULE 9(i): PARTICULAR PLEADING IN ADA CASES

Suggestion 21-CV-N (attached to this report) comes by way of a letter from Senators Tillis, Grassley, and Cornyn (all members of the Senate Judiciary Committee) to the Chief Justice, and it is now before the Advisory Committee.

Appended to the suggestion is a draft proposed Rule 9(i):

> In alleging a violation of Title III of the Americans With Disabilities Act, a non-government party must state with particularity the circumstances constituting such a violation, including references to the specific barrier to access at issue.

The senators observe that "we defer to the Judicial Conference on how the rule should be worded."

The Senators propose that the Civil Rules should "create a pleading standard for Title III ADA cases that employs the 'particularity' standard currently contained in Rule 9(b)." They explain:

> Such a standard would benefit all stakeholders and promote judicial efficiency. Property owners can more easily resolve barriers to access with sufficient notice, disabled plaintiffs will see barriers removed more quickly, and at the motions stage, courts will have more fulsome pleadings to determine whether Title III of the ADA has been violated.

The Senators cite a July 12, 2018, report posted on www.uscourts.gov entitled "Just the Facts: Americans With Disabilities Act." They describe this as a Judicial Conference Report. This report includes statistical information on trends in filing, and says that between 2005 and 2017 filings of non-ADA civil rights cases declined 12%, while ADA case filings increased 395%. Among ADA filings, employment-related claims increased 196% during that period, while other ADA claims increased 521%. According to the report, these cases are concentrated in three states — California, New York, and Florida.

Regarding California, the report notes that California legislation permits damage claims (Title III ADA claims are limited to injunctive relief), which "may have contributed to the large numbers of ADA cases filed in California." Regarding Florida, it suggests that "testers" may be contributing to the growth in filings. And for New York, it suggests that the large number of cases there "may have been influenced by the age of many public buildings and infrastructure across New York City."

The report also notes that "as the baby boom population has aged the pool of disabled persons has increased," and that a 2017 decision was "the first ADA case raising a public accommodation claim related to website accessibility," suggesting another possible growth area in such litigation.

A footnote to the report cites a Dec. 4, 2016, article in the Insurance Journal entitled "Why Claims Under the Americans With Disabilities Act Are Rising." Among other things, this

article cites the California legislation, and quotes a defense-side lawyer saying that "Sometimes they [ADA plaintiffs] just do the Unruh Act."

The www.uscourts.gov report also has a link to a 60 Minutes episode from December 4, 2016 entitled "What's a 'Drive-By' Lawsuit?" This episode includes an interview with a man who introduces the idea of a "Google lawsuit," based on a Google search to determine whether a hotel or motel has a required pool lift for its pool. "In the comfort of your own home, with a few clicks of a mouse, you can see if a pool near you has one, and if they don't appear to have one, * * * you can file a lawsuit. Just like that." It also contains assertions that some lawyers have filed thousands of ADA suits and made millions for themselves in the bargain.

There have been legislative responses to these issues. The www.uscourts.gov report also cites Florida legislation in a footnote that provides a method for businesses in that state to obtain a "certification" of compliance with the ADA that courts are required to consider in determining whether ADA claims were filed in good faith, in part to evaluate the appropriateness of any award of attorney's fees. How that state legislation would apply to a case in federal court under a federal statute is unclear.

It should be clear that ADA litigation is controversial, and more recent reports indicate that the controversy surrounding this litigation has continued. To provide just one example, the July 25, 2021, New York Times Magazine had a long article about these issues: "The Price of Access: One Man Has Filed More than 180 Lawsuits in California For Alleged Violations of the Americans With Disabilities Act. Is It Profiteering — or Justice?," by Lauren Markham.

Another indication of the controversy is the fact that there is a website entitled ADAabuse.com, which compiles reports about such things as a certain plaintiff attorney being declared a vexatious litigant and tendering his resignation from the State Bar with disciplinary charges pending.

There likely is much to be learned about claims that pathologies exist in regard to some ADA Title III litigation. It also is likely that there are narratives that paint a different picture. It may be that legislative or regulatory or State Bar actions would be warranted to deal with abusive litigation behavior.

The issue raised by this submission, however, is whether a special pleading rule should be adopted for suits under Title III of the ADA. The pending submission seems to call for adoption of a very substance-specific Civil Rule — dealing only with claims under a specific title of one federal statute. The submission contrasts these ADA claims with civil rights claims more generally, but there is no specific pleading rule about those other civil rights or discrimination claims.

The Committee has in the past spent considerable time addressing the possibility of adding substance-specific provisions to Rule 9. In *Leatherman v. Tarrant County Narcotics and Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court held that the Fifth Circuit's "heightened pleading standard" for constitutional claims against municipalities was impermissible because Rule 9 did not have any provisions for such claims. But the Court also seemed open to a rule change adopting new provisions in Rule 9 for certain types of claims. The

Committee repeatedly explored these questions between 1993 and the 2007 decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and repeatedly concluded that adoption of more exacting pleading standards for particular substantive claims is not practicable. Framing a good substance-specific pleading rule requires deep knowledge of the substantive law and, still more elusive, a full understanding of the realities that confront plaintiffs and defendants in bringing meritorious claims to judgment on the merits. There is a real risk that a specific rule will inadvertently favor plaintiffs or defendants in undesirable ways, or will be perceived to have that effect. Title III of the ADA may well present special challenges, perhaps arising in part from the behavior of a very few members of the bar, but it will be difficult to craft a pleading rule that in the long run proves better than ongoing responses by the courts within the present rules of procedure and Title III.

In order to evaluate the recurrent reports about abusive litigation under Title III of the ADA, it would likely be necessary to undertake an extensive study of this litigation. One focus of such a study would be on Rule 11, which applies to all suits in federal court and seems designed to address issues of abusive litigation brought without a valid basis or adequate investigation.

More specifically about pleading standards, such a study could evaluate whether the standards already in the Civil Rules suffice to equip courts to deal with abusive ADA suits. There is at least some reason to think that they do. For example, a report cited in footnote 2 of the Senators' submission suggests that the courts are responding.

The report is dated Feb. 23, 2021, and is from the law firm Seyfarth, on the topic ADA Title III News and Insights. It is entitled: "Ninth Circuit Makes Clear in Trilogy of Decisions That Disability Access Complaints Without Specific Barrier Allegations Will Be Dismissed." It concludes: "As this trilogy of cases makes clear, plaintiffs and lawyers in disability access cases must provide sufficient factual detail to place defendants on notice of the nature of the barriers they allege that they personally encountered and which allegedly denied them full and equal access in order to state a claim."

All three of the Ninth Circuit cases involved the same plaintiff. One of those three cases was *Whitaker v. Tesla Motors, Inc.*, 985 F.3d 1173 (9th Cir. 2021). In that case, plaintiff Whitaker, a quadriplegic who uses a wheelchair, alleged that he "visits privately-owned businesses to determine whether their facilities comply with the standards set forth in Title III of the Americans with Disabilities Act." Id. at 1174.

Plaintiff Whitaker alleged that he visited a Tesla dealership and encountered inaccessible service counters, adding an allegation "on information and belief, that there are other violations and barriers on the site that relate to [plaintiff's] disability." *Id.* at 1175. Tesla moved to dismiss under Rule 12(b)(6) on the ground that plaintiff failed to specify which service counters are actually deficient. The district court granted the motion with leave to amend, but plaintiff refused to amend and the court dismissed the case.

The Ninth Circuit affirmed, invoking *Iqbal* and *Twombly*, and observing: "The [district] court did not describe an onerous or technical pleading standard; it observed that necessary detail could have been shown through allegations that 'the counter was too high' or 'not in a place that had wheelchair access.'" *Id.*

So evolving interpretation of Rules 8(a)(2) and 12(b)(6) may provide a method of addressing the sorts of concerns the Senators cite. Beyond that, it could be noted that in the case described above Tesla might also have moved for a more definite statement under Rule 12(e) on the ground that the generality of the allegations prevented it from determining how to answer plaintiff's complaint. It might even have filed a motion to strike the "information and belief" allegations under Rule 12(f). With the backstop of Rule 11 available as well, there may well be sufficient tools in the current rules to address the concerns raised by the Senators.

Determining whether the Ninth Circuit approach is reflected across the country would, as noted above, require considerable additional effort. Whether or not there is uniformity, trying to achieve it for claims under one part of one statutory scheme would run counter to the trans-substantive orientation of the Civil Rules.

Moreover, adopting a uniform national Civil Rule for claims under Title III of the ADA would not change practices of state courts. In California, we are told, the fact damages are available under state disability laws may make those claims more attractive than ADA claims limited to injunctive relief. Indeed, the 60 Minutes episode from 2016 cited in a footnote in the Judicial Conference report cited by the Senators included material from John Wodatch, described as a retired chief of the Department of Justice's disability rights section, who was part of a team that wrote the ADA:

> When the Americans With Disabilities Act was being written, the Department of Justice was concerned about people taking advantage of this part of the law. They intentionally did not include monetary damages for plaintiffs in federal lawsuits. The problem is now many states do provide for damages, and John Wodatch says that has led to abuse, most notably in California, where, with limited exceptions, business owners have to pay not only lawyers fees and remodeling costs, but also a minimum of $4,000 in damages each time a disabled customer visits a business with a violation.

Amending the Civil Rules will not change the pleading standards in state court, and in light of the reported Ninth Circuit pleading standard for federal court California lawyers may prefer suing in the California state courts and asserting only claims under the California law. It's likely that there would not be complete diversity in such suits.

In sum, though there may be many reasons to worry about abusive ADA litigation, it does not appear that amending Rule 9 would be an effective or appropriate response. And the challenge of determining whether there actually is a serious problem the current rules cannot address would be considerable.

United States Senate
WASHINGTON, DC 20510

21-CV-N

VIA ELECTRONIC TRANSMISSION

The Honorable John Roberts
Chief Justice
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

June 7, 2021

Dear Chief Justice Roberts:

We write to you today in your capacity as the Chief Administrative Officer of the federal judiciary. We write to request that you direct the Judicial Conference of the United States to amend Rule 9 of the Federal Rules of Civil Procedure to bring reason and fairness to the ballooning litigation under Title III of the Americans with Disabilities Act (ADA) and better ensure resolution of violations of the Act.

As the Judicial Conference has already noted, the continuous, rapid increase in Title III litigation far outpaces other types of similar cases. The Judicial Conference noted that "[f]rom 2005 to 2017, filings of civil rights cases excluding ADA cases decreased 12 percent. In contrast, during that period, filings of ADA cases increased 395 percent"[1] In addition, many of the complaints filed in Title III ADA cases provide little or no detailed information that property owners could use to quickly remedy any potential ADA accessibility issue. In fact, the Ninth Circuit recently began dismissing cases because the allegations contained in the pleadings are so vague that property owners cannot determine whether an ADA violation exists at all.[2] This lack of specificity makes it very difficult for property owners to correct any potential ADA issue. Individuals seeking access under the ADA do not benefit unless property owners know what needs to be fixed.

We ask that you coordinate with the Judicial Conference to create a pleading standard for Title III ADA cases that employs the "particularity" requirement currently contained in Rule 9 (b) of the Federal Rules of Civil Procedure. Such a standard would benefit all stakeholders and promote judicial efficiency. Property owners can more easily resolve barriers to access with sufficient notice, disabled plaintiffs will see barriers removed more quickly, and at the motions stage, courts will have more fulsome pleadings to determine whether Title III of the ADA has been violated. An amended Rule 9 would thus assist in furthering the policy goals of Title III of

[1] *See* https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act
[2] *See* https://www.adatitleiii.com/2021/02/ninth-circuit-makes-clear-in-trilogy-of-decisions-that-disability-access-complaints-without-specific-barrier-allegations-will-be-dismissed/.

the ADA while ensuring judicial resources are used efficiently. Additionally, this change can and should be made by the judiciary under the Rules Enabling Act.

While we defer to the Judicial Conference on how the rule should be worded, we believe the draft text we have appended to this letter would accomplish this goal. Thank you for considering our request. We strongly support efforts by the Judicial Conference to update the pleading requirements in these cases to better ensure potential ADA violations can be resolved.

Sincerely,

Thom Tillis
United States Senator

Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary

John Cornyn
United States Senator

cc: Honorable John D. Bates
Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle NE
Washington, DC 20544

APPENDIX

Proposed Rule 9(i)

In alleging a violation of Title III of the Americans with Disabilities Act, a non-government party must state with particularity the circumstances constituting such a violation, including references to the specific barrier to access at issue.

TAB 17

17. RULE 23: OPT-IN, NOT OPT-OUT

Suggestion 21-CV-S (attached to this report) is from Daniel M. Sivilich. It is a broad-based attack on Rule 23. This is a long submission, but the following sums up the basic point:

> I assert that Rule 23 obstructs my First Amendment right 'to petition the Government for a redress of grievances." Rule 23 needs to be changed to require attorneys to obtain written permission from potential members to be included in a class action. This can be easily done by certified US mail requiring a signature proof of delivery or electronically acquiring a legal dated signature using a service such as DocuSign.

The claimed First Amendment right to petition the government is derived from *Eastern Railroad Presidents Conf. v. Neorr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). These cases interpret the federal antitrust laws not to treat petitioning the government as a violation of the antitrust laws even if motivated by anticompetitive intent. They do not show that Rule 23 violates the Constitution.

It appears that Mr. Sivilich's proposal results from three recent class action settlements. One is in the Blue Cross/Blue Shield MDL in the N.D. Ala. Mr. Sivilich's wife received a notice in the mail that she was included in the settling class. Mr. Sivilich notes that this mailed notice was on "inexpensive 44 lb (0.0076" thick) paper stock" rather than "card stock," which is 67 lb. and 0.010" thick.

The other two class action settlement notices were sent to him by email and showed up in his spam folder. As he explains: "I ACCIDENTALLY FOUND BOTH OF THESE EMAILS IN MY SPAM FOLDER!"

From his perspective, the problem is that Rule 23 requires class members to opt out to avoid being bound. As he puts it, "the burden is on ME to take an action" to avoid being bound.

He also objects to the attorney fee award provisions of the Blue Cross/Blue Shield class settlement:

> In my opinion, there is not a law firm in the world that deserves a fee of $667.5 million and $101 million for additional costs and service awards! These types of lawsuits have become cottage industries for unscrupulous lawyers to strike it rich instead of being remotely associated with fair and equitable judicial process.

Mr. Sivilich has identified an aspect of American class actions that has not found acceptance in other nations. The basic division is between an "opt in" and an "opt out" approach to class actions. Some nations (e.g., Germany) emphasize personal autonomy and insist that collective actions may proceed only on behalf of those who affirmatively elect to join.

A potential problem with the opt in approach is that relatively few class members are likely to go to the trouble to do so. Even in Germany, it is recognized that in low value consumer class actions it is highly unlikely that injured people will take this step. So the opt out approach to Rule 23(b)(3) class actions proceeds on the assumption that notice and an opportunity to opt out adequately protects class members' interests, and also on the assumption that not many would really want to opt out, so that if the class action produces a benefit for them they likely will be glad and might feel disappointed to learn that they did not get the benefit because they did not manage to opt in properly.

As a starting point, it is worth noting that class actions certified under Rules 23(b)(1) and (b)(2) do not call for notice at all and do not permit opting out. Mr. Sivilich's objection, then, would seemingly nullify those forms of class action, even though they have often been used in prison conditions, school integration, and other "structural reform" situations.

When Rule 23(b)(3) was added in 1966, the committee note explained:

> Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interest of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus, the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.

So opt-out was central to the 1966 scheme, which endures to this day.

Some Supreme Court precedent recognizes the special status that unnamed members of a class receive. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), defendant claimed that a Kansas state court unconstitutionally bound non-Kansas class members by using its procedure analogous to Rule 23(b)(3). "Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims." *Id.* at 806. Stressing that the Kansas rule, like Rule 23(b)(3), permitted opting out, the Court rejected this argument. As Justice Rehnquist explained:

> Petitioner contends, however, that the "opt out" procedure provided by Kansas is not good enough, and that an "opt in" procedure is required to satisfy the Due Process Clause. * * *
>
> Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter.

Id. at 811.

True, the supposed First Amendment protection claimed in this submission is different from the Due Process limitation on state court jurisdiction. But whatever the right to petition the government, it does not limit the authority of a federal court acting in accord with Rule 23(b)(3).

It is recommended that this proposal be removed from the agenda.

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21-CV-S

July 29, 2021

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Esteemed Members of the Committee,

I would like to request that the Federal Rules of Civil Procedure, Rule 23: Class Actions be reviewed as a violation of my First Amendment right to petition the government for redress of grievances including a right to file suit in a court of law.

Per Rule 23: Class Actions:

> "(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;"

This allows the plaintiff attorneys to use my name and personal information to be included into a class action without my expressed permission. In most states, you can be sued for using someone else's name, likeness, or other personal attributes without permission for an exploitative purpose. This has become a significantly profitable thus exploitive business practice for many class action law firms. I will provide examples later in this request.

With the advent of high speed computers, the internet, cloud-based databases, this clause is out dated and no longer applicable. Letters requesting potential members' permissions to join an action can be generated rapidly. There are letter mailing services that can process vast quantities of certified mail to potential members asking permission to include them in the lawsuit. The burden should be on the Plaintiff attorneys to use my name rather than me having to exclude myself from the action.

In Noerr, 41 truck drivers and their trade unions sued a collection of railroads, railroad presidents and the public relations firm hired to influence legislation concerning truck weight limits and tax rates for heavy trucks. The Court found that the railroad defendants' influence campaign was immune from antitrust liability under the Sherman Act because "the right to petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." The Plaintiff attorneys infringe on my Constitutionally protected rights by automatically obstructing my right to independently bring suit against the Defendant unless I petition the court to opt out.

Also part of Rule 23 is as follows:

> "(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(2) *Notice.*

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3)."

Section (v) puts the burden on me, the class member, to opt out. By not doing so, I wave right to independently sue the Defendant. If I do not receive a notification due to the method of delivery, then I have not been properly informed of "(i) the nature of the action." This cannot be a more direct violation of my First Amendment right to file a lawsuit in a court of law. Here is one of many examples of United States mail notification exactly as it was received by my wife:

If you purchased certain Welspun home textile products labeled as "Egyptian Cotton" or "Pima Cotton," a class action Settlement may affect you.

A proposed class action Settlement has been reached in *Hansen-Mitchell, et al. v. Welspun USA, Inc.*, et al., Case No. 19-L-0391, alleging that home textile products were improperly labeled and/or marketed as "Egyptian Cotton" or "Pima Cotton." As part of the Settlement, Defendants have agreed to implement marketing reforms and provide a monetary Benefit for customers. Defendants deny any wrongdoing.

Who is a Settlement Class Member?
You may be an eligible Settlement Class Member if you purchased certain products, a description of which can be found on the website below (the "Subject Products"), between January 1, 2012 and July 2, 2019.

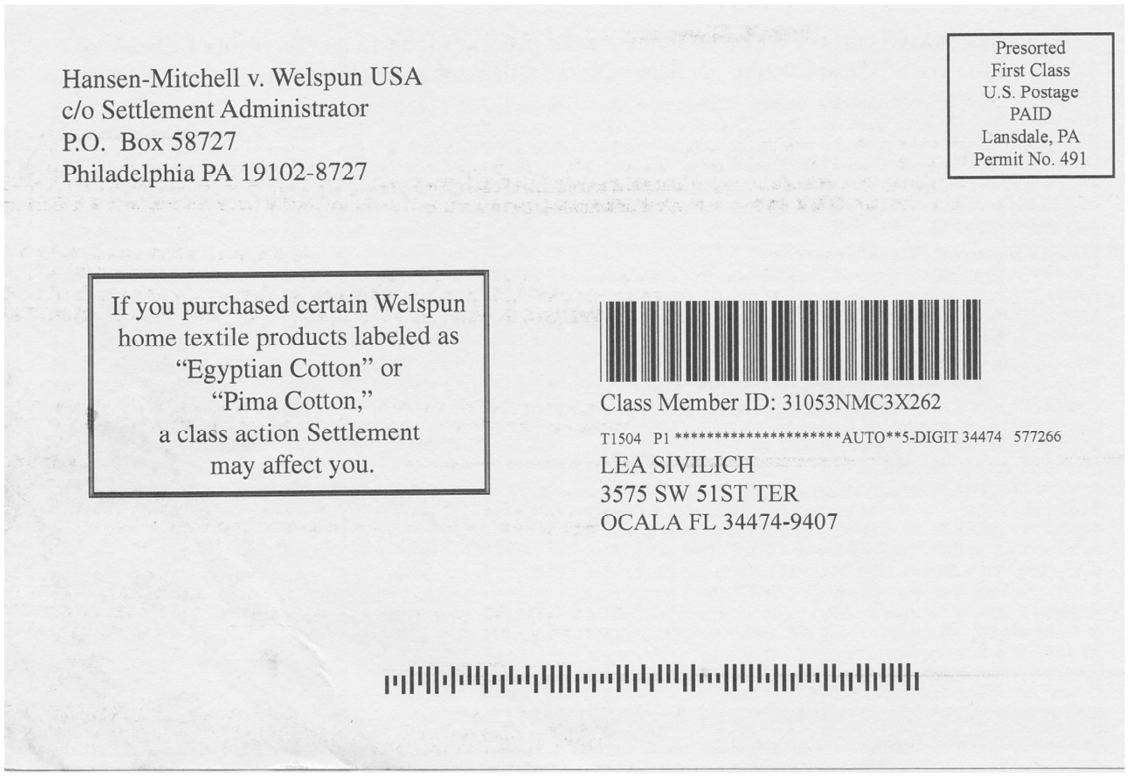
What are the Benefits?
Welspun has agreed to make $36,000,000 available to pay Valid Claims. Eligible Class Members with proof of purchase may receive up to $2.30 per Subject Product for towels and pillowcases and up to $9.20 per Subject Product for all other products purchased during the Class Period, with no Household limit; or Class Members without proof of purchase may receive up to $1.15 per Subject Product for towels and pillowcases and up to a maximum of $4.60 per Subject Product for all other products purchased during the Class Period, with a $10.35 Household limit. If you received a Refund for a Subject Product, you can receive a 10% one-time discount voucher or a $5.00 credit on a future purchase if you timely submit a valid claim with your valid postal or email address. This voucher may not be clubbed or exchanged for cash. The Settlement also requires Welspun to follow certain practices when marketing and labeling products "Egyptian Cotton" and "Pima Cotton."

What are my rights?
You must file a Claim, either online at the website below or by mail, by November 27, 2019 to get a payment. You can Opt-Out and keep your right to sue Defendants about the claims released by this Settlement but you will not get a payment from this Settlement. You can Object to any aspect of the Settlement in writing by following the instructions found on the Settlement website. If you do nothing, you will not get a payment but you will be bound by all decisions of the Court. Any Opt-Out or Objection must be postmarked by October 11, 2019.

The Court will hold a Fairness Hearing in the Circuit Court for the 20th Judicial Circuit, Court of St. Clair, State of Illinois, St. Clair County Building, 10 Public Square, Belleville, Illinois 62220, before the Honorable Judge Christopher T. Kolker in Courtroom 401, 4th Floor, on October 28, 2019 at 9:00 a.m. Central Time to decide whether to approve the Settlement and to award Attorneys' Fees and Expenses of up to $9,000,000 (or the equivalent of 25% of the value of the Settlement Amount) and Administration Expenses to be paid by Defendants, plus $750 per named Plaintiff as Class Service Awards. The application for Attorneys' Fees and Expenses will be posted on the website below after being filed. You may attend this hearing, but you do not have to.

This is only a summary. Please visit www.EgyptianPimaCottonSettlement.com, or contact the Settlement Administrator at 1-844-271-4781 or by writing to: Hansen-Mitchell v. Welspun USA, c/o Settlement Administrator, P.O. Box 58727, Philadelphia, PA 19102-8727.

www.EgyptianPimaCottonSettlement.com 1-844-271-4781


Hansen-Mitchell v. Welspun USA
c/o Settlement Administrator
P.O. Box 58727
Philadelphia PA 19102-8727

Presorted
First Class
U.S. Postage
PAID
Lansdale, PA
Permit No. 491

If you purchased certain Welspun home textile products labeled as "Egyptian Cotton" or "Pima Cotton," a class action Settlement may affect you.

Class Member ID: 31053NMC3X262

T1504 P1 **********AUTO**5-DIGIT 34474 577266
LEA SIVILICH
3575 SW 51ST TER
OCALA FL 34474-9407

It is a 4" x 6" notice printed on inexpensive 44 lb (0.0076" thick) paper stock. As a point of reference, "card stock) is 67 lb or 0.010" thick. The front is damaged from processing making it difficult to read. How many people actually read these notices and not assume that it is simply "junk" mail? How many of these get lost in the mail or just not delivered? Since no proof of delivery is required, how can this be used as a bonafide court document? Of those who do, how many actually type a letter and send it to the court to opt out? This is clearly using the ambiguity of Rule 23 to gain enormous profits by the Plaintiff attorneys.

From 1996 - 2011 my wife was covered under the Freehold Township Board of Education, Freehold Twp., NJ by Horizon Blue Cross Blue Shield of NJ, Subscriber # 3HZN74709990, Group # 085568. We moved to Florida in 2018. From May, 2018 we now use Florida Blue as our supplemental insurance to Medicare. In April, 2021 my wife received the following notice from Blue Cross/Blue Shield (hereinafter referred to as BCBS), also printed on 8" x 6" inexpensive 44 lb paper stock:

A federal court authorized this Notice.
This is not a solicitation from a lawyer.

If you purchased or were enrolled in a Blue Cross or Blue Shield health insurance or administrative services plan between 2008 and 2020, a $2.67 billion Settlement may affect your rights.

Para una notificación en español, visite www.BCBSsettlement.com/espanol

Questions? Call (888) 681-1142 or Visit www.BCBSsettlement.com

Blue Cross Blue Shield Settlement
c/o JND Legal Administration
P.O. BOX 91390
Seattle, WA 98111

PRESORT
FIRST-CLASS
U.S. POSTAGE
PAID
TOPPAN MERRILL

Electronic Service Requested

SEMI AUTO**SCH 5-DIGIT 34474
F1R20G-4028069C 414/14085/51672
Lea Sivilich
3575 SW 51st Ter
Ocala, FL 34474-9407

What can you get from the Settlement?

Class Members who submit valid claims may receive a cash payment from the Net Settlement Fund. The Net Settlement Fund is estimated to be approximately $1.9 billion. This is after deducting attorneys' fees, administration expenses and other costs from the $2.67 billion Settlement Fund. For more details on the Plan of Distribution, read the Long Form Notice available at www.BCBSsettlement.com. You can also call (888) 681-1142. Settling Defendants also agreed to make changes in the way they do business to increase the opportunities for competition in the market for health insurance.

How do you get a payment?

You must submit a valid claim online at www.BCBSsettlement.com or postmarked by mail no later than November 5, 2021. Claim Forms are available at www.BCBSsettlement.com or may be requested by calling (888) 681-1142.

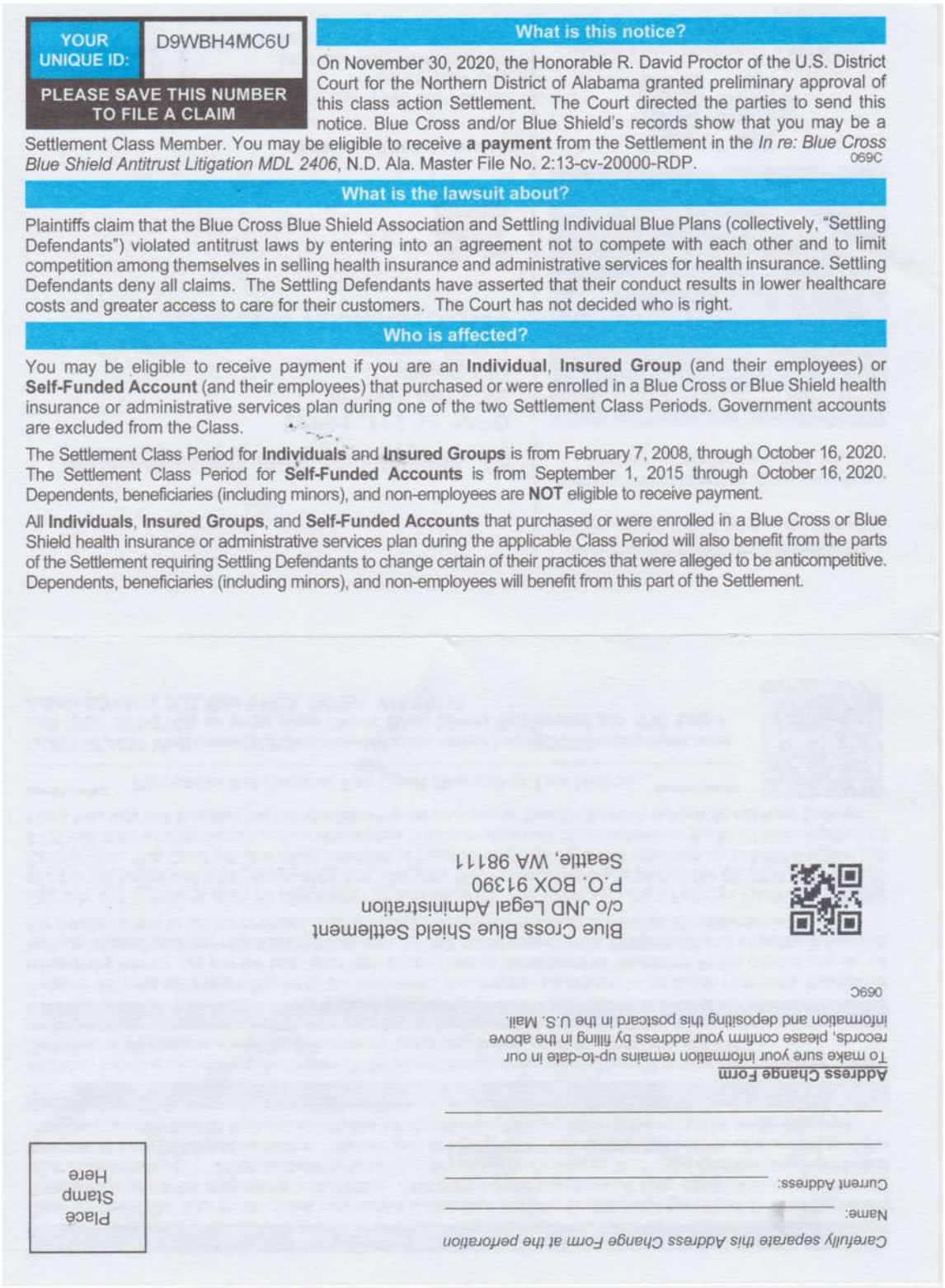
What are your other options?

If you do not want to be legally bound by the Settlement, you may send a request for exclusion ("opt out"). You will not receive any money, but you will keep your right to sue Settling Defendants for the claims in this case. If you do not exclude yourself, you may object to the Settlement. You will still be bound by the Settlement if your objection is rejected. For details on how to opt out or object, read the Long Form Notice available at www.BCBSsettlement.com.

Opt outs and objections must be postmarked by July 28, 2021. The Court will hold a Fairness Hearing to consider whether the Settlement is fair, reasonable, and adequate. The Fairness Hearing is on October 20, 2021 at 10:00 a.m. Central Time. The Court will also decide whether to approve attorneys' fees and expenses up to $667.5 million and $101 million for additional costs and service awards. These amounts will be deducted from the $2.67 billion Settlement Fund. You may ask to attend the Fairness Hearing, on your own or through counsel, but you do not have to do so.

Please Do Not Contact The Court Regarding This Notice.

QUESTIONS? Visit www.BCBSsettlement.com, email info@BCBSsettlement.com, call (888) 681-1142, or write Blue Cross Blue Shield Settlement c/o JND Legal Administration, P.O. Box 91390, Seattle, WA 98111.



YOUR UNIQUE ID: D9WBH4MC6U

PLEASE SAVE THIS NUMBER TO FILE A CLAIM

What is this notice?

On November 30, 2020, the Honorable R. David Proctor of the U.S. District Court for the Northern District of Alabama granted preliminary approval of this class action Settlement. The Court directed the parties to send this notice. Blue Cross and/or Blue Shield's records show that you may be a Settlement Class Member. You may be eligible to receive **a payment** from the Settlement in the *In re: Blue Cross Blue Shield Antitrust Litigation MDL 2406*, N.D. Ala. Master File No. 2:13-cv-20000-RDP.

069C

What is the lawsuit about?

Plaintiffs claim that the Blue Cross Blue Shield Association and Settling Individual Blue Plans (collectively, "Settling Defendants") violated antitrust laws by entering into an agreement not to compete with each other and to limit competition among themselves in selling health insurance and administrative services for health insurance. Settling Defendants deny all claims. The Settling Defendants have asserted that their conduct results in lower healthcare costs and greater access to care for their customers. The Court has not decided who is right.

Who is affected?

You may be eligible to receive payment if you are an **Individual**, **Insured Group** (and their employees) or **Self-Funded Account** (and their employees) that purchased or were enrolled in a Blue Cross or Blue Shield health insurance or administrative services plan during one of the two Settlement Class Periods. Government accounts are excluded from the Class.

The Settlement Class Period for **Individuals** and **Insured Groups** is from February 7, 2008, through October 16, 2020. The Settlement Class Period for **Self-Funded Accounts** is from September 1, 2015 through October 16, 2020. Dependents, beneficiaries (including minors), and non-employees are **NOT** eligible to receive payment.

All **Individuals**, **Insured Groups**, and **Self-Funded Accounts** that purchased or were enrolled in a Blue Cross or Blue Shield health insurance or administrative services plan during the applicable Class Period will also benefit from the parts of the Settlement requiring Settling Defendants to change certain of their practices that were alleged to be anticompetitive. Dependents, beneficiaries (including minors), and non-employees will benefit from this part of the Settlement.

Carefully separate this Address Change Form at the perforation

Name: _____

Current Address: _____

_____

_____

Address Change Form

To make sure your information remains up-to-date in our records, please confirm your address by filling in the above information and depositing this postcard in the U.S. Mail.

069C

Blue Cross Blue Shield Settlement
c/o JND Legal Administration
P.O. BOX 91390
Seattle, WA 98111

Place Stamp Here

It appears from this notification that we are already part of a settlement FOR WHICH WE NEVER RECIEVED NOTIFICATION of actually being in the class action! I had to go online to get the "Long Form Notice" of this action. Per Section 9 of this form:

9. How do I get a Payment?

To make a claim and receive a payment, you must file a claim form online or by mail postmarked **November 5, 2021**. Claims may be submitted online at www.BCBSsettlement.com or by mail to:

Blue Cross Blue Shield Settlement
c/o JND Legal Administration
PO Box 91390
Seattle, WA 98111

If you select the Alternative Option, you must submit relevant data or records showing a higher contribution percentage. Otherwise the Default Option will be used. Instructions for submitting your claim are on the claim form and on the Settlement Website. When required, sufficient documentation shall include an attestation signed under penalty of perjury when other documentation is no longer available.

But according to Section 11:

11. What happens if I do nothing at all?

If you do nothing, you will remain a member of the Settlement Classes and be bound by the Settlement.
However, if you had been entitled to share in the Settlement proceeds, you will not get a payment.

Again, the burden is on ME to take an action. BUT if I never received the postcard, I would not know any of this.

Now let's review the compensation. Per the example in their Long Form Notice, the actual claimants will get a whopping $178 USD as compensation. BUT per Section 17:

17. How will the lawyers be paid?

Settlement Class Counsel may submit an application(s) to the Court ("Fee and Expense Application") for: (i) an award of attorneys' fees plus (ii) reimbursement of expenses and costs, up to a combined total of 25% of the $2.67 billion fund (i.e., $667,500,000) created by the Settlement. This fee will include Self-Funded Class Counsel's application. You will not have to pay any fees or costs.

In my opinion, there is not a law firm in the world that deserves a fee of $667.5 million and $101 million for additional costs and service awards! These types of lawsuits have become cottage industries for unscrupulous lawyers to strike it rich instead of being remotely associated with fair and equitable judicial process.

As further examples of flaws in Rule 23, On April 19, 2019 I received an email that I was part of a class action settlement against *Square Trade Protection Plan* for which I received no notice that I was a plaintiff. On January 28, 2020 I received an email that I was part of a class action settlement against *Yahoo Data Breach Settlement* for which again I received no notice that I was a plaintiff. I ACCIDENTALLY FOUND BOTH OF THESE EMAILS IN MY SPAM FOLDER! My spam folder automatically deletes emails after 30 days. Had I not noticed these emails I would not have known about either of these class actions.

Therefore, I assert that Rule 23 obstructs my First Amendment right "to petition the Government for a redress of grievances." Rule 23 needs to be changed to require attorneys to obtain written permission from potential members to be included in a class action. This can easily be done by certified US mail requiring a signature proof of delivery or electronically acquiring a legal dated signature using a service such as DocuSign®.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

If you purchased or were enrolled in a Blue Cross or Blue Shield health insurance or administrative services plan between 2008 and 2020, a $2.67 billion Settlement may affect your rights

Para una notificación en español, visite www.BCBSsettlement.com/espanol

A federal court authorized this Notice. This is not a solicitation from a lawyer.

- Class Representatives ("Plaintiffs") and the Blue Cross Blue Shield Association ("BCBSA") and Settling Individual Blue Plans reached a Settlement in a class action antitrust lawsuit called *In re: Blue Cross Blue Shield Antitrust Litigation MDL 2406*, N.D. Ala. Master File No. 2:13-cv-20000-RDP (the "Settlement").[1] BCBSA and Settling Individual Blue Plans are called "Settling Defendants."

- Plaintiffs allege that Settling Defendants violated antitrust laws by entering into an agreement not to compete with each other and to limit competition among themselves in selling health insurance and administrative services for health insurance.

- Settling Defendants deny all allegations of wrongdoing and assert that their conduct results in lower healthcare costs and greater access to care for their customers.

- The Court has not decided who is right or wrong. Instead, Plaintiffs and Settling Defendants have agreed to a Settlement to avoid the risk and cost of further litigation.

- The Court certified two Settlement Classes in this case—a Damages Class and an Injunctive Relief Class. These Classes are further defined in Question 5.

- If approved by the Court, the Settlement will establish a **$2.67 billion Settlement Fund.** Settling Defendants will also agree to make changes in the way they do business that will increase the opportunities for competition in the market for health insurance.

- Your legal rights are affected whether you act or do not act. Please read this Notice carefully.

[1] All capitalized terms used in this Notice shall have the same meaning as provided for in the Settlement Agreement, unless stated otherwise.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT		
FILE A CLAIM (DAMAGES CLASS ONLY)	• File a claim for payment online or by mail. • Be bound by the Settlement. • Give up your right to sue or continue to sue Settling Defendants for the claims in this case.	Submitted online or postmarked by **November 5, 2021**
ASK TO BE EXCLUDED ("OPT OUT") (DAMAGES CLASS ONLY)	• Remove yourself from the Class. • Receive no payment. • Keep your right to sue or continue to sue Settling Defendants for the claims in this case.	Postmarked by **July 28, 2021**
OBJECT	• Write to the Court about why you do not like the Settlement.	Postmarked by **July 28, 2021**
ATTEND THE HEARING	• Ask to speak to the Court about the fairness of the Settlement.	**October 20, 2021 at 10:00 a.m. Central Time**
DO NOTHING	• Receive no payment • Be bound by the Settlement. • Give up your right to sue or continue to sue Settling Defendants for the claims in this case.	

- These rights and options—**and the deadlines to exercise them**—are explained in this Notice. The deadlines may be changed, so please check the Settlement Website, www.BCBSsettlement.com, for updates and further details.
- The Court in charge of this case still has to decide whether to approve the Settlement. Payments will be made if the Court approves the Settlement and after any appeals are resolved. Please be patient.

Questions? Visit www.BCBSsettlement.com or call toll-free at (888) 681-1142

WHAT THIS NOTICE CONTAINS

Questions? Visit www.BCBSsettlement.com or call toll-free at (888) 681-1142

BASIC INFORMATION

1. Why was this Notice issued?

The Court authorized this Notice because you have a right to know about the proposed Settlement of certain claims against Settling Defendants in this class action lawsuit and about your options before the Court decides whether to approve the Settlement. If the Court approves the Settlement, and after objections and appeals are resolved, you will be bound by the judgment and terms of the Settlement. This Notice explains the lawsuit, the Settlement, and your legal rights and options, and the deadlines for you to exercise your rights.

2. What is this lawsuit about?

This class action is called *In re: Blue Cross Blue Shield Antitrust Litigation MDL 2406*, N.D. Ala., Master File No. 2:13-cv-20000-RDP and is pending in the United States District Court for the Northern District of Alabama Southern Division. U.S. District Court Judge R. David Proctor is overseeing this class action.

Plaintiffs allege that Settling Defendants violated antitrust laws by entering into an agreement where the Settling Defendants agreed not to compete with each other in selling health insurance and administration of Commercial Health Benefit Products in the United States and Puerto Rico, as well as agreeing to other means of limiting competition in the market for health insurance and administration of Commercial Health Benefit Products. Settling Defendants deny all allegations of wrongdoing. They assert that their conduct results in lower healthcare costs and greater access to care for their customers. The Court has not decided who is right or wrong. Instead, Plaintiffs and Settling Defendants have agreed to a Settlement to avoid the risk and cost of further litigation.

3. What is a class action, and who is involved?

In a class action lawsuit, one or more people or businesses called class representatives sue on behalf of others who have similar claims. All of the people or businesses who have similar claims together are a "class" or "class members" if the class is certified by the Court. Individual class members do not have to file a lawsuit to participate in the class action settlement or be bound by the judgment in the class action. One court resolves the issues for everyone in the class, except for those who exclude themselves from the class.

4. Why is there a Settlement?

The Court did not decide in favor of the Plaintiffs or Settling Defendants. Instead, both sides have agreed to the Settlement. Both sides want to avoid the risk and cost of further litigation. The Plaintiffs and their attorneys think the Settlement is best for the Settlement Classes.

WHO IS IN THE SETTLEMENT CLASSES?

5. Am I part of the Settlement Classes?

The Court certified two Settlement Classes in this case—a Damages Class and an Injunctive Relief Class.

- The Damages Class includes all **Individuals**, **Insured Groups**[2] (and their employees), and **Self-Funded Accounts**[3] (and their employees), that purchased, were covered by, or were enrolled in a Blue-

[2] Insured Groups include both employers and other groups (e.g., Taft-Hartley plans, multi-employer welfare arrangements, association health plans, retiree groups, and other non-employer groups).
[3] Self-Funded Accounts include both employers and other groups (e.g., Taft-Hartley plans, multi-employer welfare arrangements, association health plans, retiree groups, and other non-employer groups).

Branded Commercial Health Benefit Product[4] sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the respective class periods. The class period for the fully insured **Individuals** and **Insured Groups** (and their employees) is from February 7, 2008, through October 16, 2020 ("Settlement Class Period"). The class period for the **Self-Funded Accounts** (and their employees) is from September 1, 2015 through October 16, 2020 ("Self-Funded Settlement Class Period"). Dependents, beneficiaries (including minors), and non-employees are **NOT** included in the Damages Class.

Self-Funded Accounts encompass any account, employer, health benefit plan, ERISA plan, non-ERISA plan, or group, including all sponsors, administrators, fiduciaries, and Members thereof, that purchased, were covered by, participated in, or were enrolled in a Self-Funded Health Benefit Plan during the Self-Funded Settlement Class Period. A Self-Funded Health Benefit Plan is any Commercial Health Benefit Product other than Commercial Health Insurance, including administrative services only ("ASO") contracts or accounts, administrative services contracts or accounts ("ASC"), and jointly administered administrative services contracts or accounts ("JAA").

For associational entities (e.g., trade associations, unions, etc.), the Self-Funded Account includes any member entity which was covered by, enrolled in, or included in the associational entity's Blue-Branded Commercial Health Benefit Product. A Self-Funded Account that purchased a Blue-Branded Self-Funded Health Benefit Plan and Blue-Branded stop-loss coverage remains a Self-Funded Account.

Excluded from the Damages Class are:
- Government Accounts[5];
- Medicare and Medicaid Accounts;
- Settling Defendants themselves, and any parent or subsidiary of any Settling Defendant (and their covered or enrolled employees);
- Individuals or entities that file an exclusion or opt out from the Settlement; and
- The judge presiding over this matter, and any members of his judicial staff, to the extent such staff were covered by a Commercial Health Benefit Product not purchased by a Government Account during the Settlement Class Period.

- The Injunctive Relief Class includes all **Individuals**, **Insured Groups**, **Self-Funded Accounts**, and **Members** that purchased, were covered by, or were enrolled in a Blue-Branded Commercial Health Benefit Product sold, underwritten, insured, administered, or issued by any Settling Individual Blue Plan during the applicable Settlement Class Period. Dependents, beneficiaries (including minors), and non-employees are included in the Injunctive Relief Class.

6. I am still not sure if I am included.

If you are still not sure if you are included in the Settlement Classes, please review the detailed information contained in the Settlement Agreement, available for download at www.BCBSsettlement.com. You may also contact the Claims Administrator at info@BCBSsettlement.com or call toll-free at (888) 681-1142.

[4] Unless the person's or entity's only Blue-Branded Commercial Health Benefit Product during the class periods was a stand-alone vision or dental product.
[5] Additional information about Government Accounts is in the Settlement Agreement.

SETTLEMENT BENEFITS

7. What does the Settlement provide?

The Settlement provides monetary payments to Damages Class Members who submit a valid claim by **November 5, 2021**. Settling Defendants also agreed to make changes in the way they do business to increase the opportunities for competition in the market for health insurance ("injunctive relief") that benefits Injunctive Relief Class Members. You may be included in both Settlement Classes.

If the Court approves the Settlement, in exchange for Class Members' release of the Released Claims, a $2.67 billion Gross Settlement Fund will be established. The money remaining in the Settlement Fund, after paying the Attorneys' Fee and Expense Awards not to exceed $667.5 million and the Notice and Settlement Administration costs of $100 million, is called the "Net Settlement Fund." The Net Settlement Fund is estimated to be approximately $1.9 billion and will be distributed to Damages Class Members. This Net Settlement Fund will be split as described below:

Monetary Damages:

- 93.5% of the Net Settlement Fund (approximately $1.78 billion) will be allocated to the Fully Insured (FI) Class Members as a "FI Net Settlement Fund." The FI Net Settlement Fund will be distributed to **FI Authorized Claimants,** which include:
  - Individuals ("FI Individual Policyholders");
  - Insured Groups ("FI Groups"); and
  - Insured Group Employees ("FI Employees")

  who submit a valid claim by **November 5, 2021**.
- The remaining 6.5% of the Net Settlement Fund (approximately $120 million) will be set up as a "Self-Funded Net Settlement Fund." The Self-Funded Net Settlement Fund will be distributed to **Self-Funded Authorized Claimants,** which include:
  - Self-Funded Accounts ("Self-Funded Groups"); and
  - Self-Funded Account Employees ("Self-Funded Employees")

  who submit a valid claim by **November 5, 2021**.
- The FI Net Settlement Fund and Self-Funded Net Settlement Fund are separate funds for FI Authorized and Self-Funded Authorized Claimants, respectively. If the claim rate is lower in one fund than the other, the payment to the Authorized Claimants will be proportionately increased in that fund only, and not to all Authorized Claimants overall.

Injunctive Relief:

- Settling Defendants have agreed to make changes in the way they do business that will increase the opportunities for competition in the market for health insurance. As part of the Injunctive Relief (the changes in the way the Settling Defendants do business), a Monitoring Committee will be established for five years to mediate any disputes resulting from the implementation of the Injunctive Relief. If the Monitoring Committee Process approves any systems or rules, that information will be included in the Release. It will also be posted in a report of Monitoring Committee Actions on the Settlement Website. Additional information is detailed in the Settlement Agreement, available at www.BCBSsettlement.com.

8. How much can Damages Class Members get from the Settlement?

Damages Class Members who submit a valid approved claim ("Authorized Claimants") will receive a payment from either the FI Net Settlement Fund or the Self-Funded Net Settlement Fund, if the Settlement is approved.

Distribution of the FI Net Settlement Fund

FI Authorized Claimants qualify for a payment based on the total amount of estimated premiums they paid to the Settling Defendants ("Total Premiums Paid") during the Settlement Class Period. Payments will be distributed on a proportional basis across all FI Authorized Claimants based on their estimated premiums.

The payment amount (i.e. claim payment) to FI Authorized Claimants will be determined by the following formula:

Total Premiums Paid During the Settlement Class Period by FI Authorized Claimant A

Divided by

Total Premiums Paid during the Settlement Class Period by all FI Authorized Claimants who submit claims

Multiplied by

Total dollars in FI Net Settlement Fund

= Claim payment of FI Claimant A's claim

For Example[6]:

$1000

Divided by

$10,000,000,000

Multiplied by

$1,780,000,000

= $178

FI Individual Policyholders – Total Premiums Paid for FI Individual Policyholders will be based on data provided by Settling Defendants. In most cases that data should allow for the calculation of Total Premiums Paid without requiring the FI Authorized Claimant to submit any premium data.

FI Groups and FI Employees – Total Premiums Paid for FI Groups and FI Employees will be based on (a) data provided by the Settling Defendants showing the total amount of premiums paid by any FI Group and (b) a process for allocating the Total Premiums Paid between each specific FI Group and any FI Employees of that FI Group who submit a claim.

[6] These numbers are provided **for example only**. The numbers do not show actual premiums or an anticipated actual ratio of premiums paid by a Claimant to the Total Premiums Paid by all Claimants.

Because FI Groups and FI Employees typically share the economic burden of premium payments, the Plan of Distribution allocates premiums between the two. When filing a claim, FI Groups and FI Employees may choose a Default or Alternative Option for determining the allocation of Total Premiums Paid between the employer and any employee of that FI group that file a claim. To efficiently process claims, the Plan of Distribution sets a Default allocation as follows: (1) 15% of an employee's premium for single coverage is deemed to have been paid by the employee (with the remainder to the employer) and (2) 34% of an employee's premium for family coverage is deemed to have been paid by the employee (with the remainder to the employer). The Alternative option allows the claimant to submit data or records supporting a contribution higher than the Default. The below scenarios are examples of how an estimated premium may be calculated for use in determining a claimant's proportional share of the FI Net Settlement Fund. In any case where an FI Group makes a claim, it will receive credit for any premiums not otherwise allocated to claiming employees.

IF…	**THEN…**
• FI Group files a claim • No FI Employees for that FI Group file a claim	• FI Group's share will be calculated from full premium paid by that FI Group
• FI Group files a claim and accepts Default option • One or more of its FI Employees files a claim and accepts Default option	• For each claiming FI Employee, the Default % will be used to calculate their premiums paid, with remainder allocated to FI Group
• FI Group files a claim and selects Alternative Option and provides relevant data or records to support a contribution % higher than the Default % • FI Employee files a claim	• Allocation between the FI Group and claiming FI Employees will be based on the relevant data or materials provided by each (dependent on a review process)
• FI Group files a claim and accepts Default option • One or more FI Employees for that FI Group files a claim and selects the Alternative Option • One or more FI Employees for that FI Group files a claim and accepts Default option	• Allocation between the FI Employees who select the Alternative Option and for the related FI Group with regard to these employees will be based on the relevant data or materials provided by each (dependent on a review process) • Default % will be used to calculate premiums for the claimants who accept the Default option
• FI Employee files a claim and does not select the Alternative Option • FI Group(s) does not file a claim	• The FI Employee's premium will be calculated based on the Default % as seen above
• FI Employee files a claim and selects the Alternative Option and provides relevant data or records to support a contribution % higher than the Default % • FI Group(s) does not file a claim	• The FI Employee will receive an allocation based on the relevant data or materials he or she provides (dependent on a review process)

Employer Groups: Purchasing Entities and Covered Entities are both eligible to file a claim.[7]

[7] Information about the plan of allocation for Employer Groups can be found in the Plan of Distribution.

Distribution of Self-Funded Net Settlement Fund

Self-Funded Authorized Claimants are eligible for compensation for Total Self-Funded Fees Paid to the Settling Defendants during the Self-Funded Settlement Class Period. Payments will be distributed on a proportional basis across all Self-Funded Authorized Claimants.

The amount of each claim submitted by any given Self-Funded Authorized Claimant will be determined by the following formula:

Total Administrative Fees Paid During the Self-Funded Settlement Class Period
by Self-Funded Claimant B

Divided by

Total Administrative Fees Paid during the Self-Funded Settlement Class Period
by all Self-Funded Authorized Claimants who submit claims

Multiplied by

Total dollars in Self-Funded Net Settlement Fund

= Claim payment of Self-Funded Claimant B's claim

Total Administrative Fees Paid will be based upon (a) the data provided by the Settling Defendants showing the total amount of Administrative fees paid by any Self-Funded Group and (b) an allocation process to split the Total Self-Funded Fees Paid between each specific Self-Funded Group and any Self-Funded Employees of that Self-Funded Group who submit claims. The Self-Funded Groups/Employees will have the same opportunity to choose either the Default or Alternative option, as outlined in the chart on page 8 for the FI Group and FI Employees.

The Self-Funded Default Option allocation is: (1) 18% of an employee's administrative fee for single coverage is deemed to have been paid by the employee (with the reminder to the employer); and (2) 25% of an employee's administrative fee for family coverage is deemed to have been paid by the employee (with the reminder to the employer). The Alternative option allows the claimant to submit data or records supporting a contribution higher than the Default.

Minimum Claim Payment

If the total payment for any Damages Class Member is equal to or less than $5.00 ("minimum claim payment"), no payment will be made to the Damages Class Member. The claimant will be notified that there will be no distribution given the minimum claim payment.

No distributions will be made until there is a final resolution of all determinations and disputes that could potentially impact the Claims Payments.

Claimant Review

Authorized Claimants will be able to review the Total Premiums Paid and/or Total Administrative Fees Paid used to calculate their award before the distribution of the Net Settlement Fund. If an Authorized Claimant disagrees with their Total Premiums Paid and/or Total Administrative Fees, they must provide the necessary documentation to support the amount they believe it should be. The Claims Administrator will review any data

submitted and determine whether to change the Total Premiums Paid and/or Total Administrative Fees for that Authorized Claimant.

9. How do I get a Payment?

To make a claim and receive a payment, you must file a claim form online or by mail postmarked **November 5, 2021**. Claims may be submitted online at www.BCBSsettlement.com or by mail to:

Blue Cross Blue Shield Settlement
c/o JND Legal Administration
PO Box 91390
Seattle, WA 98111

If you select the Alternative Option, you must submit relevant data or records showing a higher contribution percentage. Otherwise the Default Option will be used. Instructions for submitting your claim are on the claim form and on the Settlement Website. When required, sufficient documentation shall include an attestation signed under penalty of perjury when other documentation is no longer available.

10. What am I giving up by staying in the Settlement Classes?

Unless you exclude yourself, you remain in the Settlement Classes. This means that you cannot sue, continue to sue, or be part of any other lawsuit against Settling Defendants that makes claims based on the facts and legal theories involved in this case or any of the business practices the Settling Defendants adopt pursuant to the Settlement Agreement. It also means that all of the Court's orders will apply to you and legally bind you. The Released Claims are detailed in the Settlement Agreement, available at www.BCBSsettlement.com. For purposes of clarity, if a Self-Funded Account that opts out meets the criteria to request a Second Blue Bid under the terms of the Settlement Agreement, that Self-Funded Account does not release any claims for declaratory or injunctive relief to request a Second Blue Bid during any time it meets the criteria to request such a bid under the terms of the Settlement Agreement. All other claims for declaratory or injunctive relief released under the Settlement Agreement are released.

11. What happens if I do nothing at all?

If you do nothing, you will remain a member of the Settlement Classes and be bound by the Settlement. However, if you had been entitled to share in the Settlement proceeds, you will not get a payment.

EXCLUDING YOURSELF FROM THE DAMAGES CLASS

12. How do I exclude myself from the Damages Class?

If you are a member of the Damages Class, do not want the monetary benefits, and do not want to be legally bound by the terms of the Settlement, or if you wish to pursue your own separate lawsuit against Settling Defendants, you must exclude yourself from the Damages Class. This requires submitting a written request to the Claims Administrator stating your intent to exclude yourself from the Damages Class (an "Exclusion Request"). Your Exclusion Request must include the following: (a) your name, including the name of your business (if your business purchased health insurance from a Blue Cross or Blue Shield entity during the Class Period for employees), address, and telephone number; (b) a statement that you want to be excluded from the Damages Class in *In re: Blue Cross Blue Shield Antitrust Litigation*; and (c) your personal, physical signature (electronic signatures, including DocuSign, or PDF signatures are not permitted and will not be considered personal signatures). Requests signed solely by your lawyer are not valid. You must mail or email your Exclusion Request, postmarked or received by **July 28, 2021**, to:

Blue Cross Blue Shield Settlement
c/o JND Legal Administration – **Exclusion Dpt.**
PO Box 91393
Seattle, WA 98111
or info@BCBSsettlement.com

13. If I do not exclude myself, can I sue Settling Defendants for the same thing later?

No. Unless you exclude yourself, you give up the right to sue Settling Defendants for any claims that are released by the Settlement Agreement. If you have a current lawsuit against the Settling Defendants, speak to your lawyer in that lawsuit immediately to determine whether you must exclude yourself from the Settlement Classes to continue your own lawsuit against Settling Defendants.

OBJECTING TO THE SETTLEMENT

14. How do I tell the Court that I do not like the Settlement?

If you are a Settlement Class Member and have not excluded yourself from the Settlement, you can object to the Settlement if you do not like part or all of it. The Court will consider your views.

To object, you must send a letter or other written statement saying that you object to the Settlement in *In re: Blue Cross Blue Shield Antitrust Litigation* and the reasons why you object to the Settlement. This letter must include:

- The name of the Action – *In re: Blue Cross Blue Shield Antitrust Litigation*
- Description of your objections, including any applicable legal authority and any supporting evidence you wish the Court to consider;
- Your full name, address, email address, telephone number, and the plan name under which Blue Cross Blue Shield was provided and dates of such coverage;
- Whether the objection applies only to you, a specific Settlement Class or subset of a Settlement Class, or both Settlement Classes;
- The identity of all counsel who represent you, including former or current counsel who may be entitled to compensation for any reason related to the objection, along with a statement of the number of times in which that counsel has objected to a class action within five years preceding the submission of the objection, the caption of the case for each prior objection, and a copy of any relevant orders addressing the objection;
- Any agreements that relate to the objection or the process of objecting between you, your counsel, and/or any other person or entity;
- Your (and your attorney's) signature on the written objection;
- A statement indicating whether you intend to appear at the Final Fairness Hearing (either personally or through counsel); and
- A declaration under penalty of perjury that the information provided is true and correct.

Do not send your written objection to the Court or the judge. Instead, mail the objection to the Claims Administrator with copies to Co-Lead Counsel and Counsel for Settling Defendants at the addresses listed below.

Your objection must be postmarked by **July 28, 2021**.

Claims Administrator:
Blue Cross Blue Shield Settlement
c/o JND Legal Administration
PO Box 91393
Seattle, WA 98111
(888) 681-1142

Plaintiffs' Co-Lead Counsel:
BLUE CROSS BLUE SHIELD SETTLEMENT
C/O MICHAEL D. HAUSFELD
HAUSFELD LLP
888 16th Street NW, Suite 300
Washington, DC 20006
(202) 849-4141
BCBSsettlement@hausfeld.com

BLUE CROSS BLUE SHIELD SETTLEMENT
C/O DAVID BOIES
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(888) 698-8248
BCBS-Settlement@bsfllp.com

Counsel for Settling Defendants:
DAN LAYTIN
KIRKLAND & ELLIS LLP
300 N. LaSalle St.
Chicago, IL 60657
(312) 862-4137
BCBSsettlement@kirkland.com

15. What is the difference between excluding myself and objecting?

Objecting is telling the Court that you do not like something about the Settlement. You can object only if you do not exclude yourself from the Settlement Classes. Excluding yourself is telling the Court that you do not want to be part of the Settlement Classes or the lawsuit as outlined in Question 12. If you exclude yourself, you are no longer a member of the Settlement Classes and you do not have a right to share in the Settlement's proceeds or to object because the Settlement no longer affects you.

THE LAWYERS REPRESENTING YOU

16. Do I have a lawyer in this case?

The Court has appointed (1) Michael Hausfeld of Hausfeld LLP and (2) David Boies of Boies Schiller Flexner LLP as Co-Lead Counsel on behalf of the Plaintiffs and Settlement Class Members. Their contact information is provided above in Question 14.

You do not need to hire a lawyer because Co-Lead Counsel is working on your behalf.

If you wish to pursue your own lawsuit separate from this one, or if you exclude yourself from the Settlement Classes, these lawyers will no longer represent you. You will need to hire a lawyer if you wish to pursue your own lawsuit against Settling Defendants.

17. How will the lawyers be paid?

Settlement Class Counsel may submit an application(s) to the Court ("Fee and Expense Application") for: (i) an award of attorneys' fees plus (ii) reimbursement of expenses and costs, up to a combined total of 25% of the $2.67 billion fund (i.e., $667,500,000) created by the Settlement. This fee will include Self-Funded Class Counsel's application. You will not have to pay any fees or costs.

THE COURT'S FAIRNESS HEARING

18. When and where will the Court decide whether to approve the Settlement?

The Court will hold a hearing to decide whether to approve the Settlement. You may attend and you may ask to speak, but you do not have to. The Court will hold a Fairness Hearing at **10:00 a.m. Central Time on October 20, 2021**, at the United States District Court for the Northern District of Alabama, Hugo L. Black United States Courthouse, 1729 5th Avenue North, Birmingham, Alabama 35203. At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. The Court will also consider whether to approve attorneys' fees and expenses up to $667.5 million and $101 million for additional costs and service awards. If there are objections, the Court will consider them. The Court will listen to people who have asked to speak at the hearing. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

19. Do I have to come to the hearing?

No. Co-Lead Counsel will attend the hearing and answer any questions the Court may have. However, you are welcome to come at your own expense. If you send an objection, you do not have to come to the hearing to talk about it. As long as you mailed your written objection on time, the Court will consider it. You may also pay your own lawyer to attend, but it is not necessary.

20. May I speak at the hearing?

You may ask to speak at the Fairness Hearing. To do so, you must send a letter saying that it is your "Notice of Intention to Appear in *In re: Blue Cross Blue Shield Antitrust Litigation*." Be sure to include your name, including the name of your business (if applicable), current mailing address, telephone number, and signature. Your Notice of Intention to Appear must be postmarked by **July 28, 2021**, and it must be sent to the Clerk of the Court, Co-Lead Counsel, and Defense Counsel. The address for the Clerk of the Court is: Clerk of Court, United States District Court for the Northern District of Alabama, Hugo L. Black United States Courthouse, 1729 5th Avenue North, Birmingham, Alabama 35203. The addresses for Co-Lead Counsel and Defense Counsel are provided in Question 14. You cannot ask to speak at the hearing if you excluded yourself from the Settlement.

GETTING MORE INFORMATION

21. How do I get more information about the Settlement?

This Notice summarizes the proposed Settlement. More details are in the Settlement Agreement. You can find a copy of the Settlement Agreement, other important documents, and information about the current status of the case by visiting www.BCBSsettlement.com. You may contact the Claims Administrator at info@BCBSsettlement.com or toll-free at (888) 681-1142. You may also contact Co-Lead Counsel at the address, phone number, and email address provided in Question 14.

PLEASE DO NOT CONTACT THE COURT REGARDING THIS NOTICE.

TAB 18

18. RULE 25(a)(1): COURT TRIGGER FOR SUBSTITUTION PERIOD

Rule 25(a)(1) currently provides:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Suggestion 21-CV-Q (attached to this report) comes from a current law clerk to a federal judge, and urges that Rule 25(a)(1) be amended to provide that the court may sua sponte trigger the 90-day period for dismissal provided in the third sentence of the rule by itself making a "statement noting the death." That 90-day period may be extended under Rule 6(b), but the rule calls otherwise for dismissal with regard to the decedent.

The submission keys on "zombie cases" in which none of the following occurs:

1. A statement noting the death is filed, and a motion to substitute is filed within 90 days of that — the court rules on the motion.

2. No statement noting the death is filed, but a motion to substitute is filed — the court rules on the motion.

3. A statement noting the death is filed, but no motion to substitute is filed within 90 days — the court dismisses the action unless it extends time for filing the motion under Rule 6(b), in which case the court then rules on the motion.

It seems that the foregoing scenarios encompass the great majority of cases subject to Rule 25(a).

The "zombie case" situation arises when there is neither a suggestion of death nor a motion to substitute. Such a case can linger, because the 90-day time limit is never triggered. The suggestion is that the court be permitted to trigger the 90-day period on its own.

It is not clear that the "zombie case" scenarios arise frequently in practice. The submission identifies some examples, however. An initial examination of these examples suggests that they are unlikely to be replicated frequently. Perhaps a description of them fleshes out the issues.

But first it is useful to focus also on Rule 25(a)(3):

> A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

In *Ciccone v. Sec'y of the Dep't of Health & Human Services*, 861 F.2d 14 (2d Cir. 1988), plaintiff challenged the denial of retirement benefits. The denial was based on plaintiff's

refusal to state his former occupation, and the district court dismissed on the ground this was a valid ground for denial of benefits. Plaintiff's argument on appeal was, in part, that the Fifth Amendment protection against self-incrimination provided a valid basis for him to refuse to provide the requested information. The court of appeals rejected this argument on the ground that there is no governmental compulsion to apply for retirement benefits. *See id.* at 17-18. Along the way, it observed in a footnote that plaintiff died after the suit was commenced, but added that the failure to move for a substitution of parties was "not fatal [to the appeal] since no suggestion of death was made to the district court." *Id.* at 15 n.1. The fact this was a "zombie case" does not seem to have produced difficulties.

In *Atkins v. City of Chicago*, 547 F.3d 869 (7th Cir. 2008), plaintiff sued the City for what he claimed was an illegal traffic stop. About a year after suit was filed, plaintiff was murdered. His lawyer then filed "Plaintiff's Motion to Substitute Because of Death," which Judge Posner called a "strange document." The district court denied the motion, and the court of appeals concluded that a motion to substitute can be filed only by a party or by the executor or administrator of the decedent's estate. "The decedent's lawyer may not file such a motion in his own name because he no longer has a client." *Id.* at 872.

Defendant moved to dismiss in the district court, deeming the filing by the lawyer to be a suggestion of death. The trial court accepted that argument, but extended the time to file a motion to substitute for another 30 days. However, the lawyer did not file a petition in state court to have the plaintiff's widow appointed as representative until the last day of that period, and simultaneously moved in federal court to have the widow substituted as the plaintiff. The problem was that the widow had not yet been appointed representative of her husband's estate. The district court dismissed.

The court of appeals found the lawyer's delay in pursuing the matter "inexcusable," but also ruled that the "Motion to Substitute" filed by plaintiff's lawyer did not start the 90-day period running because it was not served on the widow as required by Rule 25(a)(3). The lawyer "confused matters terribly, but the defendants are at fault as well. As soon as they were notified of [plaintiff's] death they should have filed a suggestion of death with the court and served it on [plaintiff's] widow." *Id.* at 874. Accordingly, dismissal as to the widow was reversed.

In *Rea v. Mutual of Omaha Ins. Co.*, 2018 WL 3126749 (W.D.N.Y., June 26, 2018), plaintiff claimed that defendant owed her disability benefits. About a year later, plaintiff's lawyer reported at a Rule 26 scheduling conference that plaintiff had died. The lawyer said he had not located an administrator for the estate or any family members, and the court gave him 90 days to locate an administrator. After those 90 days expired, the court ordered the lawyer to file a formal suggestion of death and set the matter for a further status conference. The lawyer failed to file the suggestion of death, or to attend the status conference.

Defendant then moved to dismiss under Rules 16, 25, 37, and 41, prompting the plaintiff lawyer to file an "affirmation" saying that he was unable, either via social media or otherwise, to locate any family members or evidence of an estate. The court found that the lawyer's "affirmation" did not constitute a formal "statement noting the death." But it dismissed pursuant to Rule 41(b) for failure to prosecute. Without "sua sponte" noting the death, then, the court found a solution in the current rules.

Finally, in *McMurtry v. Obaisi*, 2020 WL 3843566 (N.D. Ill., July 8, 2020), a state prisoner sued a prison doctor for failure to provide proper treatment. The assigned judge soon drew attention to the fact that in another case against the same doctor a suggestion of death had been filed, and pointed to information in that case indicating how to serve the doctor's estate. But plaintiff went through four sets of appointed counsel, and it wasn't until more than two years after the court initially pointed out the death of the doctor that plaintiff finally filed a motion to substitute the estate as a defendant.

By then the case had been assigned to a different judge, who concluded that the minute order entered by the original judge shortly after the suit was filed "counts as a 'statement' about the death": "It is hard to see why a statement by a party should count, but a statement by the Court should not. If anything, a statement by the Court should count more rather than less." *Id.* at *2. It then refused to extend the time to move to substitute under Rule 6(b) on the ground the delay was not excusable — "counsel simply overlooked the issue and missed the deadline." *Id.* at *3. Moreover, the estate was never served with process, "an independent ground for dismissal."

It is to be hoped that these are not recurrent situations. And under the view of the last case discussed above, sua sponte action by the judge constitutes a sufficient "statement noting the death," which is what the proposal says should be explicitly written into the rule. So on that view no amendment is needed.

More generally, the likely infrequency of examples like the four cited in the submission makes an amendment of problematical value. And it could be that so amending the rule might produce negative consequences. For one thing, there remains the problem that Rule 25(a)(3) says the statement noting the death must be served on nonparties under Rule 4. If the rule says explicitly that the court may itself make the "statement noting death," is the court required also to serve the nonparties entitled to notice? How exactly does it identify them? Is it to hire a process server to serve them, or use a U.S. Marshal to do that?

An additional concern is that treating a comment by the judge as a "statement noting the death" that triggers the 90-day dismissal clock could also create undesirable uncertainty. Must the judge's "statement" be in writing? if not, how can it be served on anyone? And how formal must it be? In one of the cases described above, the decedent's lawyer failed to attend a status conference. If the judge said something during that conference, should that be considered sufficient? Particularly given the unusual features of the cases described above, it could be undesirable to introduce uncertainty about whether something the judge said constituted a "statement noting the death" within the meaning of Rule 25(a)(1).

It seems likely that the current rules contain sufficient provisions to address these problems. For one thing, any party can clearly file and serve a suggestion of death, and then also bear the responsibility of satisfying Rule 25(a)(3). These cases are odd in that no party did those things even though the rules clearly authorize them.

For another, it seems that the first sentence of Rule 25(a)(1) empowers the court to do something other than itself file a statement noting the death — "order substitution of the proper party." In at least some instances, courts may order the addition of parties. *See* Rule 19(a)(2) (order that a required party be made a party). It would seem that current Rule 25(a)(1) provides

authority for a similar order, and that what the courts were doing in some of the cases described above comes close to that.

Rule 41(b), moreover, seems to provide an effective tool to deal with "zombie cases" in which the plaintiff dies because it authorizes dismissal for failure to prosecute. It seems that deceased plaintiffs cannot prosecute their cases. Of course, courts should avoid hair-trigger use of this authority to dismiss, but the case law on application of Rule 41(b) should guard against that, and it is much more flexible than Rule 25(a)(1)'s "must be dismissed" directive.

In "zombie cases" in which the defendant has died, like the suit against the prison doctor, the statute of limitations likely provides needed protection if no suggestion of death is served on the successor or representative. Unless there is some reason to permit relation back under Rule 15(c), failure to serve a statement noting the death and/or a motion to substitute on the estate of the deceased defendant likely defeats the claim.

On balance, then, this submission appears to provide a possibly troublesome solution to a problem that seems susceptible to cure under the current rules. But if it is decided to pursue this matter further, it may be that a wider examination of Rule 25 would result in order.

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July 4, 2021

21-CV-Q

Committee on Rules of Practice and Procedure
c/o Rules Committee Staff
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendment to Federal Civil Rule 25

To Whom This May Concern:

I write today to ask you to consider an amendment to Federal Civil Rule 25(a)(1) that would permit courts to initiate the 90-day dismissal process *sua sponte* when undisputed evidence indicates that a party has died.

Background

Rule 25(a) addresses substitution of a party when the party dies. In short, the substitution process requires formal notice of the death and then a motion for substitution that proposes a successor. The full text of Rule 25(a)(1) currently reads as follows:

> If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

Fed. R. Civ. P. 25(a)(1). The first sentence establishes the core substantive principle in Rule 25(a)(1): Courts have the power to substitute deceased parties. The omission in the first sentence

[1]I am a law clerk in the federal judiciary. Any opinions expressed in this letter are entirely my own.

of any *sua sponte* substitution authority creates the need for the second sentence: Courts have the power to substitute deceased parties, but that power is limited to orders on motions for substitution. Neither the first nor the second sentence requires a statement or "suggestion" of death before a motion can be filed. The third sentence addresses one scenario that can arise after the death of a party: If a remaining party does serve a statement of death, and no party or prospective successor makes a motion for substitution within 90 days, then the action by or against the decedent must be dismissed. "The rule was drafted on the assumption that, most commonly, successors or representatives will move to substitute promptly and voluntarily." 6 Moore's Federal Practice - Civil § 25.12 (Lexis 2021).

Discussion of the Problem

What happens, though, when the assumption behind the rule fails? The following table summarizes how Rule 25(a)(1) addresses only three of four possible scenarios that can occur after the death of a party:

Scenario Following Death of Party	Outcome
Statement of death and motion to substitute (within 90 days)	Court rules on motion
No statement of death but motion to substitute	Court rules on motion
Statement of death but no motion to substitute within 90 days	Dismissal
No statement of death AND no motion to substitute	???

The original version of Rule 25(a)(1) implicitly addressed the fourth scenario but in a different context. The original version limited a court's power to substitute to a period of two years after the death occurred. Once two years passed, "[i]f substitution is not so made, the action shall be

dismissed as to the deceased party." Fed. R. Civ. P. 25(a)(1) (1938). Following what was regarded as a rigid application of the two-year period in *Anderson v. Yungkau*, 329 U.S. 482 (1947),[2] the Advisory Committee proposed an amendment in 1955 that would have eliminated the two-year period and would have modified the consequence of a delay in substitution as follows: "If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party." Fed. R. Civ. P. 25(a)(1) (proposed 1955 amendment), *in* 6 Moore's Federal Practice - Civil § 25 App. 4 (Lexis 2021). In the Committee Note to the proposed amendment, the Advisory Committee observed that, even without a rigid deadline for substitution, "[p]rovision has been made for dismissal of the action if substitution is not made within a reasonable time; thus to the extent that the period for substitution is not otherwise limited by applicable state or federal law, the trial court is left free to consider the circumstances of the particular case in determining whether substitution has been delayed so long that the action should be dismissed as to the deceased party." *Id.* (Committee Note). The proposed 1955 amendment was not adopted. In the Committee Note to its 1963 amendment, which introduced the 90-day deadline following a statement of death, the Advisory Committee created the assumption of prompt substitution by noting that "[a] motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so

[2] Although not relevant to my proposal, I note that *Anderson* created disagreements over whether courts, as opposed to legislatures, could create rules that operated like statutes of limitations. *Compare, e.g.*, *Perry v. Allen*, 239 F.2d 107, 111 (5th Cir. 1956) ("Such a limitation may be placed solely by the legislature and is beyond the competence of a court exercising its power to formulate rules of procedure.") *with Iovino v. Waterson*, 274 F.2d 41 (2d Cir. 1959) (substitution outside two-year limit affirmed, where defense counsel waived any statute of limitations by failing to advise timely of his client's death).

made. If a party or the representative of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record." Fed. R. Civ. P. 25(a)(1), Committee Note to 1963 Amendment, *in* 6 Moore's Federal Practice - Civil § 25 App. 7 (Lexis 2021). Hence the fourth scenario in my table above was born.

The fourth scenario that I have described has forced courts to choose either to pretend that a deceased party remains fully capable of appearing and developing the record—a situation that I am tempted to call "zombie cases"—or to halt a case indefinitely. Zombie cases are particularly problematic when the deceased party is a sole or principal plaintiff. An extreme example of a zombie case appears in *Ciccone v. Sec'y of Dep't of Health & Human Servs.*, 861 F.2d 14 (2d Cir. 1988), where the plaintiff died during proceedings before the District Court. Whether counsel had authority to represent a deceased client was unclear. The District Court nonetheless ruled against the deceased plaintiff; the deceased plaintiff somehow filed an appeal; and the Second Circuit went as far as to issue an opinion affirming the judgment—all of this justified because "no suggestion of death was made to the district court." *Id.* at 15 n.1 (citation omitted). *See also In re Ketaner*, 17 F.3d 1434 (4th Cir. 1994) (table case) (citing *Ciccone* to "dispense with oral argument" and to affirm a judgment against a *pro se* litigant who died after filing his appeal). Effectively the same problem occurred in *Atkins v. City of Chicago*, 547 F.3d 869, 874 (7th Cir. 2008), where the Seventh Circuit reversed a dismissal and ordered reinstatement of a deceased plaintiff (one of two plaintiffs, who were brothers) because plaintiffs' counsel did not serve a statement of death on the decedent's wife. In contrast, confusion over how to handle the fourth scenario led to a lengthy delay in *Rea v. Mut. of Omaha Ins. Co.*, No. 16-CV-73-FPG-HBS, 2018 WL 3126749 (W.D.N.Y.

June 26, 2018). In *Rea*, the plaintiff commenced her action on January 28, 2016 and died several months later, in October 2016. Counsel—who, in the District Court record, questioned whether he had authority to proceed—never filed a statement of death and, sadly, could not identify any potential successor. In September 2017, the defendants moved to dismiss under multiple rules including Rule 25(a)(1). In a decision issued on June 26, 2018—nearly two years after the plaintiff died—the court denied relief under Rule 25 solely because no statement of death was ever filed. *Id.* at *2. In the alternative, given the lengthy delay that occurred, the court granted relief under Rule 41(b) for failure to prosecute. The fourth scenario was pushed to an extreme in *McMurtry v. Obaisi*, No. 18-CV-2176, 2020 WL 3843566 (N.D. Ill. July 8, 2020), where plaintiff's counsel argued that Rule 25(a)(1) did not apply because no one filed a statement of death, even though the plaintiff died before the filing of the action and the court called repeated attention to the death on the record. In frustration, the court in *McMurtry* declared its own minute order referring to the death to be a statement of death that started the 90-day clock under Rule 25(a)(1); concluded that the necessary 90 days passed without substitution; and then dismissed the case. The case law contains other examples of courts wrestling with the fourth scenario, and I do not intend any criticism of the judges or attorneys involved in the cases that I have cited. I have cited the above cases only to demonstrate that the fourth scenario that I have described is a real problem and not just a theoretical gap in the text of Rule 25(a)(1). Courts across the country should not have to improvise inconsistently to address a problem that can hamper fair adjudication of meritorious claims.

To address the problem created by the fourth scenario, I propose amending Rule 25(a)(1) to allow a court to commence the 90-day clock *sua sponte*. To ensure full procedural safeguards, and to minimize the scope of the amendment by fitting it within the current framework, I propose that a court's invocation of *sua sponte* authority here would begin with the receipt of information, in any form, that would satisfy the standard for judicial notice under Federal Rule of Evidence 201. Once the court is satisfied that it could take judicial notice, an order would issue that would function as the statement of death. I have no opinion as to how widely such an order should be served; perhaps the Committee can take this opportunity to address the Seventh Circuit's observation in *Atkins* that "Rule 25(a)(1) requires service, though it does not say which nonparties must be served . . . obviously not every person in the United States who happens not to be a party to the lawsuit in question. But nonparties with a significant financial interest in the case, namely the decedent's successors (if his estate has been distributed) or personal representative ([if] it has not been), should certainly be served." 547 F.3d at 873 (citations omitted). Finally, once proper service of an order occurs, the 90-day clock can run in the ordinary course. The combination of judicial notice, a formal order, and appropriate service should suffice to allay any due-process concerns while allowing courts to break the logjam when the fourth scenario presents itself.

Thank you for taking the time to consider my proposal, and do not hesitate to contact me if you wish to discuss it with me further.

Cordially,

Giuseppe A. Ippolito

TAB 19

19. RULE 37(c)(1)

This submission raises a question about the meaning of Rule 37(c)(1) that seems to arise from perceived tensions between the clear language of the rule text and comments offered in the committee note. The rule text seems clear enough that there is little reason to rewrite it, apart from providing an excuse to clarify the committee note. On balance it seems better to do nothing.

The appendix to this report includes the following:

- Suggestion 21-CV-E
- Rules Law Clerk's research memorandum (March 31, 2021)

Rule 37(c)(1) implements the initial disclosure provisions of Rule 26(a) and the allied duty to supplement the disclosures imposed by Rule 26(e):

> **(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.**
>
> **(1)** ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> **(A)** may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> **(B)** may inform the jury of the party's failure; and
>
> **(C)** may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

The rule expressly provides that the alternative sanctions listed in (A), (B), and (C) may be used "instead of this [exclusion] sanction." (Before the Style project, the alternatives could be awarded "in lieu of" exclusion, an equally clear if unnecessarily fancy word.)

The 1993 committee note refers to exclusion as "a self-executing sanction * * * without need for a motion," or an "automatic sanction [that] provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence." The sanctions provided by subparagraphs (A), (B), and (C), "though not self-executing, can be imposed when found to be warranted after a hearing."

So far so good. "Self-executing" and "automatic" need not mean "mandatory" unless the failure is substantially justified or harmless. These words in the committee note seem intended to distinguish the need for a motion and opportunity to be heard before the other sanctions are imposed, a protection that is particularly important when the court both excludes proffered evidence and imposes another sanction in addition, such as informing the jury of the failure to disclose. They do not detract from the plain meaning of "instead of."

The difficulty flagged by Judge Tjoflat in the dissenting opinions described in the research memorandum arises from the first sentences of the paragraph in the committee note that addresses the alternative sanctions provided by (A), (B), and (C): "Preclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party. However, the rule provides the court with a wide range of other sanctions * * *." Read without reference to the clear rule text, these words might be taken to mean that the alternative sanctions are not to be used instead of exclusion when the information not disclosed is favorable to the party that should have disclosed it and who now wants to introduce it. But there is little reason to read them to defeat the plain rule text.

Consideration of the array of alternative sanctions reinforces the plain meaning of the rule text. Any sanction is available only if the failure to disclose was not substantially justified and is not harmless. Exclusion is one sanction, and a powerful one that may reach information that was not disclosed because it initially seemed unfavorable — the situation addressed in the troublesome part of the committee note — and is adduced only after discovering that it is favorable. But exclusion may be inappropriate when the failure is marginally (though not substantially) justified and any harm can be cured by such measures as additional time to supplement a summary judgment record or a brief continuance of trial, perhaps supplemented by an award of reasonable expenses and attorney fees. Or the court might admit the evidence but inform the jury of the failure to disclose. A more exotic possibility would be to admit the evidence as to some issues, but invoke Rule 37(b)(2)(A)(ii) to prohibit the "disobedient" party from supporting or opposing designated claims or defenses. Other reasons to deny exclusion but invoke an alternative sanction will inevitably appear.

Rather than substitute other sanctions for exclusion, the rule plainly allows exclusion to be coupled with other sanctions, including the case-terminating sanctions incorporated through Rule 37(b)(2)(a)(i)-(vi). That part of the rule does not seem to have proved difficult to interpret.

All of this seems clear. The memorandum, however, suggests two things: First, courts have been bemused by the committee note, and respond by saying different things. But second, the courts of appeals are not reversing orders that impose alternative sanctions and refuse to exclude evidence despite a failure to show that a failure to disclose was substantially justified or was harmless. To be sure, the comforting conclusion about appellate reactions does not ensure that district courts are not misled by the committee note. But it does provide some comfort.

The question thus falls into a familiar category. A measure of confusion and misdirection has been found in what appears to be an overreading of a committee note, in defiance of clear rule text. Publishing a supplemental committee note is not an option. It is possible to amend the rule text to make the intended meaning even more inescapable. One ploy would be to add one word: "the party is ordinarily not allowed to use that information or witness * * *." The satisfaction of proposing some such amendment, however, would be gained at the cost of moving ever closer to a committee of perpetual revision. The Committee has not yet taken on that role.

Given clear present rule text, and the absence of any sign of significant wrong results in practice, it seems better to remove this proposal from the agenda.

21-CV-E

From: Patty Barksdale
To: RulesCommittee Secretary
Cc: Julie Wilson
Subject: Suggestion for Fed. R. Civ. P. 37(c)(1)
Date: Tuesday, February 16, 2021 2:28:00 PM

Good afternoon.

The rules committee is likely considering this issue already, but if not, could you please present for consideration the split of authority and need for resolution regarding Fed. R. Civ. P. 37(c)(1)? The issue and split are discussed here:

Crawford v. ITW Food Equip. Grp., LLC, 977 F.3d 1331, 1342 n.4 (11th Cir. 2020) (see also Tjoflat, J., dissenting)
Taylor v. Mentor Worldwide, LLC, 940 F.3d 582, 603 (11th Cir. 2019) (Carnes, J., concurring, and Tjoflat, J., dissenting)

Thank you for your consideration.

Sincerely,

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

MEMORANDUM

To: Professor Marcus, Professor Cooper
Reporters, Advisory Committee on Civil Rules

From: Kevin Crenny, Rules Law Clerk

Date: March 31, 2021

Re: Fed. R. Civ. P. 37(c)(1) (Suggestion 21-CV-E)

This memo analyzes a Rules suggestion submitted by Magistrate Judge Patricia Barksdale of the Middle District of Florida, identified as suggestion 21-CV-E, which concerns a potential split of authority in relation when evidence may or must be excluded under Federal Rule of Civil Procedure 37(c)(1). The suggestion points to two Eleventh Circuit cases in which members of the appellate panel disagreed on how that rule ought to be applied. My review of several dozen appellate opinions assessing district courts' application of this rule suggests that even though the rule can be read two different ways, it does not appear that the ambiguity is making much difference in practice. District courts' judges are not having their evidentiary decisions reversed at the circuit level because of differing interpretations of Rule 37(c)(1). As a result, the Advisory Committee probably does not need to take action in response to this suggestion.

I. Suggestion 21-CV-E

Federal Rule of Civil Procedure 37(c)(1) concerns penalties for the failure to disclose or supplement the evidentiary disclosures required by Rule 26. It reads as follows:

> (c) (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> > (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> > (B) may inform the jury of the party's failure; and
> > (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)—(vi).[1]

Suggestion 21-CV-E draws our attention to two relatively recent Eleventh Circuit cases, *Taylor v. Mentor Worldwide, LLC*,[2] and *Crawford v. ITW Food Equip. Grp., LLC*.[3] In each of these Judge

[1] Fed. R. Civ. P. 37(c)(1).
[2] 940 F.3d 582 (11th Cir. 2019).
[3] 977 F.3d 1331 (11th Cir. 2020).

Tjoflat wrote in dissent to express his view that a district court had erred in its application of Rule 37(c)(1).

Taylor concerned an appeal from a products liability case that went to trial as a bellwether in a multidistrict products liability case.[4] After the direct examination of one of the plaintiff's experts, the defendant moved to strike his testimony, arguing that the opinions he had offered were not disclosed in his Rule 26 report and that they differed from his deposition testimony.[5] The defendant "stated also that if the court were unwilling to strike the testimony, counsel would like an overnight continuance to prepare its cross-examination."[6] The district court denied the motion to strike but granted the continuance.[7] On appeal the defendant sought judgment as a matter of law based on what it claimed was the district court's error in admitting the testimony.[8] The controlling panel opinion in *Taylor* held that although the expert's Rule 26 report should have been supplemented, "striking [the] testimony was not the only viable response" for the district court.[9] The panel held that "Rule 37 gives a trial court discretion to decide how best to respond to a litigant's failure to make a required disclosure under Rule 26" and that "[a]n abuse of discretion occurs only when the district court relies on a clearly erroneous finding of fact or an errant conclusion of law or improperly applies the law to the facts."[10]

Crawford was also a products liability case.[11] the defendant had moved for summary judgment while noting that the plaintiff's expert had failed to identify any alternative design for a meat saw on the market that would have prevented the plaintiff's injury.[12] The plaintiff then submitted a new affidavit from his expert as part of his response to the summary judgment motion.[13] On appeal the defendant argued that it should have received judgment as matter of law at trial and because this evidence should have been excluded as untimely disclosed.[14] The panel majority concluded that it did not have to "decide whether there was a violation of Rule 26" because even if there was, the district court had not abused its discretion.[15] The ruling was a narrow one and depended on the sequence of events: the evidentiary ruling had been made five months before trial and there was ample time for the defendant to seek a supplemental deposition of the expert concerning the new affidavit.[16] There was no evidence that the defendant was prejudiced.[17]

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[4] *Taylor*, 940 F.3d at 587.
[5] *Id.* at 589.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 591.
[9] *Id.* at 592.
[10] *Id.* at 593.
[11] 977 F.3d 1331 (11th Cir. 2020).
[12] *Id.* at 1337 (majority opinion). The details of the case are unimportant for our purposes and I am glossing over them somewhat here.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1341.
[16] *Id.*
[17] *Id.* at 1342.

Dissenting in both cases, Judge Tjoflat painted a consistent less-flexible reading of Rule 37. As he saw it, a district judge presented with untimely disclosed evidence "should [ask] two simple questions: First, was [the failure to disclose] a mere mistake? Second, did [the opposing party] already know" the information that went undisclosed?[18] "If the answer to either question [is] no, then Rule 37(c)(1)'s 'automatic sanction' of exclusion [is] necessary . . . ."[19] In *Taylor* he pointed to the Rule 37 advisory committee note which suggests that the option to impose an alternative sanction exists because "[p]reclusion of evidence is not an effective incentive to compel disclosure of information that, being supportive of the position of the opposing party, might advantageously be concealed by the disclosing party."[20] This, he argued, showed that the "alternative sanctions" made available in Rule 37 were "wholly inappropriate in the mine-run of Rule 26 violations where the threat of exclusion is a sufficient deterrent." He therefore read Rule 37 as requiring automatic exclusion when harmlessness or sufficient justification could not be found.[21] In *Crawford* he likewise accused the majority of "frustrat[ing] the purpose of Rule 26 by tolerating conduct that the Rule squarely precludes" and "leav[ing] Rule 26's disclosure requirements grossly underenforced."[22]

Judge Julie Carnes responded to Judge Tjoflat's reading of the rule in a concurrence in *Taylor*.[23] She acknowledged that the advisory committee note supported Judge Tjoflat's interpretation, but that the text of Rule 37 also suggested that exclusion was not automatically required.[24] Judge Carnes noted "a split between the circuit courts on this question," and pointed to an opinion from the Southern District of Georgia that ostensibly laid out the split.[25] Judge Carnes thought that there was no need for the Eleventh Circuit to choose a side because even if Rule 37 does require automatic exclusion as a default, the district court in this case had properly

[18] *Id.* at 1356 (Tjoflat, J., dissenting).
[19] *Id.*
[20] *Taylor*, 940 F.3d at 607 (Tjoflat, J., dissenting) (quoting Rule 37 advisory committee note).
[21] *Id.* at 608–09. In *Taylor* he also thought that the district court had applied the wrong standard for harmlessness, though this is not the focus of the rules suggestion. *Id.* at 608. Judge Tjoflat argued that the district court made a legal error by "analy[zing] the violation as if it were determining prejudice rather than harm." *Id.* at 607 (Tjoflat, J., dissenting). The controlling opinion had acknowledged that the district judge had "use[d] the word 'prejudice' rather than 'harmless'" at trial, but noted that the correct word had been used in a subsequent order and saw no indication that an improper wrong standard had actually been applied. *Id.* at 593 n.4 (majority opinion) (citing *In re Mentor Corp. Obtape Transobturator Sling Prods. Liability Litigation*, No. 08-MD-2004, 2016 WL 6138253, at *6 n.3 (M.D. Ga. Oct. 20, 2016)). Judge Tjoflat disagreed and concluded that "[t]he district court failed to appreciate the distinction between . . . . Rule 37(c)(1)'s specific harm standard . . . [and] ordinary prejudice analysis." *Id.* at 607 (Tjoflat, J., dissenting).
[22] *Crawford*, 977 F.3d at 1357 (Tjoflat, J., dissenting).
[23] *Taylor*, 940 F.3d at 602–06 (J. Carnes, J., concurring).
[24] *Id.* at 603.
[25] *Id.* at 603–04 (citing *Pitts v. HP Pelzer Auto. Sys., Inc.*, 331 F.R.D. 688 (S.D. Ga. 2019)).

exercised its discretion in awarding an alternative form of relief that the opposing party had specifically requested.[26]

II. Analysis

I took two approaches to determining the extent to which the potential for reading Rule 37(c)(1) in two different ways is actually causing problems in the federal judiciary. The first was to evaluate the circuit split referenced by Judge Carnes in *Taylor*. The second was to review court of appeals decisions concerning Rule 37(c)(1) discovery sanctions to determine the extent to which and the reasons why district court decisions were being reversed under this Rule. The results of both lines of research suggest that the courts are not having difficulty applying Rule 37(c)(1) and that there is little need for the advisory committees to consider amending it at this time.

A. Purported Circuit Split

In her *Taylor* concurrence, Judge Carnes cited a Southern District of Georgia case, *Pitts v. HP Pelzer Automotive Systems, Inc.*[27] which purports to identify a circuit split.[28] According to *Pitts*, "Circuit Courts having considered the issue" of "whether absence of substantial justification and harmlessness automatically results in exclusion . . . are split."[29] In a footnote, *Pitts* lays out that the Second, Sixth, and Seventh Circuits say exclusion is not automatic, while the First, Fourth, Eighth, and Ninth say it is automatic.[30] Upon closer inspection, though, a few of the citations given are unconvincing and it is not clear to me that there is a meaningful split here, as opposed to simply different courts emphasizing different parts of the text of Rule 37 and its accompanying committee notes.

The case *Pitts* cites for the Seventh Circuit, *Hicks v. Avery Drei, LLC*,[31] does say that exclusion is not automatic, but does so in dicta and cites no precedent.[32] The prevailing rule in the Seventh Circuit appears to be that exclusion is automatic.[33] The case its cites for the Eighth

[26] *Id.* at 604 ("[T]he question is whether the district court abused its discretion when it granted Mentor one of the two alternative requests for relief it made. I say no.").
[27] 331 F.R.D. 688 (S.D. Ga. 2019).
[28] *Taylor*, 940 F.3d at 604 (citing *Pitts*, 331 F.R.D. at 695–96 & n.7) (J. Carnes, J., concurring).
[29] *Pitts*, 331 F.R.D. at 695.
[30] *Id.* at 695 n.7.
[31] 654 F.3d 739 (7th Cir. 2011).
[32] *Id.* at 743–44 ("[Plaintiff's] failure to abide by Federal Rule of Appellate Procedure 10 leaves us without a meaningful basis of review and results in a forfeiture of her [evidentiary] argument."); *id.* at 745 (noting additionally that the plaintiff "offers no convincing reason why the alternative sanctions chosen by the district court were not sufficient remedies").
[33] *E.g.*, *Karum Holdings LLC v. Lowe's Cos., Inc.*, 895 F.3d 944, 951 (7th Cir. 2018) ("[T]he exclusion of non-disclosed evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." (quoting *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004)); *Tribble v. Evangelides*, 670 F.3d 753, 760 (7th Cir. 2012) (citing *Musser*, 356 F.3d at 758), *as amended* (Feb. 2, 2012); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996).

Circuit is even further off the mark, as it explicitly states that that the Eighth Circuit has not and will not now weigh in on the dispute.[34]

Wright & Miller does not say that the differences of opinion and presentation on this issue amount to a circuit split. The treatise's section discussing Rule 37(c)(1) states only that "[m]any cases have echoed the Advisory Committee's statement that exclusion is mandatory" while "[o]ther courts have similarly concluded that preclusion is not mandatory, or that admission of material improperly withheld was permissible."[35] The collection of citations supporting those two opposed propositions is further evidence of the lack of a split. Eighth Circuit cases are cited as examples of both perspectives, and district court cases from districts within the First, Second, Third, Fourth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits are cited as examples in both footnotes.[36] First Circuit and Sixth Circuit cases are cited as examples of cases treating exclusion as automatic, but the District of Massachusetts, Eastern District of Kentucky, and Eastern District of Tennessee provide examples of the opposite proposition. Likewise, Second, Sixth, and D.C. Circuit cases are cited as examples of courts treating preclusion as non-mandatory, while districts in New York, Tennessee, Kentucky, and the District of Columbia are cited as examples of the opposite. I do not mean to suggest at all that the treatise authors made a mistake. My point is only that there are cases pointing both ways all across the country and that the Circuits—except maybe the Seventh—do not seem to be handing down particularly rigid guidance.

B. Outcomes in Practice

I reviewed approximately 60-70 court of appeals decisions[37] and found nothing indicating that there is any meaningful disagreement in the judiciary about how Rule 37(c)(1) should be applied. Every decision I reviewed was applying an abuse of discretion standard. Judge Tjoflat's two dissenting opinions, discussed above, were the only ones I saw that focused on the possibility of a legal error—concerning the distinction between prejudice and harm. In the vast majority of

[34] *Vanderberg v. Petco Animal Supply Stores, Inc.*, 906 F.3d 698, 707 n.3 (8th Cir. 2018) ("This Court has not specifically addressed this question, ... Because we would reach the same conclusion under either approach, we need not decide which approach is proper.").
[35] 8B Charles A. Wright, Arthur R. Miller *et al.*, *Federal Practice & Procedure* § 2289.1 (3d ed. 2018) (footnotes omitted).
[36] *Compare id.* n.3, *with id.* n. 8.
[37] My search was for court of appeals cases containing "37(c)(1)" and the word "reversed." Most, though not all, of the cases this search turned up were relevant. There were over 100 results in total and I did not review all of them, only the roughly 60 or 70 that Westlaw ranked as most relevant to my search terms.

the decisions I reviewed, the court of appeals affirmed the district court and wrote that it was not an abuse of discretion either to allow evidence in[38] or to exclude it.[39]

I found a decent number of cases—around seventeen—in which a court of appeals reversed a district court for abusing its discretion when evidence was excluded.[40] Most of the reversals were based on the district court's failure to consider lesser sanctions than exclusion or failing to consider whether a Rule 26 violation was substantially justified or harmless. For example, in *Howe v. City of Akron*,[41] the Sixth Circuit held that "the Plaintiffs' late disclosure was harmless, and thus the district court's decision to exclude . . . was an overreaction and an abuse of discretion."[42] In the unpublished *Tablizo v. City of Las Vegas*,[43] the Ninth Circuit held that "[b]ecause the district court did [not] find willfulness, fault or bad faith and did not consider the availability of lesser sanctions, . . . it erred in excluding evidence of damages under Rule 37(c)(1)."[44] In each of these cases reversal is based on grounds we would expect to see in any appellate reversal for abuse of discretion—i.e., "the district court failed to consider" a certain aspect of the problem or "the district court failed to explain its reasons."

One individual case that might be worth noting is *R & R Sails, Inc. v. Insurance Company of Pennsylvania*,[45] in which the Ninth Circuit held that it is an abuse of discretion for a district court not to evaluate willfulness, fault, or bad faith in connection with a Rule 26 violation when

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[38] *E.g.*, *Foodbuy, LLC v. Gregory Packaging, Inc.*, 987 F.3d 102, 117 (4th Cir. 2021); *Benjamin v. Sparks*, 986 F.3d 332, 343 (4th Cir. 2021); *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776 (6th Cir. 2003); *Greater Hall Temple Church of God v. S. Mut. Church Ins. Co.*, 820 F. App'x 915, 920 (11th Cir. 2020); *Vinzant v. United States*, 584 F. App'x 601 (9th Cir. 2014).

[39] *E.g.*, *Knight through Kerr v. Miami-Dade Cty.*, 856 F.3d 795, 811–12 (11th Cir. 2017); *U.S. ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land in Tennessee*, 821 F.3d 742, 752 (6th Cir. 2016); *Goodman v. Staples The Off. Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011); *Tokai Corp. v. Easton Enterprises, Inc.*, 632 F.3d 1358, 1365–66 (Fed. Cir. 2011).

[40] *Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205 (6th Cir. 2019); *HCG Platinum, LLC v. Preferred Product Placement Corp.*, 873 F.3d 1191 (10th Cir. 2017); *In re Complaint of C.F. Bean L.L.C.*, 841 F.3d 365, 374 (5th Cir. 2016); *Howe v. City of Akron*, 801 F.3d 718, 750 (6th Cir. 2015); *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72 (1st Cir. 2009); *OFS Fitel, LLC v. Epstein, Becker and Green*, 549 F.3d 1344 (11th Cir. 2008); *Torres v. City of Los Angeles*, 548 F.3d 1197, 1213–14 (9th Cir. 2008); *Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188 (1st Cir. 2006); *Westefer v. Snyder*, 422 F.3d 570, 584 (7th Cir. 2005); *Fidelity Nat. Title Ins. Co. of N.Y. v. Intercounty Nat. Title Ins. Co.*, 412 F.3d 745 (7th Cir. 2005); *Sherrod v. Lingle*, 223 F.3d 605 (7th Cir. 2000); *Gillum v. United States*, 309 F. App'x 267 (10th Cir. 2009); *Toyrrific, LLC v. Karapetian*, 748 F. App'x 106 (9th Cir. 2018); *Tablizo v. City of Las Vegas*, 720 F. App'x 875, 877 (9th Cir. 2018); *Everett v. Am. Gen. Life Ins. Co.*, 703 F. App'x 481, 483 (9th Cir. 2017); *Toyrrific, LLC v. Karapetian*, 606 F. App'x 365 (9th Cir. 2015).

[41] 801 F.3d 718 (6th Cir. 2015).

[42] *Id.* at 750.

[43] 720 F. App'x 875 (9th Cir. 2018).

[44] *Id.* at 877 (second alteration corrects an omission in the original).

[45] 673 F.3d 1240 (9th Cir. 2012).

excluding the evidence will essentially amount to the dismissal of a claim. This case was cited frequently in the Ninth Circuit decisions I reviewed, but *R & R Sails* itself is grounded in cases from 1993 and 1983 that predate Rule 37(c)(1). It is not based on a reading of Rule 37(c)(1). A number of courts of appeals around the country made similar observations when reversing district court decisions to exclude evidence, suggesting that the district court should have been more cautious or should have considered more alternatives when the exclusion of the evidence was going to have such a significant effect.

I did not see any cases in which a court of appeals ruled that a district court had abused its discretion or made a legal error by reading Rule 37(c)(1) to require automatic exclusion. As Professor Marcus has noted, it is difficult to imagine how such a circumstance could arise. It would likely mean that a district court had excluded evidence it thought should have been admitted based on a reading of Rule 37(c)(1) as constraining its discretion and requiring automatic exclusion. But a district court that really wanted to allow in a particular piece of evidence would likely get around this problem by finding that the nondisclosure was harmless, since that decision could be reviewed only for an abuse of discretion. So even if the court thought there was a strict automatic-exclusion legal rule, a discretionary evidentiary ruling would always be a way around it.

I only encountered one case involving Rule 37(c)(1) where a court of appeals reversed a district court's decision to allow evidence in. This was a Seventh Circuit case called *Tribble v. Evangelides*.[46] In that case, however, the district court's error did not really rely on Rule 37(c)(1). Instead it concerned the failure to treat a witness who testified as an expert as such.[47] I cannot say definitively that no court of appeals has ever reversed a district court decision on the ground that Rule 37(c)(1) required automatic exclusion of undisclosed evidence, but if such cases do exist, they seem to be rare.

[46] 670 F.3d 753 (7th Cir. 2012).

[47] *Id.* at 759 ("The issue here is not application of the 37(c)(1) sanction . . . . Th[e] duty to disclose a witness *as an expert* is *not* excused when a witness who will testify as a fact witness *and* as an expert witness is disclosed as a fact witness.").

TAB 20

20. RULE 63: DECISION BY SUCCESSOR JUDGE

After substantial expansion in 1991 and a style revision in 2007, Rule 63, with numbers added to indicate issues that will be discussed later, reads:

Rule 63. Judge's Inability to Proceed

> If a judge conducting a [1] hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be [2] completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge [3] must, at a party's request, recall any witness whose testimony is [4] material and [5] disputed and who is available to testify again without [6] undue burden. The successor judge may also recall any other witness.

Suggestion 21-CV-R (attached to this report) asks whether the direction in the second sentence that a successor judge "must" recall a witness at a party's request should be relaxed when the witness's original testimony is available on videotape. Experience with remote testimony during the pandemic is offered as a solid foundation for considering this question.

The suggestion is inspired by a nonprecedential Federal Circuit opinion applying Court of Federal Claims Rule 63, which is identical to Civil Rule 63. *See Union Telecom, LLC v. U.S.*, 2021 WL 3086212 (Fed. Cir. July 22, 2021). The opinion, of itself, probably does not offer much reason to consider changes in the rule text. It finds error where there was none, but concludes that the error was not prejudicial for the very reasons that show there was no error.

The plaintiff sought a refund of excise taxes that were never paid to the government on the theory that it had been charged for them when it purchased prepaid phone cards. Without elaborating the details of the underlying transactions, it lost because there was no evidence that it had been charged for the supposed taxes. The structured series of maneuvers that established the creation and sale of the phone cards were deliberately designed to avoid paying any taxes, to the knowledge of all concerned. Taxes in fact were not due.

The Rule 63 question arose after a 3-day trial when the case was transferred from the trial judge to a successor. The plaintiff requested that the successor recall two witnesses. The successor declined and ruled against the plaintiff because the uncontroverted evidence showed that the unpaid taxes had never been included in the price of the phone cards. The Federal Circuit first ruled that the successor erred in refusing to recall the witnesses. None of the three exceptions to "must" applied: the testimony was not immaterial, it was not undisputed, and there would have been no undue burden "on the witness." But then it ruled that the error was not prejudicial because the testimony of one witness "is not probative" for want of first-hand knowledge whether the tax was included in the price. The testimony of the other witness also "could not have altered the holding" — it supported the government on the key issue, and even if it were fully discredited there was a swath of uncontroverted evidence showing that the tax was never included in the price.

The reasons for finding no prejudice are equally reasons for finding that the testimony was not "material." Whatever meanings may be attributed to that sorry word, at a minimum it

should take in Rule 63 the meaning it has in Rule 56(a): disputed testimony is not material if it cannot affect the outcome.

The part of the case that bears on the role of recorded witness testimony is found in the statement of the successor judge that an extensive review of the audio recordings and transcripts of the live testimony, coupled with "the limited amount of testimony," "well-positions the Court to render a decision on any purported credibility determinations."

This suggestion does not seem an occasion for delving into the psychology literature that attempts to test the revered tradition that credibility is best determined at a live hearing. The question is rather to consider the prospect that a range of substitutes may prove adequate in the circumstances addressed by Rule 63. The successor judge may have only a written trial transcript, or only an audio recording, or only a video recording, or some combination. The challenge is to determine whether Rule 63 is sufficiently flexible in its present form to allow reliance on the original testimony when it is presented in a form sufficient to the findings that remain to be made in a nonjury proceeding.

There are several reasons to believe that Rule 63 is sufficiently flexible as it stands. When Rule 63 was amended in 1991, the committee note — without the extensive advances that have been made, particularly with extensive use of remote testimony during the COVID-19 pandemic — said that the propriety of proceeding without rehearing a witness "may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed."

Many elements of Rule 63 suggest the sliding array of variable factors that bear on the weight borne by the qualified "must" in the witness-recall provision.

1. The rule applies to a "hearing" as well as a "trial." Hearings come in many sizes and shapes. If there was no witness, recall of a witness is not an issue. But there may be witnesses at many kinds of hearings held for at least as many purposes. The importance of hearing live witnesses may depend on the occasion. Looking to topics addressed by recent rule amendments, a hearing might inquire into the citizenship of a participant in an LLC, or whether reasonable steps were taken to preserve electronically stored information, or whether the requirements for certifying a class under Rule 23 have been satisfied. A more exotic example might be hearing a witness under Rule 43(c) on a motion for summary judgment, not for the improper purpose of judging credibility but for the purpose of establishing the equivalent of an unambiguous affidavit or declaration. The nature of the hearing can be taken into account in deciding whether a witness must be recalled.

2. Whether a hearing or trial can be completed without prejudice to the parties is, in one way, illustrated by the finding of no prejudice from the "error" in the *Union Telecom* case. More generally, the determination of potential prejudice depends heavily on the role of the witness in the full circumstances of a particular case. Although this finding is a necessary element in determining whether "any other judge" may proceed, it may be interdependent with the witness-recall decision:

determinations whether the testimony is material and undisputed, and whether recall would be an undue burden, affect the ability to proceed without prejudice.

3. In Rules vocabulary "must" is, standing alone, a word of inescapable command. But here, as in many places, it is a qualified command. The witness need not be recalled if the testimony is not material, or if it is not disputed, or if undue burden is involved. Each of those qualifications adds real flexibility. Before the 2007 Style Project, moreover, the word was "shall." The style decision to substitute "must" rather than "should" need not be second-guessed to recognize that these qualifications undermine the nature of the command.

4. The requirement that the testimony be "material" is readily put aside when, as in the Union Telecom case, it can make no difference to the outcome. But testimony might also be found not material if the successor judge, reviewing the full trial transcript, concludes that it is not sufficiently important to justify recalling the witness. That conclusion often will be made in conjunction with an assessment of the burden entailed by recalling the witness.

5. The question whether the testimony is "disputed" may be ambiguous. Does it depend on dispute during the original trial proceeding, or is it enough that a party seeking recall wants to dispute it now? The 1991 committee note and scant preliminary research provide no guidance. But there should be room for the successor judge to conclude, as the trial judge in the Union Telecom case concluded, that the transcript "well-positions the Court to render a decision on any purported credibility determinations." A belated attempt to raise a new dispute also might be treated with some restraint.

6. The Federal Circuit refers to the final factor as "no undue burden on the witness." But this qualification does not appear in the rule text, which refers only to "undue burden." This phrase may afford greater latitude than any other part of the rule text. On its face, it allows weighing the burdens on the court and all parties as well as the witness. Truly important and continuously disputed testimony, with direct contradictions unilluminated by documentary or other concrete evidence, may justify imposing high burdens because they are not undue in comparison to the burdens of abandoning a first trial and beginning anew. But substantial burdens may not be justified when the testimony bears on a tangential issue, is disputed only in minor detail, or confronts massive contradictory testimony.

All of these considerations suggest that this is another of the frequent occasions when one questionable court opinion does not show a need to amend rule text. Present Rule 63 should prove adequate to the opportunities that video transcripts provide to determine that a successor judge can conclude an unfinished hearing or bench trial without recalling a witness.

If amendment is to be considered, a first sketch might look something like this:

* * * recall any witness whose testimony is material and disputed and who is available to testify again without undue burden, considering whether the testimony is preserved in written, audio, or video transcript. * * *

21-CV-R

From: Richard Hertling [redacted]
Sent: Friday, July 23, 2021 9:56 AM
To: Robert Dow [redacted]
Subject: FRCP 63 comment

Good morning, Judge Dow. I write to you in your capacity as chair of the Civil Rules Advisory Committee to broach an issue regarding Rule 63. Although the Court of Federal Claims has its own set of procedural rules, they are based on and follow the Civil Rules unless a deviation is warranted due to the court's distinctive jurisdiction with the United States being the only defendant.

As you know, Rule 63 provides that "[i]f a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge ***must***, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.:

In an appeal interpreting the parallel and identical Rule 63 of the Rules of the Court of Federal Claims, the Court of Appeals for the Federal Circuit held yesterday in a non-precedential opinion that "must" in Rule 63 means "must." *Union Telecom, LLC v. United States*, No. 20-1052 (Fed. Cir. July 22, 2021). The case involved a trial conducted by a former judge of the Court of Federal Claims. Upon her retirement, the case was reassigned to another judge of the court, who was able to review a videotape of the trial and, as a result, declined the plaintiff's request to recall witnesses after finding he could make the necessary findings and evaluate credibility based on the videotape. The Court of Appeals found the successor judge's decision to be incompatible with the plain language of Rule 63. The Court of Appeals affirmed, however, finding the error to have been harmless.

I wish to raise for possible consideration by the Civil Rules Advisory Committee whether, in the wake of the increased reliance during the course of the pandemic on virtual proceedings that have been videotaped, Rule 63 might be ripe for an amendment by which the current "must" is softened to allow the successor judge some discretion when video is available and the successor judge makes appropriate findings on the record that's/he is able to reach an appropriate decision based on the videotape and without need to recall any witnesses.

The current rule made sense in a world without videotaped proceedings, but the increased availability and use of technology, such as video, has rendered the current mandatory nature of Rule 63 overbroad in some instances. There are now circumstances in which judges ought to be allowed to exercise discretion over the recall of witnesses, even when a party requests recall, when the witness's testimony has been preserved on video.

I am a relatively new judge (two years on the Court of Federal Claims), and have no direct experience with Rule 63. To be clear, I am not advocating that Rule 63 be changed, but I am proposing that the Civil Rules Advisory Committee review the mandatory nature of the current Rule 63 and consider whether it ought to be revised to allow discretion in appropriate cases in light of the broader use of technology that has been accelerated by the pandemic and the remote proceedings we have all had to undertake to keep our dockets moving. The members of the Committee you chair have far more experience and expertise than me and can make solicit broader input on the proposition.

I serve on my Court's Rules Advisory Committee and I consulted with the Chair of that Committee. He advised that our Court will not consider revising our own Rule 63 in the absence of a revision to the FRCP version, so I thought I would broach the topic with you.

I would be pleased to discuss the matter further if you would like.

With best regards,

Richard A. Hertling
Judge
U.S. Court of Federal Claims
National Courts Building
717 Madison Place NW
Washington DC 20439

TAB 21

21. NEW RULE: AMICUS BRIEFS

Suggestion 21-CV-F (attached to this report) urges adoption of a new rule to govern briefs amicus curiae. It includes a draft inspired by D.D.C. Local Rule 7(o) and Appellate Rule 29. The draft would be a good foundation for creating a model local rule. The provisions are summarized below with a few comments. Rather than attempt to prepare a detailed draft of a model national rule, however, the proposal is presented for general consideration of the need for a national rule.

The central question is whether the role played by amicus briefs in the district courts is sufficiently similar to practice on appeal as to make any rule appropriate, and whether the provisions that work for the courts of appeals can be adapted readily to courts of original jurisdiction.

One difference is clear. The submission reports that amicus briefs are filed in 1% to 2% of cases on appeal, but only 0.1% — one in a thousand — of cases in the district courts, about 300 cases per year. This difference suggests further questions: are the circumstances of amicus practice in trial courts so variable among the rare cases that attract them that any explicit rule is unnecessary, or risks an inappropriate measure of uniformity? May it be that practice in the District Court for the District of Columbia attracts a sufficient share of amicus briefs to support and justify a local rule, while other courts encounter fewer amicus briefs and are better served by an ad hoc process, or perhaps local rules that vary according to local circumstances?

The relative scarcity of amicus briefs in present practice suggests a related question: would an express national rule encourage more filings? Or, conceivably, might it impose limits that discourage filings? Would either effect be a good thing?

The distinction between appeals and trial court procedure goes to a more important question as well. The nature of party responsibilities in a trial court is far more complex, and in many ways more important, than the much more confined responsibilities and opportunities encountered on appeal. Intruding an amicus may run a greater — and perhaps a far greater — risk of interference with the parties' needs for control. Party control, moreover, is increasingly shared by the court in many of the more complex actions. The court can protect its own interests, however, if it is given absolute control over the decision whether to permit an amicus brief.

The difference between the role of trials and appeals can be viewed from another perspective as well. Working through the means of gathering, presenting, focusing, and finding disputed facts is central to the trial court's function. Appeals focus primarily on the law. Amicus arguments may be valuable as a means of ensuring full presentation of all interests in developing the law and of all arguments for shaping the law to common interests. Nonparties, including the public at large, often have interests even more important than the perhaps parochial interests of the parties themselves. One question is whether a court rule should attempt to confine amicus briefs to arguments of law, as shaped by the facts of the case, or whether it would be better to leave any such limit to the court's discretion.

A different possible limit might be considered. Should amicus briefs be permitted in class actions and MDL proceedings? Means of presenting divergent views are established for such

cases, including the formal role of objectors in class actions. It seems likely that amicus briefs should be permitted nonetheless, but the question deserves consideration. Parties to parallel state-court proceedings, for example, may have strong reasons for presenting their interests to a federal class-action or MDL court.

The basic structure of the proposal may be summarized against these background questions, noting that it has been prepared by lawyers who "frequently serve as amicus counsel to a diverse range of corporations and organizations in federal district courts across the United States." The draft provides a good beginning if the project is to be taken up.

The most fundamental question is the standard for participation as an amicus. The proposal provides several standards: The United States or its officer or agency, or a state may file without consent of the parties or leave of court. Others may file with the consent of all parties, or on leave of court — but the court may prohibit filing, or strike a brief that would result in disqualifying the judge "or for such other reasons as the court determines in the interests of justice." It would be possible to adopt a rule that says no more than this. But another vital element is added in paragraph (2) — (B) in standard rule designations: "Amicus participation should be permitted whenever deemed helpful, in the sound discretion of the district court, to the resolution of the issues presented."

The proposed procedure for seeking leave, when leave is required and not accorded by the court on its own, is by a motion that addresses many issues: the nature of the movant's interest; the party or parties supported, if any; the reasons why the brief would be helpful to the court in disposing of the case; the reasons why the movant's position or expertise is not adequately represented by a party; and the position of each party as to the filing of the brief. The proposed brief must accompany the motion. Although presented as elements of the procedure for seeking leave, these elements embellish the standard for permitting filing. One of them raises an interesting question: why does it matter whether the "position" of a would-be amicus is "adequately represented by a party"? Intervention under Rule 24 seems a more secure procedure for securing representation of interests that may be irrelevant or even hostile to all parties' interests.

The rest of the proposed rule addresses purely procedural details of timing the motion for leave, time for submitting the brief (although it is also to be attached to the motion for leave), length of the brief, and permission to file a reply brief or participate in oral argument. Such details may compete with local practices in many ways. The risk of misfit with local rules, standing orders, or individual judge practices seems real. Apart from that, such matters are seldom addressed in the national rules, and the case for addressing them for the relatively marginal amicus practice seems weak. The length question, however, is adroitly finessed by establishing a limit at "no more than one-half the maximum length authorized by these rules." That would fit perfectly with a local rule that actually does set maximum brief lengths. And it might fit a new national rule if it were revised to one-half the length permitted by the court's rules.

GIBSON DUNN

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21-CV-F

March 17, 2021

VIA E-MAIL

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposal for Federal Rule of Civil Procedure on District Court Amicus Briefs

Dear Secretary:

We respectfully submit this proposal to the Advisory Committee on Civil Rules, proposing a Federal Rule of Civil Procedure governing the filing of amicus briefs in the district courts. Along with many of our colleagues at Gibson, Dunn & Crutcher LLP, we frequently serve as amicus counsel to a diverse range of corporations and organizations in federal district courts across the United States. District court amicus briefs provide our clients with an important opportunity to impact the outcome of cases that affect their interests and the development of the law. These briefs also add value to the judiciary, as our clients are able to provide a unique voice to assist the court and to add expertise and perspective that the parties may not be able to offer. Despite the significance and value of district court amicus briefs, guidance on how and when to file an amicus brief in a federal trial court is scarce and haphazard. No uniform federal rule exists to govern the procedural or substantive requirements for district court amicus briefs. And while some district courts have adopted local rules on the issue, for example D.D.C. Local Civil Rule 7(o), *see* Ex. A, most have not.

Instead, parties are generally left to consider a hodgepodge of often unwritten local practices and guidance that vary by the district and even the individual district judge. As frequent district court amicus counsel, we have many times searched in vain for applicable rules governing the circumstances in which a particular district court will accept or refuse amicus briefs, how such briefs should be formatted, and when and how to file such a brief. Frequently, we find no firm answers to these questions and only sparse common-law style authority. While we are ultimately able to rely on our own experience and judgment from prior cases, we do so at the expense of uniformity and predictability across cases, judges, and geographic locations. And parties and counsel without prior experience in this area are forced to muddle through without fixed guideposts.

The absence of uniformity across courts ultimately stems from the fact that district courts generally lack any express statutory or rules-based authority or guidance regarding amicus briefs and instead consider whether to allow amicus briefs based only on the courts' inherent docket-management authority and discretion. *See, e.g.*, *Club v. Fed. Emergency Mgmt. Agency*, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) ("No statute, rule, or controlling case defines a federal district court's power to grant or deny leave to file an amicus brief."); *see also Lehman XS Trust, Series 2006–GP2 v. Greenpoint Mortg. Funding*, 2014 WL 265784, at *1 (S.D.N.Y. Jan. 23, 2014) ("Resolution of a motion for leave to file an amicus brief thus lies in the 'firm discretion' of the district court."); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("District courts have inherent authority to appoint or deny amici . . ."). District courts have thus adopted inconsistent standards regarding when district court amicus briefs will be accepted. For example, some courts have restricted amicus submissions to situations where "a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Cobell v. Norton*, 246 F. Supp. 2d 59, 62-63 (D.D.C. 2003). Meanwhile, other courts have taken a more permissive approach, allowing amicus submissions even when "plaintiffs are represented by competent counsel and some of the arguments proffered in the proposed amicus brief are duplicative of those raised by plaintiffs." *C & A Carbone v. Cty. of Rockland*, 2014 WL 1202699, at *3 (S.D.N.Y. March 24, 2014). The result is inconsistency between courts and confusion among litigants and counsel. Moreover, while a far smaller percentage of district court cases receive amicus briefs than do circuit court cases (0.1% of civil cases in the former, compared to 1-2% of cases in the latter), in raw terms the district courts are in the same general realm—300 cases per year in all district courts, compared to 500-1,000 cases per year in all circuit courts, according to our analysis.[1]

In light of these circumstances and facts, we respectfully submit that the time has come for this Committee to promulgate and adopt a Federal Rule of Civil Procedure governing amicus practice in the district courts, just as it is standardized in the Federal Rules of Appellate Procedure, *see* Ex. B, and the Rules of the Supreme Court, *see* Ex. C. Such a rule will bring much needed clarity, predictability, and uniformity to this important practice area. It will ensure that, as with any other filing, any litigant from those most ably counseled to the pro se can pick up the federal rules and understand the procedures and standards for participating as a district court amicus.

[1] *See* Akiva Shapiro, Lee R. Crain & Amanda L. LeSavage, *Tips for District Court Amicus Brief Success*, 264 N.Y.L.J. 122 (Dec. 24, 2020).

I. Elements That Should Be Included in a District Court Amicus Brief Rule

Based on our experience, we set out below several elements we believe should be included in a Federal Rule of Civil Procedure governing district court amicus brief practice. We also set out below the proposed text of a rule that embodies those elements—text drawn from a well-drafted and practical local rule adopted by the U.S. District Court for the District of Columbia, *see* Ex. A, as well as from Rule 29 of the Federal Rules of Appellate Procedure, *see* Ex. B—which we hope will be helpful in the Committee's consideration.

Any rule should have the following four elements:

Procedure for Seeking Leave. A uniform federal amicus rule should provide guidelines on whether and how putative amici should request leave to file a brief, and whether they should first obtain consent from the parties. We respectfully submit that the positions of the parties should be obtained and included in any leave application, and that leave of the court should not need to be obtained unless one or both parties do not provide consent. This proposal, which is consistent with Federal Rule of Appellate Procedure 29, *see* Ex. B, and U.S. Supreme Court Rule 37, *see* Ex. C, will save district courts from wasting their limited resources deciding leave applications where the parties agree that amicus participation is appropriate. Nevertheless, we suggest that the rule permit district courts to prohibit the filing of an amicus brief or strike a brief that would result in a judge's disqualification, again following the Federal Rules of Appellate Procedure.

Substance. A rule should provide a uniform standard that governs the circumstances in which an amicus party will be granted leave to participate so litigants and counsel can evaluate with more clarity whether amicus participation in a given case is appropriate, and, where necessary, can explain with greater clarity to the district court why participation is appropriate. The substantive standard should generally permit amicus participation whenever helpful to the district court's resolution of the issues presented. At a high level, amicus parties should bring a unique perspective that leverages the expertise of the party submitting the brief and adds value by drawing on materials or focusing on issues not addressed in detail in the parties' submissions, instead of repeating arguments that the parties or other amici have already raised. A rule should therefore require a party seeking leave to explain why their participation would be helpful to the court, including why the matters to be addressed in the amicus brief are relevant to the disposition of the case or motion and why their position or expertise is not adequately represented by a party.

Timing. A federal amicus rule should ensure that amici are required to file in a timely manner that does not prejudice the existing parties by unduly delaying the pending matter. It is crucial that a leave application and accompanying amicus brief is filed in time to give parties the opportunity to respond to the brief in advance of the motion, hearing, or trial to

which it is directed. This means that that an amicus brief should typically be filed after the party the amicus is supporting files its principal brief, but sufficiently in advance of the opposing party's responsive brief (i.e., its opposition brief or reply, depending on which party the amicus is supporting). Providing a uniform timing rule will provide transparency and uniformity for potential amici and existing parties and will also provide courts clear bases to deny late-filed briefs that would otherwise prejudice the parties or delay proceedings. Such a rule will therefore better preserve the courts' ability to manage their docket and to efficiently resolve motions.

Length and Format. A federal amicus rule should give clear, uniform guidance as to the lengths of amicus briefs along the lines of the amicus brief rules set forth in appellate courts. Specifically, an amicus brief should be materially shorter than the parties' briefs, consistent with Federal Rule of Appellate Procedure 29(a)(5), *see* Ex. B, and U.S. Supreme Court 33, *see* Ex. C. This principle arises out of the common sense notion that as a friend of the court and not a party, amici should be saying less than the parties themselves. Providing a uniform rule—such as one that tethers the length of a party's amicus brief to a percentage of the parties' principal briefs—will ensure litigants have clarity on how long their briefs may be.

II. Proposed Rule

We respectfully propose the following rule, which is adapted from Local Civil Rule 7(o) adopted by the U.S. District Court for the District of Columbia, *see* Ex. A, and from Rule 29 of the Federal Rules of Appellate Procedure, *see* Ex. B. Based on our experience, the proposed rule is sensible and reasonable, and will provide clear and consistent guidance to district court judges, amicus counsel, and litigants.

Specifically, we propose the following rule:

> **Rule __. Brief of an Amicus Curiae**
>
> (1) The United States or its officer or agency or a state may file an amicus curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only upon consent of all parties (exclusive of other amicus curiae), which consent shall be noted in the brief, or upon leave of Court, which may be granted after the submission of a motion for leave to file or upon the Court's own initiative. Even if all parties consent to the filing of an amicus curiae brief, a court may prohibit the filing of or strike a brief that would result in a judge's disqualification, or for such other reasons as the court determines in the interests of justice.

(2) A motion for leave to file an amicus brief shall concisely state the nature of the movant's interest; identify the party or parties supported, if any; and set forth the reasons why the proposed amicus brief would be helpful to the court, including why the matters to be addressed in the brief are relevant to the disposition of the case or motion and why the movant's position or expertise is not adequately represented by a party. The motion shall state the position of each party as to the filing of such a brief and be accompanied by a proposed order. The motion must be accompanied by the proposed brief. Amicus participation should be permitted whenever deemed helpful, in the sound discretion of the district court, to the resolution of the issues presented.

(3) The motion for leave shall be filed in a timely manner such that it does not unduly prejudice any party or delay the Court's ability to rule on any pending matter. Any party may file an opposition to a motion for leave to file an amicus brief, concisely stating the reasons for such opposition, within 14 days after service of the motion or as ordered by the Court. There shall be no further briefing unless otherwise ordered by the Court.

(4) An amicus curiae must file its brief, accompanied by a motion for leave when necessary, no later than 7 days after the filing of the principal brief of the party being supported. Any amicus brief that does not support either party must be filed no later than 7 days after the principal brief of the moving party. In no circumstances shall an amicus curiae file an amicus brief less than 7 days before the filing deadline for the final brief of the party not being supported. A court may grant leave for later filing if just cause is shown, specifying the time within which any adverse party may respond.

(5) Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules or any superseding local rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) An amicus curiae may file a reply brief or participate in oral argument only with the court's permission.

Thank you for your consideration of this proposal.

GIBSON DUNN

Respectfully,

/s/ Akiva Shapiro	*/s/ Lee R. Crain*	*/s/ Amanda L. LeSavage*
Akiva Shapiro	Lee R. Crain	Amanda L. LeSavage
Partner	Associate Attorney	Associate Attorney

Exhibit A

RULES
OF THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

EFFECTIVE AS OF
SEPTEMBER 2015
Updated: July 2019

E. Barrett Prettyman
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

raised in the motion or opposition. Unless so requested by the Court, the entire administrative record shall not be filed with the Court.

(2) The appendix shall be prepared jointly by the parties and filed within 14 days following the final memorandum on the subject motion. The parties are encouraged to agree on the contents of the appendix which shall be filed by plaintiff. In the absence of an agreement, the plaintiff must serve on all other parties an initial designation and provide all other parties the opportunity to designate additional portions of the administrative record. Plaintiff shall include all parts of the record designated by all parties in the appendix.

(3) In appropriate cases, the parties may request the option to submit separate appendices to be filed with any memorandum in support of, or in opposition to, the dispositive motion.

COMMENT TO LCvR 7(h)*: This provision recognizes that in cases where review is based on an administrative record the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record. As a result the normal summary judgment procedures requiring the filing of a statement of undisputed material facts is not applicable.*

COMMENT TO LCvR 7(m): *The changes to this rule are designed to bring non-incarcerated pro se litigants within the scope of the duty to confer on nondispositive motions, so as to extend the benefits of the rule to cases in which such litigants are parties.*

COMMENT TO LCvR 7(n): *This rule is intended to assist the Court in cases involving a voluminous record (e.g., environmental impact statements) by providing the Court with copies of relevant portions of the record relied upon in any dispositive motion. This rule is patterned after Local Rule 17 and Local Rule 30 of the D.C. Circuit and Rule 30 of the Federal Rules of Appellate Procedure. Pages in the appendix should retain the original pagination from the administrative record.*

(o) BRIEF OF AN AMICUS CURIAE.

(1) The United States or its officer or agency or a state may file an *amicus curiae* brief without the consent of the parties or leave of Court. Any other *amicus curiae* may file a brief only upon leave of Court, which may be granted after the submission of a motion for leave to file or upon the Court's own initiative.

(2) A motion for leave to file an amicus brief shall concisely state the nature of the movant's interest; identify the party or parties supported, if any; and set forth the reasons why an amicus brief is desirable, why the movant's position is not adequately represented by a party, and why the matters asserted are relevant to the disposition of the case. The motion shall state the position of

each party as to the filing of such a brief and be accompanied by a proposed order. The motion shall be filed in a timely manner such that it does not unduly delay the Court's ability to rule on any pending matter. Any party may file an opposition to a motion for leave to file an amicus brief, concisely stating the reasons for such opposition, within 14 days after service of the motion or as ordered by the Court. There shall be no further briefing unless otherwise ordered by the Court.

(3) The *amicus* brief shall be filed within such time as the Court may allow.

(4) Unless otherwise ordered by the Court, a brief filed by an *amicus curiae* shall conform to the requirements of LCvR 5.4 and may not exceed 25 pages.

(5) An *amicus* brief shall comply with the requirements set forth in FRAP 29(a)(4).

(6) An *amicus curiae* may participate in oral argument only with the court's permission.

LCvR 9.1

APPLICATIONS FOR A STATUTORY THREE-JUDGE COURT

In every case in which by statute a Three-Judge Court is required, there shall be filed with the complaint a separate document entitled "Application for Three-Judge Court," together with a memorandum of points and authorities in support of the application. Upon the convening of a Three-Judge Court, each party shall submit to the Clerk two additional copies of all pleadings and papers previously filed by the party, and all subsequent filings shall be in quadruplicate.

LCvR 9.2

HABEAS CORPUS PETITIONS, SECTION 1983 COMPLAINTS, AND SECTION 2255 MOTIONS

Petitions for a *writ of habeas corpus* and complaints pursuant to 42 U.S.C. § 1983 filed by a petitioner incarcerated in the District of Columbia, and motions filed pursuant to 28 U.S.C. § 2255 (attacking a sentence imposed by the Court), must be filed on standard forms to be supplied upon request to the petitioner or plaintiff by the Clerk without cost. Counsel filing a petition for a *writ of habeas corpus*, a complaint under 42 U.S.C. §1983, or a motion under 28 U.S.C. § 2255 need not use a standard form, but any such petition, complaint or motion shall contain essentially the same information set forth on the standard form.

Exhibit B

FEDERAL RULES

OF

APPELLATE PROCEDURE

WITH FORMS

DECEMBER 1, 2019

Printed for the use
of
THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; and intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if it:

(i) contains no more than 13,000 words; or

(ii) uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if it:

(i) contains no more than 15,300 words; or

(ii) uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 21 days after the appellant's response and reply brief is served, but at least 7 days before argument unless the court, for good cause, allows a later filing.

(As added Apr. 25, 2005, eff. Dec. 1, 2005; amended Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 16, 2013, eff. Dec. 1, 2013; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 26, 2018, eff. Dec. 1, 2018.)

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits.

(1) **Applicability.** This Rule 29(a) governs amicus filings during a court's initial consideration of a case on the merits.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of

the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing, but a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification.

(3) **Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

(A) the movant's interest; and

(B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(4) **Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

(B) a table of contents, with page references;

(C) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

(E) unless the amicus curiae is one listed in the first sentence of Rule 29(a)(2), a statement that indicates whether:

(i) a party's counsel authored the brief in whole or in part;

(ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(iii) a person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

(F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

(G) a certificate of compliance under Rule 32(g)(1), if length is computed using a word or line limit.

(5) **Length.** Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(6) **Time for Filing.** An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

(7) **Reply Brief.** Except by the court's permission, an amicus curiae may not file a reply brief.

(8) **Oral Argument.** An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing.

(1) **Applicability.** This Rule 29(b) governs amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless a local rule or order in a case provides otherwise.

(2) **When Permitted.** The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court.

(3) **Motion for Leave to File.** Rule 29(a)(3) applies to a motion for leave.

(4) **Contents, Form, and Length.** Rule 29(a)(4) applies to the amicus brief. The brief must not exceed 2,600 words.

(5) **Time for Filing.** An amicus curiae supporting the petition for rehearing or supporting neither party must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the petition is filed. An amicus curiae opposing the petition must file its brief, accompanied by a motion for filing when necessary, no later than the date set by the court for the response.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 26, 2018, eff. Dec. 1, 2018.)

Rule 30. Appendix to the Briefs

(a) Appellant's Responsibility.

(1) **Contents of the Appendix.** The appellant must prepare and file an appendix to the briefs containing:

(A) the relevant docket entries in the proceeding below;

(B) the relevant portions of the pleadings, charge, findings, or opinion;

(C) the judgment, order, or decision in question; and

(D) other parts of the record to which the parties wish to direct the court's attention.

(2) **Excluded Material.** Memoranda of law in the district court should not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) **Time to File; Number of Copies.** Unless filing is deferred under Rule 30(c), the appellant must file 10 copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number.

(b) All Parties' Responsibilities.

(1) **Determining the Contents of the Appendix.** The parties are encouraged to agree on the contents of the appendix. In

Exhibit C

RULES

OF THE

Supreme Court of the United States

ADOPTED APRIL 18, 2019

EFFECTIVE JULY 1, 2019

(g) Word limits and cover colors for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
(i) Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	9,000	white
(ii) Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4); Respondent's Brief in Support of Certiorari (Rule 12.6)	9,000	orange
(iii) Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	3,000	tan
(iv) Supplemental Brief (Rules 15.8, 17, 18.10, and 25.6)	3,000	tan
(v) Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	13,000	light blue
(vi) Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	light red
(vii) Reply Brief on the Merits (Rule 24.4)	6,000	yellow
(viii) Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	13,000	orange
(ix) Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	13,000	yellow
(x) Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi) Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii) Brief for any Other *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in		

	an Original Action at the Exceptions Stage (Rule 37.3)	8,000	light green
(xiii)	Brief for an *Amicus Curiae* Identified in Rule 37.4 in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiv)	Brief for any Other *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	8,000	dark green
(xv)	Petition for Rehearing (Rule 44)	3,000	tan

(h) A document prepared under Rule 33.1 must be accompanied by a certificate signed by the attorney, the unrepresented party, or the preparer of the document stating that the brief complies with the word limitations. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document. The word-processing system must be set to include footnotes in the word count. The certificate must state the number of words in the document. The certificate shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746.

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C.

Rule 37. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify whether consent was granted, and its cover shall identify the party supported. Only one signatory to an *amicus curiae*

brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk

a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such

a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Rule 38. Fees

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the court below appointed counsel for an indigent party, no affidavit or declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institu-

TAB 22

22. RULE 4: METHODS OF SERVICE

As noted below, a proposed Rule 87 to address Civil Rules Emergencies was published for comment in August. Most of the emergency rules authorize a court order for service by a method reasonably calculated to give notice. The CARES Act Subcommittee will study comments and testimony on the Rule 4 provisions, and may recommend a broader study of Rule 4. The independent proposals described here would fall within any such project.

Suggestion 21-CV-K. Sai submitted this proposal, inspired by the 19-CV-W proposal to address "snap removal" by a complicated waiver of service amendment in a new Rule 4(d)(6). That proposal was removed from the agenda at the October 29, 2019 meeting, with the observation that the problem of snap removal has been taken on by the Federal-State Jurisdiction Committee.

The current proposal goes far beyond snap removal, and indeed would address snap removal only indirectly. Instead, it would dispense with any need to make service under Rule 4 on a party that has actual knowledge of the action by adding a new Rule 4(c)(4):

> **(4)** Service under this rule is not required upon a party that has:
>
> > **(A)** actual knowledge of the suit, the name of the court in which the suit was filed, and their relation to the suit (e.g. that they are a defendant); and
> >
> > **(B)** actual possession of, or PACER access to, a copy of the complaint.

Sai explains that the point of service is to ensure actual knowledge of the action. Actual knowledge fulfills that purpose. In addition, relying on actual knowledge would avoid not merely the gamesmanship involved in snap removal, but also "the far more common shenanigans of people with actual knowledge trying to evade formal service."

The proposal is careful to say that while the burden of proving actual knowledge is on the party that would have to make service, courts are quite capable of determining the question. Some situations will be easy, as when the party to be served has made a filing in the case. (Compare the Rule 12(b)(5) motion to dismiss for insufficient service of process.)

A potential difficulty under Rule 4(m) is noted: what of the requirement that service be made within 90 days after the complaint is filed? Substituting proof of actual knowledge and the rest within 90 days may be awkward, and the problem of showing good cause for not managing actual knowledge within 90 days but getting more time for service looms apparent.

This proposal is charmingly direct. Some support might be found by analogy to Rule 15(c)(1)(C), which allows an amendment of a complaint that changes the party against whom a claim is asserted to relate back if the new party "received such notice of the action that it will not be prejudiced in defending on the merits."

Still, this proposal would, without further apology, make irrelevant much of Rule 4 and the ages-old tradition of insisting on formal service and all the ways in which it impresses the

importance of the occasion. Apparently, there would be no need for the summons and notice that a failure to respond will lead to default. It would substitute a much more casual, and occasionally accidental, procedure for the waiver-of-service provisions in Rule 4(d).

The question whether the means of service provided by Rule 4 should be expanded arose in deliberations on the Emergency Rules 4 contained in proposed Rule 87, which was published for comment last August. The Rule 87 subcommittee has taken on the task of considering Rule 4 questions in a more general way, whether as a substitute for emergency rules provisions or otherwise. The proposal to accept actual knowledge of the action, coupled as here proposed with a copy of the complaint or PACER access to it, does not seem likely to win much support in the ongoing work, but it can be folded into it.

Suggestion 21-CV-I. Sai also submitted this proposal. Parts of it seem to misread in ways not now relevant the Rule 4(i) provisions for suing the United States or its agencies, officers, or employees.

Two themes may be carried forward for consideration in any long-range Rule 4 study that is taken up.

The more general theme is that electronic service on the United States should be available on the terms now provided by Rule 5(b) for service of papers other than the summons and complaint. The modest beginning made in proposed Social Security Rule 3 supports consideration of a more general provision.

A subordinate theme is that Rule 4(i) requires waste motion by requiring multiple service. These provisions likely reflect concern that the plaintiff should not be put to the work of ensuring that notice is provided to the United States, and also to an agency or employee involved with the subject of the litigation. They distinguish between service and sending notice — service on one, notice to another. Although change may not seem likely, the subject can at least be considered.

TAB 23

23. RULE 5(d)(3)(B): PRO SE FILING

Suggestion 21-CV-J is addressed to the Appellate, Bankruptcy, Civil, and Criminal Rules. It elaborates on Sai's earlier submission (Suggestion 15-CV-EE) addressed to the electronic filing provisions for pro se litigants in Rule 5(d)(3)(B). Rule 5(d)(3)(B) was worked out together with the similar Appellate, Bankruptcy, and Criminal Rules. Any renewed consideration should be undertaken in tandem with the respective advisory committees.

The substance of the submission is familiar. A pro se litigant should have access to filing in the CM/ECF system on the same terms as a person represented by an attorney under Rule 5(d)(3)(A). At the same time, the reality that many pro se litigants are not able to work through the CM/ECF system means that they should have a right to file on paper unless the court orders e-filing for good cause. And a prisoner pro se party should have an absolute right to file by paper if the prisoner prefers paper.

The submission expands at length on the great advantages of e-filing for any party that is able to engage with the system, and at equal length on the disadvantages visited on those who are able but denied access because of pro se status. Much of the presentation is familiar, but much also is new and clearly expressed.

One clearly new element is the argument that many districts expanded pro se access to e-filing during the COVID-19 pandemic, and found that it worked. This experience should be gathered and studied, with the expectation that it will confirm the ability of many pro se litigants to navigate CM/ECF tutorials and confer on other parties and the court the multiple advantages that all experience with filing through the CM/ECF system.

This topic came up for tangential consideration during deliberations on the emergency rules provisions in the proposed Rule 87 that was published last August. Reports gathered in an informal survey indicated that several courts adopted a general practice that permits e-filing by pro se litigants, but often by a process that relied on e-mail submissions that then were entered into the CM/ECF system by the clerk's office. At the same time, other courts were not as sanguine about the practice. It is quite possible that a variety of local circumstances may mean that some courts are indeed in a good position to initiate general pro se e-filing now, while others are not yet as well situated.

This question will not go away. But more time may be needed to develop system practices that will enable all districts to manage a broader general right for pro se e-filing. Careful coordination with the other advisory committees is essential. This item should remain on the agenda, subject to continuing attention to developing circumstances in the district courts.

TAB 24

24. THIRD-PARTY LITIGATION FUNDING (TPLF)

This matter is on the agenda for the Fall 2021 meeting because it seemed timely to report back to the Committee, in part due to an inquiry in May 2021 from Senator Grassley and Representative Issa.

This report identifies a variety of challenges that any rulemaking effort on this front might present, and also includes a catalog (prepared by successive Rules Law Clerks) that collects materials on the subject.

This memorandum does not recommend any immediate action, but provides an opportunity for Committee members to address these issues. The agenda book therefore contains a rather expansive treatment of this topic to acquaint Advisory Committee members with the issues, should the Committee be interested in proceeding at this time. If not, it is expected that the Committee will continue to monitor developments. It is likely that further information can be brought to bear. If the decision at present is to continue monitoring TPLF developments, there is no present need (despite the number of pages that follow) to delve deeply into these issues. But moving forward likely will present them.

The appendix to this report includes the following:

- Excerpt from the agenda book for the Advisory Committee's November 7, 2017 meeting (Excerpt)
- Suggestion 21-CV-L
- Catalog of materials collected by successive Rules Law Clerks on TPLF issues since 2019 (TPLF Catalog)

Rulemaking Background

Because it has been some time since the Committee discussed TPLF issues, it seems useful to provide some detail about the background of the current situation.

Proposals to add disclosure regarding third-party litigation funding first appeared on the Committee's agenda in Fall 2014. The U.S. Chamber of Commerce Institute for Legal Reform recommended then that a requirement to disclose TPLF be added to Rule 26(a)(1)(A), and apply to all civil actions. At that time, the Committee concluded that the field was changing rapidly and that not enough was known about it to support adding a disclosure requirement, and also that there were other questions about the wisdom of doing so.

Essentially the same proposal was raised again in 2017, submitted by the Chamber Institute for Legal Reform and more than two dozen other entities (Suggestion 17-CV-O). That proposal drew responses from two of the largest entities in the litigation funding business and also from two law professors who are prominent in the legal ethics field and familiar with the operation of TPLF entities. The agenda book for the November 2017 meeting of the Committee included more than 120 pages devoted to TPLF disclosure issues. The agenda memo presented at that meeting is included in this agenda book.

During the November 2017 meeting, the Committee discussed a variety of issues related to the role of TPLF in contemporary litigation. On the day after that meeting, the Humphreys Complex Litigation Institute of George Washington University National Law Center organized an all-day conference about TPLF that was attended by several members of the Committee.

Thereafter, the TPLF issues were among many studied by the MDL Subcommittee. Information from the Judicial Panel on Multidistrict Litigation and other sources indicated that such arrangements were not commonplace in MDL proceedings and, at the Committee's October 2019 meeting the subcommittee reported that TPLF did not seem particularly prominent in MDL proceedings. The conclusion reached was that further work on a possible rule would be suspended, but the evolution of TPLF would be monitored going forward, not with a primary focus on MDL proceedings but with regard to all civil litigation, the focus on the original 2014 proposal. This changed treatment was reported to the Standing Committee at its January 2020 meeting.

That monitoring has continued, and successive Rules Law Clerks have assisted in preserving a collection of materials on the subject, as well as preparing a summary of what's in the collection. As noted above, the current version of this catalog is in this agenda book.

The purpose of this memo, then, is to introduce the current status of these issues. One starting point might be drawn from the Institute for Legal Reform's 2017 submission in support of its proposal in 2017 (Suggestion 17-CV-O at 9), which urges that disclosure should be required because TPLF arrangements "often distort the traditional adversarial system of civil justice." Somewhat the same point appears in the minutes of the Advisory Committee's minutes of the November 2017 meeting (at p. 17, lines 744-48):

> "Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all.

Perhaps further evidence of that dispute is that a new organization — the International Legal Finance Association, founded in September 2020 — submitted a comment to the Committee on April 7, 2021 (Suggestion 21-CV-H), pushing back against points made in the most recent submission by the U.S. Chamber Institute for Legal Reform (Suggestion 20-CV-II), citing the "countless hearings, receipt of testimony" and "extensive factfinding" by this Committee in deciding not to proceed with the disclosure proposal before it, and noting that district courts have often rejected discovery requests directed to litigation funding.

It is clear that there are strong views on both sides of the disclosure issues. It is not clear that either set of views is correct in all instances, or most of the time. TPLF organizations (and others) emphasize that such funding enables people with valid claims to sustain litigation. TPLF funders urge that they carefully scrutinize the validity of claims before funding litigation because, given the usual non-recourse nature of their financing, they can only make money if the litigation produces positive financial results. For example, a law firm blog mentioned in the TPLF Catalog noted on April 2, 2019 that litigation funding can be used by insurance policyholders to counteract an insurer's incentives to drag out litigation and delay paying claims.

Disclosure proponents point to reported instances of TPLF financing used to support outreach of "claims aggregators" who collect claims and funnel them to lawyers. It is not clear that any across-the-board judgment on whether TPLF is desirable or not desirable will be possible.

Meanwhile, in some states there have been legislative initiatives to address allegedly overreaching tactics by some litigation funders. In general, this legislative activity has had a "consumer protection" cast, and it has focused on the "consumer" part of the TPLF market. The "commercial" version of TPLF usually involves much larger sums of money and sophisticated actors. One feature of such consumer protection initiatives has to do with usury protections. Disclosure of terms to the borrower, not disclosure to the litigation adversary, is sometimes included.

In addition, as noted below, in late June 2021, the District of New Jersey adopted a local rule addressing TPLF, and in early 2017, the Northern District of California adopted a local rule calling for disclosure of TPLF arrangements in connection with class actions.

Inquiry from Senator Grassley and Representative Issa (Suggestion 21-CV-L)

In May 2021, Senator Grassley, Ranking Member of the Senate Judiciary Committee, and Representative Issa, Ranking Member of the House Judiciary Committee, wrote to the Committee inquiring about its ongoing consideration of TPLF issues. In part this submission says:

> The practice of TPLF cannot be allowed to proceed in its current form. Under present law, virtually all TPLF activity occurs in secrecy because there is no procedural or evidentiary rule requiring disclosure of the use and terms of such funding. Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information.
>
> Transparency brings accountability. It is true of Congress, the Executive, and our courts. A healthy dose of transparency is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit.

Both Senator Grassley and Representative Issa have introduced legislation addressing TPLF that closely resembles bills introduced in prior Congresses. Senate Bill 840 would add a new § 1716 to Title 28, providing in part that:

> (a) IN GENERAL. — In any class action, class counsel shall —
>
> (1) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and

(2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

The bill would also add a new subsection (g) to § 1407 of Title 28, saying in part:

(g)(1) In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall —

(A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and

(B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

If enacted, this bill might produce some questions of implementation. For one thing, it is not clear what consequences follow from failure to comply with the disclosure requirements. Should that lead to dismissal with prejudice? Perhaps that would give the funder a strong incentive to ensure disclosure.

But complying might prove difficult for class counsel in class actions. For one thing, it is not clear whether the bill would apply from the moment the proposed class action is filed or only after class certification. Rule 23(g)(3) permits the court to appoint interim class counsel before certification. Would the disclosure apply to this lawyer as well? Would that mean that class counsel must collect and report the contingency fee agreements class members have reached with retained counsel? Perhaps the limitation to a "commercial enterprise" would exclude retained counsel, though one might say that lawyers are engaged, at least in part, in a commercial enterprise.

A different set of complications could ensue if putative class counsel (whether or not appointed as interim class counsel) negotiate a pre-certification settlement that includes class certification as well as the substantive relief available via the settlement. Rule 23(e) requires notice to the class of the proposed settlement and, in Rule 23(b)(3) class actions, Rule 23(c)(2)(B) requires individual notice to class members who can be identified through reasonable effort. They can opt out if they choose. Are class counsel obliged to determine and disclose whether any class members have made TPLF arrangements, perhaps of a "consumer" sort? Should the Rule 23(c) notice advise class members that such disclosure is required if they do not opt out?

In the MDL setting, related but somewhat different issues might be presented. The disclosure responsibility seems to rest on retained counsel there rather than leadership counsel. In MDL proceedings in which there is a PFS or Census practice, perhaps disclosure of TPLF arrangements would be appended to that.

Earlier bills regarding TPLF before Congress did not all focus only on class actions and MDL proceedings.

"Consumer" Funding Issues

As already introduced, another set of potential issues relates to the funding not obtained by lawyers but by clients themselves. We have been told repeatedly that there are at least two disparate worlds of litigation funding — "commercial" litigation funding (often involving funding commitments in the millions) and "consumer" litigation funding, often involving much smaller amounts of money that plaintiffs use to support themselves while their cases are pending. At least in some instances lawyers may not be aware of all such funding. At least the "commercial enterprise" provision would seem to exclude disclosure regarding financing from friends and relatives who provide support to the plaintiff during the litigation in expectation that they would be paid back after a successful conclusion of the case. But it would seem to call for disclosure of funding from an entity in the business of providing "consumer" TPLF.

The 2017 and 2014 proposals to this Committee sought to add a new subsection (v) to Rule 26(a)1)(A) as follows:

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

This proposal would apply to all civil litigation. It is not limited to "commercial enterprises," and could reach relatives of the plaintiff who provided support for the plaintiff's living expenses while the suit was pending, expecting to be repaid after the suit's successful conclusion.

All these proposals could be criticized as being one-sided. That is, they are directed only at those asserting claims, and not at those defending against them. Yet (as mentioned in some of the recent literature) there are indications that in at least some instances TPLF arrangements exist to support defendants litigating against claims. It seems that at least some of those are arranged by "commercial enterprises." One might ask whether the existence of such arrangements might also distort the traditional adversary system of U.S. civil justice.

Growing Importance of TPLF

Another starting point is to recognize that TPLF is, according to some, an increasingly big deal: "Litigation finance is our civil justice system's killer app. Unheard of yesterday, it is a mainstay today." Suneal Bedi & William Marra, *The Shadows of Litigation Finance*, 74 Vand. L. Rev. 563, 565 (2021). There is even a publication called the Third Party Litigation Funding Law Review, published by Law Business Research Ltd. of London. Its 2019 third edition had chapters on TPLF arrangements in 23 countries, including Indonesia, Nigeria, Ukraine, and the United Arab Emirates.

Chapter 23 of this TPLF Law Review is about the U.S. It distinguishes between two "main categories" of funding activity — commercial claims often in excess of $10 million, and consumer claims, typically of a mass tort or personal injury nature. It also identifies a number of sorts of funders. *Id.* at 217-18.

1. Large, publicly-traded entities

2. US-based private funds

3. privately held foreign funders

4. funders focused on smaller opportunities

5. lesser known, smaller entities, some of which are backed by single investors or raise capital on an investment by investment basis

It also reports that "a growing secondary market exists, in which hedge funds and other investment managers increasingly participate." In addition, "major funders have increasingly shifted toward portfolio funding," involving "a collateral pool of multiple cases. * * * Some funders also provide loans to law firms against legal receivables." *Id.* at 218-19. At some point, those may come to resemble bank financing of law firms secured by receivables.

Looking beyond the U.S., TPLF appears to be prominent internationally. For example, Professor Victoria Sahini of Arizona State University College of Law published a book entitled Third Party Funding in International Arbitration (Walters-Kluwer 2017, co-authored with Lisa Bench Nieuwveld). According to her online law school biography, Prof. Sahini has also published at least four articles in U.S. law reviews on TPLF, and also has contributed chapters on TPLF to three forthcoming books to be published in Europe.

As noted in the catalog of materials gathered during the monitoring of TPLF issues, there are less orthodox arrangements that may be viewed as funding. One example is *Lawson v. Spirit AeroSystems, Inc.*, 2020 WL 3288058 (D. Kan., June 18, 2020), a dispute between the former CEO of one company and a company with which he signed on as a consultant. The CEO was owed periodic payments from his former company that it threatened to terminate on the ground that he was forbidden from serving as a consultant to the new company. The new company then promised to pay the CEO the amounts that he was to receive from his old company in return for being subrogated to claims (asserted in this lawsuit) against his former company for separation payments. As the court put it, "Elliot [the new company] is now funding this lawsuit to recover the amounts Spirit [the old company] owes Lawson pursuant to his Retirement Agreement." This certainly looks like a one-off arrangement, but it also suggests the variety of litigation funding arrangements that may come into existence.

Other recent cases point up other sorts of arrangements that may occur and be regarded as TPLF. For example, *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), was a False Claims Act case in which the relator got funding when defendant filed a motion for judgment as a matter of law. At that point (well into the case), the relator sold 4% of her interest in the recovery (estimated to be many millions of dollars) to a funder. The court addressed the question whether this arrangement deprived the relator of Article III standing. The court rejected

the argument. Though it is an odd example, it may suggest a whole area of litigation funding that has existed for some time — funding after a successful result in the trial court to support appellate efforts to protect the resulting judgment. Some items listed in the TPLF Catalog thus focus on litigation funding for judgment enforcement efforts. It is not clear whether the various proposals before this Committee seek to require disclosure of funding sought to enforce or protect judgments entered by district courts; the focus seems to be more at funding obtained near the outset, not after judgment in the trial court.

Still other recent developments point up possible additional considerations. In some Bankruptcy Court proceedings, for example, litigation on behalf of the estate may be financed by litigation funders. Indeed, court approval may be necessary before such funding arrangements can be consummated. One example is provided by *In re Bronson Masonry, LLC*, Case No. 15-34713-sgj7 (N.D. Tex.) — a transcript of an evidentiary hearing on April 13, 2016 concerning approval by the court for such an arrangement. It is not clear how frequent such arrangements might be, but it is understandable that they may sometimes be considered. Bankruptcy Rule 7026 says that "Fed. R. Civ. P. 26 applies in adversary proceedings." It may be that the possible impact of an amendment to Rule 26(a)(1)(A) in bankruptcy court proceedings should be considered. It does not appear that the pending bill in Congress would affect those proceedings.

Issue Presently Before the Committee

The question at present is whether to launch a serious study of TPLF activity to support possible rulemaking. Though there certainly have been developments since 2019, it seems that many or most of the questions that existed when the Committee last considered these issues continue to be challenging. For the present, it seems useful to draw from the reports cataloged in Appendix D a partial list of issues suggested by those materials that would affect any such rulemaking effort. The effort would require a considerable amount of work. As information about the multitude of issues increases, it may be that one response is to conclude that this collection of issues is too diverse to be handled by a civil rule amendment. Another is to conclude that regulation of TPLF is best left to other entities, such as state legislatures, rather than individual federal judges.

The following provides information bearing on the Committee's role.

<u>Local Rules and State Legislation Addressing Disclosure</u>

There has been some consideration in the past of local rules addressing disclosure of TPLF. In 2018, Rules Law Clerk Patrick Tighe prepared a memorandum on local rules in the courts of appeals and the district courts that was included in the agenda book for the Committee's April 2018 meeting. *See* Agenda Book for April 2018 Meeting at 209-18. Tighe found disclosure requirements in some two dozen district courts, seemingly designed to alert the court to possible grounds for recusal. (About half the courts of appeals had similar rules.) It does not seem that these disclosure rules are focused on the main issues the current proposal before this Committee addresses.

On June 21, 2021, the District of New Jersey adopted its Local Rule 7.7.1 that seems to be focused more closely on issues like those raised by the current submission before this Committee. It applies to all cases, and calls for compliance in pending cases within 45 days (i.e., by early August 2021). It provides, in pertinent part:

> (a) Within 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed, all parties, including intervening parties, shall file a statement (separate from any pleading) containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan or insurance:
>
> 1. The identity of the funder(s), including the name, address, and if a legal entity, its place of formation;
>
> 2. Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
>
> 3. A brief description of the nature of the financial interest.
>
> (b) The parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of the parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.

A Bloomberg Law News story on May 24, 2021, while the local rule was under consideration, reported that a practitioner involved in drafting this rule proposal invoked Patrick Tighe's 2018 study of other district court local rules. But it does not seem that the local rules Tighe found, focused on recusal issues, resemble the proposals on which this memorandum is focused. And there appears to have been some controversy about the D.N.J. local rule proposal. Thus, the May 24 Bloomberg Law News story about it is entitled "New Jersey Sees New Battle Over Litigation Finance Disclosure."

The D.N.J. local rule does not automatically require the party that obtained funding to turn over the funding agreement. Instead, it focuses on issues of funder control of litigation and contemplates further discovery based on the showings outlined in section (b) of the proposed rule.

In 2018, the Wisconsin Legislature adopted a provision for the Wisconsin state courts that required disclosures of the sort called for by the proposal before this Committee. That

provision was part of a larger bill known as Wisconsin Act 235, which also included other provisions like one revising the scope of discovery in Wisconsin state courts to correspond to the revised scope definition in Rule 26(b)(1). Two days after Wisconsin Governor Scott Walker signed the Wisconsin act, the president of the U.S. Chamber Institute for Legal Reform said other states would follow Wisconsin's lead. *See* U.S. Chamber Institute for Legal Reform release, April 5, 2018 (citing Lisa Rickard's statement in an interview with the National Law Journal).

Informal research does not indicate that this Wisconsin legislation has had a major impact in the Wisconsin state courts. It is not clear whether any other states have adopted similar legislation.

In January 2017, the N.D. Cal. added the following to the paragraph of its Standing Order on the Contents of Joint Case Management Statement that relates to a certification of interested persons: "In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." In its submission in support of the rule proposal before this Committee, the Institute for Legal Reform quoted a newspaper article saying that this court's action was "a harbinger and a signal that courts * * * need to consider the presence of third-party financiers." Suggestion 17-CV-O at 10. Though no search has been made, it is not clear that other federal courts have followed the California lead.

It bears noting, however, that this provision is (like the pending legislation in Congress) not applicable to all civil litigation but instead only to class, collective, or representative actions. In addition, it requires only the identification of the person that is funding the litigation. To date, there has evidently been only one occasion of disclosure pursuant to the N.D. Cal. order. That disclosure was of a grant from a public entity (not a litigation funder per se) to help with the costs of a prisoner civil rights litigation.

Problems of scope: As already noted, the pending proposal before this Committee and the bill in Congress have different scopes in terms of what they apply to. As was noted in 2017, there would be problems of scope if this Committee pursues rulemaking. *See infra* Excerpt. The information obtained since 2017 suggests that many would need to be confronted:

All civil litigation or only class, MDL, and "representative" litigation: One of the most active litigation areas for litigation funding is reportedly patent litigation, but that would not seemingly be affected by the bill in Congress. On the other hand, including all personal injury auto accident cases in federal court might be seen as excessive, in part depending on what is considered "litigation funding." When a relative helps the victim with living expenses, should that be covered? Should "consumer" litigation funding be included?

"Commercial" v. "consumer" funding: There seem to be at least two major branches of litigation funding. The "commercial" branch appears to involve large funding amounts (millions of dollars) that sometimes go directly to the lawyers to pay for the litigation. The consumer form of funding tends to involve payments to the plaintiffs to cover rent, groceries, etc. Limiting a rule to "commercial" funding could prove difficult. Would that dividing line look to the dollar

amount of the funding commitment, the nature of the litigant (natural person or legal entity), or the nature of the claim (e.g., personal injury or patent infringement)?

Sources of funding covered: It does not seem that the primary concern of those advancing disclosure proposals is to have them apply to relatives who help with living expenses. Thus, the bill in Congress speaks of "commercial enterprises." We have been informed that there are companies that are in the business of making relatively small loans to auto accident claimants. It is not clear that requiring disclosure of these "living expenses" arrangements addresses the concerns of the proponents of disclosure. Perhaps one can assume that most such cases will not be in federal court, but one might also consider that we are told defendants often prefer federal court and will remove if that is possible.

"Public interest" or "social interest" litigation funders: In the TPLF Catalog there is a reference to *Hyland v. Navient Corp.*, No. 18-cv-9031 (S.D.N.Y., Oct. 9, 2020) in which the American Federation of Teachers paid plaintiffs' counsel fees in a class action, but this arrangement was not disclosed to the court. The court therefore directed that what would otherwise be paid as an attorney's fees award instead be paid into a cy pres fund. Other discussions of TPLF have raised the possibility that "social justice" organizations might support litigation, and that requiring disclosure of those arrangements could be disruptive without seeming to address the concerns raised by the proponents of disclosure.

In a related vein, one might think of the action brought by Hulk Hogan against Gawker, in which his litigation costs were reportedly underwritten by the Silicon Valley billionaire Peter Thiel, who had an unrelated grudge against Gawker. Perhaps Thiel regarded bankrupting Gawker as "social justice," but that seems different from the efforts of the American Federation of Teachers.

Farther afield yet is a March 7, 2021 article (included in the catalog of materials in this agenda book) entitled "Who's Funding That Lawsuit? Implications for Lawfare." This article warns that an American company vying for a contract to build infrastructure in an African country might find itself facing a class action in U.S. courts funded by a foreign bidder for the same project. The foreign company or government might fund the American litigation; "the rise of phenomena like third-party litigation funding [could allow] foreign actors to weaponize the [American] legal system for their own influence objectives." This scenario may be far-fetched, but it is worth noting that the current proposals would not reach it because they focus on funders who seek a payout from the litigation; in the hypothetical situation the goal is only to hobble the American company. Indeed, the article posits that the hypothetical lawsuit would eventually be dismissed, but that dismissal would happen too late to enable the American company to compete for the business in Africa. This is surely not "public interest" litigation.

What must be disclosed: A different problem of scope is the scope of required disclosure. The proposal before this Committee requires that the parties' full agreement must be disclosed, and the bill in Congress says the same in instances in which it would apply. There are other gradations. Disclosure could be limited to the fact of funding. Disclosure could also require that the funder's identity be included. (This could address recusal issues.) Disclosure could call for a general description of the funding agreement. Disclosure could also include specific reference to any control the funder has over the conduct of the litigation. Disclosure cold also go beyond the

current proposals and include all communications between the funder and the attorney or party that received the funding. (This would raise serious work product issues, mentioned below.)

To whom must disclosure be made: The proposals before Congress and this Committee call for disclosure to all other parties, including (perhaps particularly) adverse parties. That is not the only option. In the Opioid MDL in the N.D. Ohio, Judge Polster directed that funding arrangements be disclosed to the court, with the possibility of in camera examination of funding materials if the court found that useful. As noted already, the MDL Subcommittee concluded that there is little indication of attorneys in MDL proceedings using litigation funding. In the Zantac MDL, Judge Rosenberg inquired about such finding but did not find any.

Follow-on discovery: As the D.N.J. local rule proposal shows, a rule could explicitly address follow-on discovery by specifying the showing that need be made. With regard to the other required disclosures under Rule 26(a)(1)(A), follow up discovery is normal, even the purpose of the initial disclosures. As noted below, district courts have been quite cautious about allowing substantial discovery regarding funding even where its existence is disclosed. One scope issue then might be whether to address this possibility in a rule. Another potential concern is that such discovery could be viewed as distracting from the merits of the case. And it might be that the fuller the disclosure the greater the potential for discovery designed to "follow up on" what was disclosed.

Portfolio funding: As the sources in the catalog of materials show, "portfolio" funding may be attractive to funders to expand the collateral available. A Bloomberg Law News story ("Firm Lawyers Wary of Portfolio Litigation Financing, March 5, 2019) says that lawyers strongly prefer single-case funding. From the rulemaking perspective, the possibility of portfolio funding could raise issues of scope. Is disclosure required in every case in the portfolio? Assuming the portfolio includes cases on file when the funding is advanced, what is the timing of disclosure for those pending cases? If the portfolio funding agreement provides that all obligations to the funder are satisfied once $X is paid (and that then the funding obligation no longer exists to pending cases), does that mean that the disclosure can somehow be withdrawn?

Cases on appeal: Funders emphasize that they pick the cases they will fund very carefully. (They stress this point in part to rebut claims that funding encourages the filing of groundless litigation.) At least with regard to cases in which a substantial verdict or judgment has been obtained, it would seem that the funder would be much more willing to provide funding to defend that judgment on appeal. Indeed, that seems to be a significant sub-category of litigation funding. Should that be included? Should it be included in the Appellate Rules? Can it really be said that funding for successful litigants facing appeals challenging their trial court success raises the concerns advanced as justifying the proposed disclosure requirement?

PPP loans included?: Solely to illustrate arguments that might be made, consider a June 12, 2020, post from California Attorney Lending (listed in the catalog of TPLF materials included in this agenda book). It suggests that PPP loans to law firms might be included even though they are not tied to specific litigation. Though they may be non-recourse (repayment not required if the recipient law firm retains its employees during the lockdown), it does not seem that anyone would seriously argue that they are subject to disclosure as TPLF. Certainly the PPP program will be behind us before any rule change goes into effect, but the possibility that such

arguments might be made illustrates the difficulties of proceeding without a great deal more knowledge.

Disclosure forbidden?: One final note on scope. There have certainly been instances in which parties that have funding want their adversaries to know about it, and perhaps to know the extent of the promised funding. That could be a club to use to encourage settlement. Conceivably, a rule might prohibit such disclosure. Nobody has suggested such a rule.

Work Product Concerns

The funders that have submitted comments to the Committee have emphasized their need to evaluate cases carefully before providing funding, explaining that intense scrutiny on the ground that non-recourse loans are high risk. A Feb. 14, 2020, article in Bloomberg Law News entitled "Litigation Finance — How to Get to 'Yes' After Hearing 'No'" (included in catalog of materials in this agenda book) cites an officer of a leading funder as saying that to obtain funding a prospective client should offer: "(1) a substantive memo on the claims, including a comprehensive explanation of how the law firm counsel plans to tackle any legal hurdles that may arise; (2) a thoughtful and supported early-stage estimate of damages; and (3) a detailed budget for counsel's fees and costs, keyed to stages in the litigation." It is not clear that all funders are this demanding; high-volume "consumer" funders of car crash claimants probably are not.

This kind of material is likely to be core opinion work product. For a litigation adversary to gain access to it would provide many strategic benefits. But ordinarily one would regard the funder and the litigating party as having a common interest sufficient to prevent waiver arguments. To require disclosure of such material would threaten to undermine that protection.

Current District Court Handling of Discovery Regarding Funding

As the letter from Senator Grassley and Representative Issa says, when defendants seek discovery of funding details "courts often do not compel production of the requested information." It seems that a significant objective of the current proposals is to overturn these district court decisions.

As Senator Grassley and Representative Issa say, the general view is that courts are reluctant to permit discovery regarding litigation funding. An illustration is *Continental Circuits LLC v. Intel. Corp.*, 435 F.Supp.3d 1014 (D. Az. 2020), decided by Judge David Campbell, a former Chair of a prior Discovery Subcommittee, of this Committee, and of the Standing Committee.

In this patent infringement action, plaintiff was a non-practicing entity, one that does not manufacture products but is primarily involved in seeking licensing fees for its patents. Plaintiff asserted that Intel had infringed several of its patents. Intel sought discovery of what it contended were "three narrowly-tailored categories of documents and information" about plaintiff's funding:

1. any final agreement between plaintiff and any funder; and

2. the identities of all persons or entities with a fiscal interest in the outcome of the litigation; and

3. the identities of any potential funders who declined to provide funding after being approached by plaintiff.

These discovery requests may offer a hint of the sort of discovery adopting a disclosure rule might invite.

Judge Campbell found that the first two requests satisfied the "relatively low bar" of relevancy, but that the third did not. Plaintiff objected to production with regard to items (1) and (2) on work product grounds. (Plaintiff did not raise attorney-client privilege grounds.) Intel argued that the funding materials were not generated "for use in" litigation, but Judge Campbell rejected that argument using the Ninth Circuit "because of" standard: "Litigation funding agreements are created 'because of' the litigation they will fund." Intel also argued that any work product protection had been waived. Judge Campbell had reviewed some funding agreements in camera and found that they included confidentiality provisions consistent with the common interest exception to waiver. Given that, Intel failed to show a substantial need to justify production of these materials. On this basis, Judge Campbell ordered plaintiff to identify its funders, but denied further discovery.

As this case demonstrates, the handling of discovery requests in given cases depends considerably on the specifics of those cases. It does seem that district judges have inquired into funding and provided discovery about it when justified in a given case. At the same time, it is apparent that tricky work product issues may arise with some frequency, particularly if funders seek and obtain opinion work product as part of their scrutiny of requests for funding.

It also seems likely that fairly aggressive discovery efforts will occur in some cases. There is a considerable argument that Rule 26 is calibrated to guide district judges in making discovery decisions in individual cases. To the extent that disclosure rules might alter the outcomes (which Senator Grassley and Representative Issa seem to say is a goal of their proposed legislation), that could deprive district judges of the discretion they currently wield in making these decisions. Doing the same thing by amending Rule 26(a)(1)(A) might similarly limit district court discretion. Presently, district judges may make case-by-case decisions, but a rule would likely change that.

Enforcement

As noted above, it is not clear how the pending bill in Congress would be enforced. Regarding the proposal to amend Rule 26(a)(1)(A) before this Committee, enforcement might prove a challenge.

For most of the other initial disclosure provisions, Rule 37(c)(1) is the enforcement device, and it says that material not disclosed may not be used by the party that failed to disclose it. That exclusion remedy has generated a great deal of case law. *See* 8B Fed. Prac. & Pro. § 2289.1.

Enforcing the disclosure of insurance coverage, required by Rule 26(a)(1)(A)(iv), is less easy. That coverage cannot usually be admitted in evidence under the Evidence Rules. And the insured (usually a defendant) ordinarily would not want to use that evidence. Perhaps this new proposed disclosure provision is similar. It hardly seems that the claim should be dismissed due to failure to disclose funding. Research on methods of responding to failures to comply with Rule 26(a)(1)(A)(iv) might yield analogies, but absent that the likely outcome will be further challenges for district judges who find that required disclosure has not been provided.

Funding for Defendants?

There is at least some suggestion that on occasion funding arrangements have been made to support litigation by the defendant rather than the plaintiff. To the extent that funding might facilitate unwarranted claims, it would seem possible that funding might also facilitate assertion of unwarranted defenses. All the proposals have focused only on claimants, and that will likely be the bulk of litigation funding activity. But if serious study of these issues is to occur, at least some thought might be given to funding of defendants. This might be regarded as another scope issue.

Lest it be thought that defense-side funding could not occur, one could refer to a case that is a law school staple regarding constitutional limits on personal jurisdiction — *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That case arose out of a rear-end collision in Oklahoma leading to a fire that seriously injured several members of a family from New York who were moving to Arizona. They claimed that their Audi was defectively designed, leading to the fire. The county in which the crash occurred was regarded as a sort of "plaintiffs' paradise." Because the family had not gotten to Arizona (thereby acquiring Arizona domicile) they were still New Yorkers for diversity purposes.

Plaintiffs sued in state court, naming not only Audi, the German manufacturer of the car, and VW of America, the nationwide distributor, but also the New York retailer from whom they bought their car, and World-Wide, the distributor for New York, New Jersey, and Connecticut. These defendants moved to dismiss for lack of personal jurisdiction, but those objections were unsuccessful in the state courts. These "small fry" defendants were not willing to pay the cost of seeking Supreme Court review, but their lawyer persuaded Audi and VW of America that the big defendants should fund the appeal to the Court in an effort to make the case removable. *See* Charles Adams, *World-Wide Volkswagen v. Woodson — The Rest of the Story*, 72 Neb. L. Rev. 1112, 1135 (1993) (reporting that Audi agreed to pay for the Supreme Court petition, have its lawyers prepare briefing in the Court, and have a name partner in its New York law firm argue the case). This funding would not be covered by any of these disclosure provisions. Audi is clearly a "commercial enterprise," but it sought no payout sourced from the ultimate victory in the Court by the funded parties. It did get to remove after the Court's decision. Yet if the goal of disclosure is to reveal who is "really on the other side of the litigation," that principle might extend to funding for defendants.

Courts as Enforcers of Professional Responsibility Rules

Several of the arguments of the proponents of rule amendment are premised on various rules of professional responsibility. Ordinarily those rules are the province of state bar

authorities. Not all states may come out the same way. For example, the TPLF Catalog includes an October 26, 2020 Bloomberg Law News article entitled "California State Bar Opinion on Litigation Funding Could Have Sway." This article reports on Formal Opinion No. 2020-204 of the state bar "strongly support[ing] legal finance and confirm[ing] that its use presents no significant hurdles to the ethical practice of law."

On the other hand, a February 28, 2020 New York City Bar Report of its Working Group on Litigation Funding raised cautions about such arrangements, particularly with regard to fee sharing. A March 2, 2020 Bloomberg Law News article commented on the potential impact of this report. *See infra* TPLF Catalog.

In general, the federal courts have not regarded themselves as responsible to enforce state professional responsibility rules. It is certainly possible that litigation funding could put stress on a lawyer's duty of loyalty to the client. But that is not the only potential source of such stress. Consider the ordinary personal injury contingency fee agreement. That also might place the lawyer's self interest in prompt payment (via settlement) in tension with the client's desire to go to trial. But there is no general disclosure requirement regarding the existence or details of contingency fee agreements so that judges can police them.

Particularly in light of the seemingly divergent attitudes in various states about litigation funding, the Committee may consider it a dubious enterprise to adopt disclosure requirements designed to immerse federal judges in these issues, or in enforcing state professional responsibility rules.

And in MDL proceedings, that might become even more difficult, as it could present far trickier choice of law issues. Is the transferee judge to apply the professional responsibility rules of the state in which she sits, or refer to the rules that prevail in the jurisdictions from which transferred cases came? And how should cases "directly filed" in the transferee court (by stipulation of the defendants) be handled?

Federal Courts as Enforcers of Champerty and Maintenance Rules

The proponents of disclosure urge that one objective should be to unearth violations of rules against champerty and maintenance. Interesting debates can focus on whether these common law doctrines continue to serve a useful purpose. For purposes of this Committee, however, if it attempts to fashion rules to govern the entire federal court system, what may matter most is that the handling of these matters is hardly uniform across the nation.

To the contrary, some reports we have received from ethics experts suggest that both these doctrines are in decline. For example, the Institute for Legal Reform proposal in 2017 cited a Minnesota Court of Appeals decision emphasizing "Minnesota's local interest against champerty." Suggestion 17-CV-O, p. 12, citing *Maslowski v. Prospect Funding Partners LLC*, 2017 Minn. App. LEXIS 26, at *22 (Minn. Ct. App., Feb. 13, 2017). Yet as disclosed in the catalog of materials included in this agenda book, the Bloomberg Law News article "The Fall of Champerty and the Future of Litigation Funding" (June 16, 2020) reports that in *Maslowski v. Prospect Funding Partners, LLC*, 44 N.W.2d 235 (Minn. S. Ct. 2020), the state supreme court

held the challenged litigation funding contract in that case was enforceable under Minnesota law over objections based on champerty.

Careful investigation of the current importance and evolving viability of the doctrines of champerty and maintenance has not been done, but the auguries may make it seem odd to establish a procedure by national rule that is designed to further legal doctrines that no longer apply in significant parts of the nation.

* * * * *

This catalog of issues is hardly exhaustive, but suggests the challenges that may lie ahead for rulemaking on this subject. As should be apparent, a very large amount of fact-gathering would be necessary to fashion a disclosure rule addressing TPLF.

The following excerpt from the November 2017 agenda book provides more, but somewhat dated, information. This additional background may illuminate the issues presented by possible disclosure rules for TPLF arrangements. The variety of materials in the catalog of TPLF publications maintained by the Rules Law Clerks provides additional detail about the wide variety of issues that may arise. Moving forward likely involves addressing many of these issues.

Suggestion 21-CV-L raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works. Although the phenomenon may have stirred controversy in some quarters, it is not clear how much a rule change would improve the handling of those controversies.

Excerpt from the Agenda Book for the Advisory Committee's November 7, 2017 Meeting

This is a joint submission from the U.S. Chamber Institute for Legal Reform, the American Insurance Assoc., the American Tort Reform Assoc., Lawyers for Civil Justice, and the National Association of Manufacturers. It proposes adding another provision to Rule 26(a)(1)(A) calling for initial disclosure (in addition to the four sorts of initial disclosure already required under the rule) of the following:

> (v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

In some ways, this proposal builds on the requirement in Rule 26(a)(1)(A)(iv) of disclosure as follows:

(iv) for inspection and copying as under Rule 34, any agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The explanation for this proposal is that third-party litigation funding (TPLF) has emerged as a "burgeoning aspect" of at least some litigation, and that it can produce "potentially adverse effects * * * on our civil justice system." Several reasons are advanced for adopting a change along the proposed lines. Before turning to those reasons, however, it seems useful to sketch out something about litigation funding and also to describe the development of what is now in Rule 26(a)(1)(A)(iv).

Third-Party Litigation Funding

In the "good old days," one might say that there was almost nothing that could be called TPLF. Private law firms called for their partners to put up the capital needed for firm operations. Contingency-fee lawyers might find their income very uneven as it depended on settlement of cases. In recent decades, some large private law firms have turned to letters of credit or similar arrangements with lenders, often banks, to finance ongoing firm activities. According to reports in the press, some of those firms have borrowed considerably, and that borrowing (and its conditions) may have contributed to the failure of some large law firms in the last decade or so. Plaintiff-side firms, meanwhile, seem increasingly to have obtained financing for their operations from other sorts of lenders, not traditional banks. Magazines targeting plaintiff firms therefore include ads about such financing options.

This proposal appears not to inquire into all these various kinds of law firm financing. Instead, it focuses on a relatively new field that sometimes involves lending tied to a specific lawsuit, with payment contingent on the outcome of that lawsuit, an activity which the proposers call TPLF. The proposed draft attempts to define that focus by calling for disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise." Whether this could include other means of financing litigation of plaintiff-side law firm operations might be debated in some cases.

The whole topic of law firm financing — including TPLF — has received quite a lot of attention in recent years. One illustration is a conference at DePaul University Law School in 2013 entitled *A Brave New World: The Changing Face of Litigation and Law Firm Finance*, which produced papers published at 63 DePaul L. Rev. 195-718 (2014). A Google search for "litigation financing" produced over 36 million responses, including, up front, several links to firms offering the sorts of services also appearing in ads in plaintiff-lawyer magazines. A quick review of those web pages suggests that they offer something in the nature of a general line of credit for law firms representing plaintiffs, not what this proposal is about. Others seem more directed to what appears to be the specific focus of this proposal — underwriting a specific litigation (often after some review of the litigation itself) in return for some sort of high return if the litigation produces a settlement or judgment, with the amount of the return related to the level of success.

Some bar organizations have addressed some issues about litigation financing, broadly considered, in recent years. Perhaps members of the Advisory Committee are familiar with some of those efforts. It may be that the entire landscape of other legal responses to new financing arrangements has not yet stabilized, which may be a factor in deciding whether to proceed now along the lines suggested by this proposal.

The Rule 26 Treatment of Insurance Coverage

As noted above, Rule 26(a)(1)(A)(iv) already has a requirement that insurance coverage be disclosed at the outset of the litigation. This disclosure requirement built on an amendment to the rule in 1970 prompted by a distinct split in the cases on whether insurance agreements were properly subject to discovery.

It is easy to understand why there was a split on that question before 1970. If discovery is designed to enable parties to obtain evidence for use at trial, this information does not seem within it. Indeed, evidence the defendant is insured is almost universally excluded. *See, e.g.*, Fed. R. Evid. 411. Thus, arguments that the existence of insurance (or absence of it) bear on whether defendant was negligent, etc., would not support discovery of this sort. More generally, discovery is not

ordinarily allowed to verify that the defendant will have sufficient assets to pay a judgment. Indeed, in California discovery regarding defendant's assets is permitted in relation to a punitive damages claim (where defendant's wealth may be a measure of the award) only after a showing that plaintiff has a "substantial probability" of prevailing on the punitive damages claim. Cal. Civ. Code § 3295(c). So more generally the question of discovery regarding assets is a sensitive one.

Notwithstanding, the rule makers decided in 1970 to opt in favor of allowing discovery regarding insurance coverage; as the committee note then explained:

> Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or its insurer; and (4) because disclosure does not involve a significant invasion of privacy.

The rule makers emphasized the narrowness of the discovery opportunity:

> The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

It should be apparent that there are differences between TPLF arrangements and the insurance agreements brought within discovery in 1970. An insurance agreement often contained two basic features — a duty to defend and a duty to indemnify. Although disclosure of the agreement presumably would ordinarily include both features, the focus of the 1970 amendment appears to have been on the indemnity aspect. Many may be familiar with "settlement for the coverage limits" discussions. Discovery about the insurer's indemnity obligation would provide information highly pertinent to those discussions. Under these circumstances, it seems that revealing information about the indemnification aspect would "conduce toward settlement," as the committee note observed.

Perhaps knowing the terms of TPLF agreements could similarly bear on litigants' willingness to settle; knowing that the other side has an "unlimited budget" to continue the litigation might prompt a party to settle if it had believed before that the adverse party's litigation budget was strapped. But that does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of TPLF agreements seems to raise different issues.

The TPLF situation differs from the insurance situation in other ways. The 1970 amendment was designed to be limited to persons "carrying on an insurance business" and did not reach other indemnification arrangements. This limitation to insurance companies responds to their distinctive treatment in other ways. In many states, insurance is a peculiarly regulated business; it is not clear that those involved in the TPLF business are similarly regulated. Indeed, some of the recent discussion of TPLF seems to be about whether the activities of these entities, or of the lawyers who use them, should be regulated, and what the regulations should be.

Another point that may distinguish TPLF is the committee note's observation that the insurer "ordinarily controls the litigation." Much concern has arisen about whether that is true in the TPLF situation, a point made in this submission. At least some involved in this new business seem to abjure such efforts to control.

For example, in November 2011, the Association of Litigation Funders of England and Wales (where TPLF seems to be more widespread than in the U.S.) adopted a Code of Conduct for Litigation Funders including the following:

> A Funder will: * * *
>
> > (b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;
> >
> > (c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder * * *

How such commitments actually work in the UK, and whether practices in the U.S. differ, are probably considerably debated.

One point of tension might be settlement; in the U.S. "bad faith failure to settle" claims against insurers have been recognized in many states. It is conceivable that similar arguments could be made if TPLF entities have a veto power over settlement, and disagreements about settlement emerge between plaintiffs and TPLF entities.

The contractual arrangements between plaintiffs and TPLF providers might have pertinent provisions on the proper role of each in the settlement

context. One American enterprise included the following in its "Code of Best Practices":

> 13. The LFA [litigation funding agreement] shall state plainly whether and in what circumstances the Funder may be entitled to participate in the Claimant's settlement decisions. For example, subject to agreement between the parties, the LFA may provide that:
>
> a. The Claimant, counsel and the Funder shall consult in good faith as to the appropriate course of action to take in connection with all settlement demands or offers.
>
> b. If the Funder and the Claimant differ in their views as to whether a claim should be settled and they are unable to resolve their differences after consulting in good faith, then either of them may refer their differences to an independent arbitrator for expedited resolution, whose decision shall be final and binding.

Bentham IMF, Code of Best Practices (January 2014).

In sum, authorizing discovery of TPLF arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements and might immerse the Committee in tough and tricky emerging and uncertain issues surrounding TPLF activity. At the same time, it does appear that courts are struggling with whether such discovery should be allowed under the current rules. For a thoughtful and thorough examination of such issues by Magistrate Judge Jeffrey Cole, *see Miller UK Ltd. v. Caterpillar, Inc.*, 2014 WL 67340 (N.D. Ill., Jan. 4, 2014).

In 1993, initial disclosure was introduced and the insurance agreement discovery authority was converted into an initial disclosure obligation applicable in all cases. The committee note's explanation for making a discovery request unnecessary was that these four types of information "have been customarily secured early in litigation through formal discovery."

It seems unlikely that there has to date been a history of discovery of TPLF information. Even in cases that order such discovery, it seems to be justified by specific circumstances in the given case. For example, in *Conlon v. Rosa*, 2004 WL 1627337 (Mass. Land Court, July 21, 2004), a case cited in the submission, the court cited indications that the plaintiff's lawsuit was actually funded by a competitor of defendant and asserted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders, often commercial competitors or political opponents." The Massachusetts court cited, *e.g.*, *Jones v. Clinton*,

where the federal judge had ordered production of documents showing contributions to plaintiff to support her litigation against the President. In the Massachusetts case, the court noted that there was a claim that the funding was provided for competitive purposes by a competitor of defendant.

Whether or not such considerations sometimes would justify ordering discovery of TPLF information, it may be that there is no reason to add a TPLF provision to initial disclosure under Rule 26(b)(1)(A), which applies to all cases except those excluded under Rule 26(a)(1)(B). Moreover, it appears that such financing is sometimes extended only after the litigation has been under way for some time. Some funders may even wait until a favorable verdict occurs at trial and provide funding then during the pendency of an appeal. That timing would make "initial" disclosure impossible. Ordinary indemnity insurance agreements presumably do not present this timing wrinkle, but TPLF arrangements may present it often.

In sum, there are some ways in which the current proposal builds on the handling of insurance under Rule 26 presently, but other factors that make it appear significantly different.

Reasons Offered for Proposed Amendment

The proposal urges that "[w]henever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised." It offers four reasons:

Enabling courts and counsel to ensure compliance with ethical obligations: The first reason presented is that some TPLF entitles are publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors. Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements. Moreover, to the extent it is true that some funders only invest after a favorable verdict, it would seem that any possible implications about the interests of the trial court judge or the jurors would not be relevant then.

In addition, the submission says that "counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients." The example given is that defense counsel may be a shareholder in an entity that may profit from plaintiff's victory in the litigation, a potential conflict that counsel should broach with the defendant. At least some of these concerns seem to have occurred to some involved in the TPLF business. Thus, one TPLF enterprize includes in its best practices between the funder and claimants' attorneys the following: "7. The Funder shall not knowingly allow an attorney or law firm representing a Claimant to invest in the Funder." Bentham IMF Code of Best Practices (January 2014).

So these issues may be important in some cases, though it is not clear how many. Certainly, avoiding conflicts of interest for judges, jurors, and attorneys is a desirable goal. That would seem to be the role of disclosure statements like those called for by Rule 7.1. Whether discovery is a suitable vehicle for that purpose may be more debatable. A plaintiff's discovery request for information about the investment portfolio of defense counsel would likely be resisted vigorously. This proposal does not authorize such discovery, but does seem to involve the courts more deeply in policing such topics.

In the same vein, it is not at all clear that the way to police lawyers' ethics is for trial courts to take the lead. Traditionally, that is the job of state bar ethics committees and the like. Judges who become aware of questionable conduct thus may refer matters to the state bar. So the entire topic seems somewhat outside the normal scope of disclosure and discovery.

Alerting defendants to who is "really on the other side of an action": Citing the 2004 Massachusetts Land Court case involving financing of litigation by a commercial competitor of defendant mentioned above, the submission urges disclosure of all TPLF arrangements. It is not clear how many such cases there are, or whether they are a model that calls for a rule like the one proposed.

This second reason emphasizes a somewhat different concern, however — that "[a] party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money." Indeed, the agreement may show that the funder will get a disproportionate share of the first dollars in a settlement, which might deter otherwise reasonable settlements.

This argument resembles one of the reasons for allowing discovery of insurance coverage — that it would "enable counsel for both sides to make the same realistic appraisal of the case," in the words of the 1970 committee note. Given the history in many cases of settlement for "the coverage limit," that was an understandable motivation for the 1970 provision. How exactly information about TPLF arrangements factors into settlement discussions is less clear. It does not appear that those arrangements constitute funds to cover settlement payouts, which could play a role like the indemnity feature (not the duty to defend) of insurance policies. Perhaps the defendant would be moved to increase its offer once aware that plaintiff has ample financial resources to continue litigating. Perhaps information about the TPLF funder's "take" would inform that decision. But if that's really true, plaintiff's counsel would presumably have an incentive to alert defense counsel to these considerations during settlement negotiations.

The submission also suggests that, having learned of the role of the funder, "the court may wish to require that funder to attend any mediation." On that score, there is at least some uncertainty about whether the insurance analogy is useful. There has been uncertainty about the power of the court to command a nonparty insurer (rather than the insured party) to attend and participate in settlement

conferences. *See In re Novak*, 932 F.2d 1397, 1407-08 (11th Cir. 1991) (holding that the court did not have inherent authority to require attendance by a representative of a party's insurer at a settlement conference). Rule 16 was amended in response to rulings that the court could not require a represented party to attend settlement conferences, and Rule 16(c)(1) now authorizes the court to require a party to attend or be "reasonably available" to consider possible settlement. No specific provision extends to insurers or TPLF providers. It might be worthwhile to revisit the insurer question under Rule 16(c)(1) and add TPLF providers.

Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order.

Facilitating resolution of motions for cost-shifting: The third reason given for the amendment focuses on cost-shifting with regard to discovery. The submission notes that, on questions of discovery cost-shifting, courts may consider the parties' financial ability to pay, and urges that it may be pertinent that one party's suit is "being financed by a lucrative TPLF company." It adds that the pending proposal to revise Rule 26(b)(1) invites consideration of "the parties' resources" in making that determination, a consideration that might be illuminated by requiring disclosure of TPLF agreements.

One reaction to this suggestion is that it is a variant on the "discovery about discovery" issue that occasionally arises — the question whether it is proper to order discovery about one matter in order to illuminate whether to order discovery about another. One recently-adopted example is Rule 26(b)(2)(B), which recognizes that there may sometimes be reason to allow discovery about the costs of retrieving information from sources that are allegedly not reasonably accessible. That discovery is not pertinent to the outcome of the suit, but only to the resolution of a discovery dispute about whether to order contested discovery. Similarly here, reference to TPLF arrangements would bear on proportionality only once a proportionality issue has arisen.

Whether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain. Presumably, once parties have put proportionality at issue both the question of the cost of complying with discovery demands and the wherewithal of the party seeking discovery could merit examination. So it's possible that both sorts of "discovery about discovery" might come into play.

Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as "lucrative," it also notes that "[u]nlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and to profit from litigation." Id. at 6, emphasis in original. How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1,

2015) is uncertain. It may be worth mentioning that the committee note to the current proposed amendment observes:

> [C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 committee note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent."

How this observation will affect the courts' handling the role of the parties' resources in making proportionality determinations remains to be seen.

It may be premature to forecast how TPLF arrangements would affect consideration of the parties' resources beginning after Dec. 1, 2015, should the amendment be adopted. It is probably premature (and possibly unwise) for the Committee to take a view on the propriety of TPLF arrangements.

In regard to the current proposal, the key point seems to be that much depends on the interpretation of the pending amendment to Rule 26(b)(1). Furthermore, even if that amendment makes resources important sometimes, that nonetheless would likely be in the relatively rare case, so that a blanket rule of disclosure may be too broad.

Information bearing on sanctions: The fourth and final reason focuses on sanctions. Citing a Florida state-court case holding that TPLF funders who controlled a litigation should be regarded as parties for purposes of sanctions under a state statute authorizing levy of attorneys' fees for claims advanced "without substantial fact or legal support," the submission urges that the proposed disclosure provision would provide important information in such circumstances. It might be noted that Magistrate Judge Cole rejected defendant's reliance on this Florida case in *Miller UK Ltd. v. Caterpillar, Inc.*, 2014, WL 67340 (N.D. Ill., Jan. 6, 2014):

> Contrary to Caterpillar's assertion that the [Florida] court held the financing agreement was relevant to the issues in the case-in-chief, there was not so much as an insinuation that it was. Nor did the opinion have anything to do with pretrial discovery of a funding agreement; it involved an appeal of the trial court's denial of plaintiff's *post-trial* motion for attorney's fees and costs against [the nonparty] who funded and controlled plaintiffs' case.

Slip op. at 8-9 (emphasis in original).

The frequency of such situations is uncertain. As noted above, if the idea appears to be to recognize that the funder is actually the real party in interest, it might be that Rule 17(a) is the place to focus. Whether the right place to look for

sanctions of this nature is in the rules might also be a subject for discussion. Perhaps this issue really arises more in relation to 28 U.S.C. § 1927 sanctions. It is likely true that the number of cases in which sanctions of any sort are seriously considered is fairly limited, and the number of those that involve TPLF arrangements probably a good deal smaller. Under those circumstances, a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern raised.

Congress of the United States
Washington, DC 20515

21-CV-L

May 3, 2021

VIA ELECTRONIC TRANSMISSION

Honorable John D. Bates
Chairman
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
Washington, DC 20544

Dear Judge Bates,

I write to inform you of the recent bicameral reintroduction of the Litigation Funding Transparency Act ("LFTA"). As you may be aware, the bill would bring much needed transparency to third-party litigation funding ("TPLF") by requiring plaintiffs' lawyers to disclose outside funding agreements in class action lawsuits and federal multi-district litigation. The bill has the support of several of my Senate Judiciary Committee colleagues and was introduced in the House by Representative Darrell Issa.

The practice of TPLF cannot be allowed to proceed in its current form. Under present law, virtually all TPLF activity occurs in secrecy because there is no procedural or evidentiary rule requiring disclosure of the use and terms of such funding. Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs generally object to providing it, and courts often do not compel production of the requested information.

Transparency brings accountability. It is true of Congress, the Executive, and our courts. A healthy dose of transparency is necessary to ensure that profiteers are not distorting our civil justice system for their own benefit. Our legislation would take one simple step towards bringing TPLF activity into the daylight.

I understand the Advisory Committee on Civil Rules has, for several years, been considering the adoption of such a disclosure requirement as a federal court procedural rule. In my view this is a commonsense matter and critical to the integrity of our federal court system. Opposing parties should be made aware of who is financing the litigation and whether there are any conflicts of interest, champerty concerns or other ethical issues, such as undue control, posed by the arrangement. I would therefore appreciate being advised of the status of the Committee's consideration of this issue, including when the next meeting on rule consideration will be held.

Thank you for your prompt attention to this important matter.

Sincerely,

Charles E. Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate

Darrell Issa
Ranking Member
Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
U.S. House of Representatives

THIRD-PARTY LITIGATION FINANCE:
Articles, Reports, Posts, & Select Cases

Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law (June 2019; Revised August 2021)

By Charles M. Agee, III; Lucian T. Pera; and Alex Agee

Published by Westfleet Advisors

Summary: This article, which is an update to a June 2019 article, summarizes the outcomes of court rulings on relevancy, attorney-client privilege, and work product protection rulings in state and federal courts regarding efforts for discovery of litigation funding materials. It reports on more than 50 cases and found that significant discovery was allowed in only around 17% of those cases.

New Local Rule Allows Disclosure of Litigation Funding in NJ's Federal Courts (July 21, 2021)

By Carl J. Schaerf and Gary N. Smith

Published by New Jersey Law Journal

Summary: This article discusses the new local rule in the District of New Jersey that requires lawyers to disclose details about litigation funding agreements. The authors note that in implementing this rule, "New Jersey federal courts seem to be charting a different path" from the "emerging trend . . . to extend privacy protections to litigation funding materials under the work-product doctrine, and generally to deny production or use of such materials in litigation." While they call this rule "modest" due to it requiring a showing of good cause before discovery will be granted, they also believe it may have a broader impact than its stated basis. The authors conclude that "the idea that a funder is a real party in interest to be disclosed at the outset is, in and of itself, not insignificant." They then offer suggestions to litigants in jurisdictions that do not tend to permit litigation funding discovery, including public records searches for litigation funding agreements and deposition questioning.

The Mysterious Market for Post-Settlement Litigant Finance (July 27, 2021)

By Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok

Published on SSRN, forthcoming in 96 N.Y.U. L. REV. ONLINE (2021)

Summary: The authors were given "unique, unrestricted access to the complete archive of 225,293 requests for funding from 2001 through 2016 from one of the largest consumer litigation financing firms in the U.S., and we are the first to explore the anatomy of litigant finance in mass tort cases." They find that "the Funder systematically offers mass tort claimants larger advances and more favorable terms along multiple dimensions than it does for consumers with motor vehicle accident claims." "[Their] data analyses involving both categories of claimants offer reassurance about numerous asserted abuses in the funding industry and lead [them] to recommend that restrictions not be imposed on the availability or cost to consumers of this funding. Rather, [they] propose that existing market competition be enhanced by the adoption of laws that would ensure greater simplicity, transparency, and consistency in the pre-funding disclosures made to consumers and by

removing the prohibitions that most states' Rules of Professional Responsibility currently impose on lawyers' ability to provide financial assistance to their clients."

The MDL Revolution and Consumer Legal Funding (June 21, 2021)

By Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok

Published on SSRN, forthcoming in 40 REV. LITIG. (2021)

Summary: This article compares consumer funding in auto accident and mass tort litigation. It is based on the authors' access to detailed information on one funder's experience over a number of years in providing such funding. It does not focus particularly on the disclosure proposals before the Advisory Committee, but does contrast the treatment of car crash funding with mass tort funding. In general, the authors argue for only lightly regulating consumer TPLF, though they do urge standardized disclosure requirements. The article also finds that mass tort plaintiffs, as a group, are treated differently, in that they usually receive offers as part of "a larger contemporaneous group of hundreds or thousands of offers," (p. 116), and that in mass tort cases, plaintiffs refuse in significant numbers to accept settlements unless either the fund reduces its take or the lawyer reduces her fee, (p. 135). It also finds that consumer plaintiffs scrutinize funding offers with some care, and that 14% of mass tort plaintiffs offered funding decline it. (The authors report that funders fairly often reject requests for funding.) The authors favor relaxing existing professional responsibility restrictions in many states that restrict the ability of plaintiff lawyers to loan living expenses to their clients.

We're About to Learn a Lot More About Litigation Finance (June 24, 2021)

Published by Bloomberg Law News

Summary: Following up on the Wilkie Farr litigation finance deal (described in the below article) the author of this piece says that the announcement of the deal will serve as "a marketing device" for funders. It quotes a funder representative who says that law firms are more comfortable revealing their relationship with funders in jurisdictions where there are rules around disclosing a funder's participation in a lawsuit: "unless and until we have legislated limits or norms that prevent defendants from seeking irrelevant and potentially prejudicial discovery when they suspect funding, we can expect that funders, law firms, and clients will continue to proceed cautiously." The author also quoted a litigation funding advisory representative who predicts that the new local rule in D.N.J. "could make it less risky for other law firms to publicly disclose their relationships with funders."

Willkie, Longford Reach $50 Million Litigation Funding Pact (June 23, 2021)

Published by Bloomberg Law News

Summary: This story reports that Willkie Farr has announced an agreement with a funder for backing of up to $50 million for cases brought by Willkie Farr. Although "the precise details of the agreement are scarse, . . . [m]any Big Law firms use litigation finding, a roughly decade-old business in the U.S. that has attracted more than $11 billion in capital." Meanwhile, the Willkie Farr partner who made this deal will join the funder's board of independent advisers. The article reports that firms have been reluctant to admit relationships with

funders "largely out of fear that a defendant would use the information to dig for documents in discovery." But because judges have not allowed such discovery, firms' concerns about being associated with funders have diminished.

It's Official: New Jersey Federal Courts Will Require Disclosure of Litigation Funding Arrangements (June 21, 2021)
Published by New Jersey Law Journal

Summary: This article reports on an summarizes the new local rule in the District of New Jersey that requires lawyers to disclose details about litigation funding agreements. The text of the Rule is available in the Order linked below. It dictates that lawyers who get financial assistance from nonparties for legal fees and expenses must disclose the funder's name and address, whether the funder's approval is needed for litigation or settlement decisions, and what terms and conditions apply to such approvals. The chair of the subcommittee that drafted the rule was quoted as saying "I'm pleased with the result. Our rule strikes the balance that was needed between those who were concerned that it would open up the floodgates of disclosure and those who felt we needed to provide certain basic information." At the same time, a trade group for lenders was displeased and called the rule "entirely unnecessary, inappropriate, contrary to the overwhelming majority of existing case law, and likely to create far more problems than it will solve." Order Amending District of New Jersey Local Rule 7.1.1 Disclosure of Third-Party Litigation Funding

The MDL Revolution and Consumer Legal Funding, 40 Rev. of Litig. 143 (2021)
By Ronen Avraham, Lynn A. Baker & Anthony J. Sebok.

Abstract: Third-party consumer legal funding, where financial companies advance money on a nonrecourse basis to assist individual plaintiffs with living expenses, is an increasingly popular and controversial part of American litigation. And consumers with mass tort claims pending in Multi-District Litigations (MDLs) constitute the fastest growing sector of those seeking assistance from this billion-dollar funding industry. Policy makers, mass tort plaintiffs' lawyers, and scholars have increasingly raised concerns about exorbitant interest rates and have called for regulations to protect vulnerable consumers from "predatory lending." To date, however, the policy debate has largely relied on anecdotes and speculation because funders have not been forthcoming with facts. This Article begins to fill that important informational void.

We were given unique, unrestricted access to the complete archive of 225,293 requests for funding from 2001 through 2016 from one of the largest consumer litigation financing firms in the U.S., and we are the first to explore the anatomy of litigant finance in mass tort cases. We find that the Funder systematically offers mass tort claimants larger advances and more favorable terms along multiple dimensions than it does for consumers with motor vehicle accident claims. Our data analyses involving both categories of claimants offer reassurance about numerous asserted abuses in the funding industry and lead us to recommend that restrictions not be imposed on the availability or cost to consumers of this funding. Rather, we propose that existing market competition be enhanced by the adoption of laws that would ensure greater simplicity, transparency, and consistency in the pre-funding disclosures made to consumers and by removing the prohibitions that most states' Rules of Professional

Responsibility currently impose on lawyers' ability to provide financial assistance to their clients.

Making Litigation Funding Agreements Discoverable is Good Public Policyv (June 17, 2021)

Published by Bloomberg Law News

Summary: This is an argument in favor of the proposed D.N.J. local rule, which also says that the proposed rule "does not go far enough." It likens disclosure of litigation funding to the required disclosure of insurance coverage added to the rules in 1970. It rejects the idea that, to be discoverable, funding agreements have to be relevant, urging that "increasingly, the TPLF company does have input into the handling of the litigation it funds." It also suggests that sometimes the agreement is admissible on issues of witness bias. The problem with the proposed D.N.J. rule, it says, is that it requires a showing to justify production of the actual agreement instead of requiring only that the plaintiff and the TPLF company provide a description of the agreement.

Demystifying the Litigation Funding Process (June 16, 2021)

Published by Bloomberg Law News

Summary: This article lists some "tips for those interested in commercial litigation finance, including clients, their in-house attorneys, and outside counsel." It suggests that "[a] funder should be a passive investor; the claimant maintains control over how the case gets litigated." The authors note two "common models" for funding: either the funder pays all the litigation expenses and part of the attorneys' fees in exchange for a share of the recovery or the funder makes one or more lump-sum payments to the claimant in exchange for a guarantee of a certain return on investment. The funder should be getting the "first money out" of the proceeds of a case. The article also suggests that funders should enter into written nondisclosure and confidentiality agreements in order to "reduce[] the odds that information shared with a funder will be subject to discovery," and that funders should not have (or require) access to privileged attorney-client communications or materials. Lawyers seeking funding should prepare detailed memos describing the evidence supporting the claims and should be "upfront about the risks of the case." There should also be "regular case updates" in order to "provide additional opportunities to strategize, hone case themes, and position the claims for the best possible outcome."

How to Hate Litigation Funding—Until You End Up Loving It (May 27, 2021)

Published by Bloomberg Law News

Summary: This piece focuses on the complicated nature of the TPLF issue, and recognizes that the valid concerns on both sides will complicate any rulemaking efforts. The author discusses the example of a False Claims Act case brought by a Florida nurse on behalf of the U.S. Government against a nursing facilities operator that was committing Medicare and Medicaid fraud. The case, *Ruckh v. Salus Rehabilitation, LLC*, 963 F.3d 1089 (11th Cir. 2020), is discussed below. The nurse won a $255 million settlement which was challenged on appeal on the ground that 4% of that award was going to a third-party funder. Having lost that appeal, the nursing home that had challenged the award on that basis was now bankrupt and was selling off its own litigation assets. The author's point was that views of litigation finance may shift, even within a single dispute, depending on who is employing it.

New Jersey Sees New Battle Over Litigation Finance Disclosures (May 24, 2021)
Published by Bloomberg Law News
Summary: This article concerns the proposed D.N.J. rule described below (entry of April 20, 2021). The U.S. Chamber of Commerce responded favorably to the proposal, while litigation finance companies and an industry group, the International Legal Finance Association (ILFA), criticized it. A practitioner involved with drafting the proposed rule referenced a "2018 survey" identifying 24 districts with local rules concerning financing disclosure. (The survey he referenced is a memo drafted in 2018 by the Rules Law Clerk.)

Omni Bridgeway Insights Newsletter (April 20, 2021)
Published by Omni Bridgeway
Summary: This is a publicity piece from Omni Bridgeway, one of the largest TPLF outfits. It appears more directed toward a U.K. audience but is noteworthy for focusing on patent cases, which are not typically raised by proponents of disclosure rules in the U.S.

D.N.J. Notice of New Local Rule (April 20, 2021)
Published by U.S. District Court for the District of New Jersey
Summary: This is an announcement of and invitation for comment on a proposed new local rule in the District of New Jersey. The rule would require disclosure of TPLF arrangements and would seem to allow discovery about third-party financing arrangements, "upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interest of parties or the class . . . are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case."

Who's Funding that Lawsuit? Implications for Lawfare (March 7, 2021)
Published by Defense One
Summary: This article argues that American litigation could be funded by foreign governments aiming to defeat efforts by U.S. companies to land foreign business. It criticizes disclosure efforts as a patchwork effort out of which "no consistent practice has emerged." Moreover, it argues "many attempts at transparency (including proposed legislation) are premised to apply only where funders have a right to receive a share of the damages awarded by a court. Such a requirement would not apply to a funder not looking to receive financial reward in return for monetary or strategic assistance."

Big Law Firms Slow to Adopt Litigation Funding, Survey Says (January 27, 2021)
Published by Bloomberg International Law News
Summary: This article summarizes a recent survey by Westfleet Advisors (PDF saved in repository) of 46 litigation finance industry participants which the author describes as "one of the few sources of hard data in the growing and highly opaque world of lawsuit funding." According to the survey, the litigation funding industry did not grow in terms of new capital from June 2019 to June 2020. Funders had suggested that they would benefit from delays in cases caused by the COVID-19 pandemic, but the survey showed that this had not been the case as of June 2020. Large firms were on the receiving end of funding in only 9% of litigation finance portfolio deals.

Five Litigation Funding Predictions for 2021 (January 7, 2021)

Published by Bloomberg International Law News

Summary: This piece by a funder representative paints an optimistic picture of the litigation finance industry in the coming year. First, the author predicts "a robust secondary market for resale of funded cases to other investors." It is not clear how this would work but, if it came to fruition it might complicate any disclosure requirements and would raise the question whether the "secondary market" arrangements also have to be disclosed. Second, the author anticipates that "[h]igher risk cases will be funded" because there will be more action in the field generally. This may accord with the assertions of disclosure proponents that litigation funding is encouraging the filing of groundless claims. The author of this piece expects that higher-risk cases would actually produce "disappointing results for less-disciplined investors."

It's Mother Against Son in Britain's Priciest Divorce War (January 5, 2021)

Published by New York Times

Summary: As the headline indicates, this article is not primarily about third-party litigation funding. Rather, it concerns proceedings in English courts filed by the ex-wife of a Russian billionaire who is trying to enforce her huge divorce judgment for her husband's assets. The article explains that: "By [the time that the English judge concluded that the Russian divorce decree was a forgery], Ms. Akhmedova had signed up with Burford Capital, a publicly traded litigation funding company, which has underwritten millions in legal fees for her lawyers and provided her with millions for living expenses. The company will reportedly take a 30 percent cut of any recovery, plus a multiple of legal expenses."

State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-204 (December 2020)

Summary: In this ethics opinion, the State Bar of California addresses how lawyers can comply with the duty of confidentiality while maintaining independent professional judgment. Lawyers asked to negotiate third-party funding agreements on their clients' behalf should "consider whether [they] ha[ve] the experience or learning required as well as whether [they] ha[ve] any personal interest that creates a conflict." A written disclosure can resolve tensions here. The lawyer must also advise the clients concerning the risks and implications of disclosing any confidential information to the third-party funder.

TPLF Suggestion from Lawyers for Civil Justice and U.S. Chamber Institute for Legal Reform (December 21, 2020)

Available on Administrative Office website

Summary: These organizations suggest three actions that the committee might take: (1) circulating a questionnaire to litigation funding entities; (2) asking the FJC to update its 2017 report on TPLF; and (3) developing a draft rule to structure discussion and analysis. Appendix A contains a list of litigation funding entities.

Litigation Funds Face New Player Disruption Risk in 2021 (December 16, 2020)

Published by Bloomberg Law News

Summary: This article paints an optimistic picture for third party litigation finance in the coming year, which notes first that 2020 was a good year, leaving financiers with plenty of profits to reinvest, and second that larger players – "[h]edge funds and large asset managers" – are

increasingly likely to begin investing in portfolios of cases. Cryptocurrencies tied to third party litigation finance are also said to be on the horizon.

Webinar: Plan, Pivot, Prosper: How Law Firms Nationwide Are Using Litigation Funding to Survive and Thrive (December 9, 2020) (pdf files saved in repository)

Sponsored by American Association for Justice

Summary: The theme of this event suggests the difficulty of determining what sorts of litigation financing qualify as third-party financing of the sort that we might envision requiring disclosure for.

California State Bar Opinion on Litigation Funding Could Have Sway (October 26, 2020)

Published by Bloomberg Law News

Summary: This article exemplifies a growing focus on regulation of attorneys with respect to third-party litigation finance. The State Bar of California Committee on Professional Responsibility and Conduct released an opinion (Formal Opinion No. 2020-204) "strongly support[ing] legal finance and confirm[ing] that its use presents no significant hurdles to the ethical practice of law, while cautioning that attorneys must be aware of their ethical obligations." In particular, the opinion notes that a funder cannot interfere with an attorney's duty to a client and notes that a lawyer must obtain the client's informed consent before sharing confidential information with any funders. The opinion also notes explicitly that outside litigation funding is permitted in California and that the doctrine of champerty does not apply.

Final Approval Order, Hyland v. Navient Corp., No. 18-cv-9031 (S.D.N.Y. Oct. 9, 2020), ECF No. 182

See also Lawyers get nothing in troubled class action vs. Navient; Never mentioned agreement with nonprofit (October 13, 2020)

Published by Legal Newsline

Summary: The American Federation of Teachers had paid plaintiffs' counsel's fees in this class action and this had not been disclosed to the court. The money that plaintiffs' counsel had sought was instead directed into a cy pres fund.

Litigation Funders See Fewer Safe Bets in Pandemic (October 8, 2020)

Published by Bloomberg Law News

Summary: In March and April of 2020, litigation funders were forecasting that there would be a lot of opportunities for litigation investment during the pandemic. This article checks back in and notes that this has not happened. The largest litigation finance firm, Buford Capital, "used words like 'collapse' and 'sharp fall' to describe its business activity in the first half of the year.'" Litigation firms seem to have been doing well and seem not to have needed outside financing at this time.

Litigation Finance Giants form Trade Group to Counter Regulation (September 8, 2020)

Published by Bloomberg Law News

Summary: Six litigation finance firms who together have over $5 billion invested in litigation finance activity have "launch[ed] an international trade association aimed at unifying the growing industry's voice to counter regulation efforts." The article also notes that Australia recently regulated litigation finance and now requires that litigation funders obtain financial services licenses and register their cases under securities and investing rules.

The Anatomy of Consumer Legal Funding (August 14, 2020)

Posted on SSRN (Publication Date and Source TBA)

Summary: This manuscript, by Tony Sebok (a frequent contributor to the TPLF dialogue) and others, includes empirical data on the TPLF industry practices. As the authors explain in the abstract, "[u]sing a unique data set from one of the largest consumer litigation financing firms in the U.S. ("Funder"), we are the first to explore the anatomy of pre-settlement litigant finance in mass tort cases, such as the NFL class action. We are also the first to examine general post-settlement litigant finance in the U.S., which is the type of funding many NFL players were reported to have obtained. Our comprehensive data set includes approximately 225,593 requests for funding from 2001 throughout 2016."

Insight: Law Firm Funding Offers Path to Client Acquisition, Retention (July 13, 2020)

Published by Bloomberg Law News

Summary: This article, written by an officer of the LexShares funding group, appears to be a pitch to Big Law. The author asserts that "[a]s social distancing measures hinder attorneys' abilities to travel and make regular court appearances, and as jurisdictions grapple with case backlogs. justification of hourly fees becomes more difficult." It would seem that, conversely, clients may be more persuaded by hourly fees in the wake of the pandemic, having seen that a task (e.g., depositions by video) may be conducted in far less time (but with equal value to the client) than before.

Ruckh v. Salus Rehabilitation, LLC, 963 F.3d 1089 (11th Cir. 2020) (June 25, 2020)

Decided by Eleventh Circuit (Ungaro, J.)

Summary: The Eleventh Circuit ruled that the relator in a False Claims Act action did not lose Article III standing, and did not violate the Act, by entering into a litigation funding agreement while the action was pending. The relator did not start off with funding. Instead she arranged it while the defendants' motion for judgment as a matter of law was pending in trial court. Footnote 6 points out that the defendants only learned of the financing arrangement (entered into while the case was in district court) through the relator's filing of a certificate of interested persons in the court of appeals. Note 7 explains that the relator's counsel offered to provide a copy of the financing agreement to the court in camera only. The court stated that it would review and consider the agreement only if the defendants were also permitted a copy. The relator declined, and the court instead relied on counsel's declarations as to the essential terms. The relator sold to the lender a less than 4% interest in her share of the recovery, describing the 4% figure as assuming the court would set her share at 30%, and assuming the judgment would hold at $347 million. The parties asserted that the agreement gave the lender no authority or influence over the litigation, including settlement.

Lit Funder Legalist Hits 100-Case Mark as Posner Departs (June 23, 2020)

Published by The American Lawyer (Law.com)

Summary: This article focuses on the San Francisco-based litigation funder Legalist's milestone of over 100 cases under investment. Retired Judge Posner, who joined Legalist in 2019, stepped down in June 2020. Before joining Legalist, he founded the now-dissolved Posner Center for Justice for Pro Se's [*sic*].

Pandemic is Expected to Bring More Lawsuits, and More Backers (June 19, 2020)

Published by The New York Times (online)

Summary: The article recognizes Omni Bridgeway and Burford as the "titans of the industry," but adds that "the industry is really a smattering of funds and what are known as fundless sponsors, or groups that find cases and then raise the money to invest in them." It focuses on one that "counts many individuals as investors," but notes also that "[b]igger firms are primarily backed by pension funds and sovereign wealth funds." The author adds: "All the firms I spoke with reported rising interest in these services. . . . Interest in the United States is up three times over last year, and in the rest of the world, it is double what it was a year ago," according to the boss of Omni Bridgeway. [A version of this article appeared in print on June 20, 2020, Section B, Page 6 of the New York edition with the headline: When Legal Disputes Lead to Lofty Returns.]

Lawson v. Spirit AeroSystems, Inc., 2020 WL 3288058 (D. Kan. June 18, 2020).

Summary: This opinion contains a very long discussion of E-Discovery cost bearing. It involves a non-compete agreement with Spirit's ex CEO, under which Spirit forbade him to sign on as a consultant to an outfit called Elliott. Forewarned of that warning from Spirit, which it said would cause it to stop making payments to Lawson if he went forward, Elliott and Lawson entered into an additional agreement under which Elliott promised to pay Lawson the amount he claimed he should receive from Spirit and he subrogated Elliott on his claims (asserted in this lawsuit) against Spirit for amounts due under his separation agreement with Spirit. By the time this discovery decision was rendered, Elliott had paid Lawson over $26 million for payments withheld by Spirit. Elliot also paid Lawson over $5 million for his consulting services.

All of that is background to the following description of the setup on p. 5 of the court's memorandum opinion: "Elliot is now funding this lawsuit to recover the amounts Spirit allegedly owes Lawson pursuant to his Retirement Agreement." This may be a new form of TPLF or may be a unique or one-off situation. The opinion does not say how the judge found out about the arrangement (i.e. through a disclosure or some other way).

Insight: The Fall of Champerty and the Future of Litigation Funding (June 16, 2020)

Published by Bloomberg Law News

Summary: This is a report on a recent decision of the Minnesota Supreme Court, *Maslowski v. Prospect Funding Partners, LLC*, 44 N.W.2d 235 (Minn. S. Ct. 2020), holding that a TPLF contract is enforceable over objections based on champerty. Specifically, the court held that significant changes in legal profession and societal attitudes toward litigation financing warranted abolishment of ancient prohibition against champerty, and, thus, the litigation financing agreement was not void as against public policy. The authors of the article suggest that the court roundly supported the activity of funders, and recognized other methods (including disclosure and discovery) as ways to deal with potential abuses.

California Attorney Lending's CARES Act Overview (updated June 12, 2020)

Posted by California Attorney Lending

Summary: This article shows that PPP loans may cross over into TPLF. These CAL loans can be non-recourse and can go to law firms. It does not look likely that these loans would fall within the sorts of TPLF definitions being considered. They are not tied to specific litigation. Further,

there may be no payback if they are non-recourse and the conditions for the loan (e.g., retaining employees) are met.

Fast Trak Investment Co. v. Sax, 962 F.3d 455 (9th Cir. 2020) (June 11, 2020)

Decided by Ninth Circuit

Summary: The court certified two questions: (1) whether a litigation financing agreement may qualify as a "loan" or a "cover for usury" where the obligation of repayment arises not only upon and from the client's recovery of proceeds from such litigation, but also upon and from the attorney fees the client's lawyer may recover in unrelated litigation; and (2) if so, what the appropriate consequences are, if any, for the obligor to the party who financed the litigation.

Nobody Knows Litigation Finance Size, But It's Not $85 Billion (June 11, 2020)

Published by Bloomberg Law News

Summary: This piece covers the dimensions of the TPLF business or "industry." It reports an estimate that approximately $2.3 billion was invested in corporate U.S. lawsuits over a year. It suggests that "the industry is very much in growth mode. Investors this year have already put more than $825 million in new capital into litigation finance firms." Another funder (LexShares) is said to have a median "internal rate of return" of 52%.

Pandering to Base Leaves Key Facts by Wayside in Class Action Battle (May 27, 2020)

Published by Crikey (Australian media company)

Summary: Related to the source below, this article refers to "[t]he government's recent moves on class action litigation funding, with the establishment of a parliamentary inquiry and the tightening of rules on funding." The article suggests that banks (especially four particular banks in Australia) stand to gain the most "when the government moves to tighten litigating funding under the cover of COVID-19."

Revealed: How Class Action Warrior C.P. Fudges the Facts (May 26, 2020)

Published by Crikey (Australian media company)

Summary: This piece denounces the government for "misrepresentations and fudges" about the supposed need to curb class actions in Australia. The focus of this effort (supported by the U.S. Chamber of Commerce, the source of the Rule 26(a) amendment proposal) is litigation funding. The article says that the Chamber's Institute for Legal Reform "has been paying close attention to Australia for well over a decade because of the pioneering role played by an Australian company, then known as IMF Bentham, in the practice of litigation funding which the ILR opposes."

Supreme Court of Canada Approves Omni Bridgeway Litigation Finance Agreement (May 15, 2020)

Posted by Omni Bridgeway

Summary: This is a follow-up to the February "Decision Alert" post about the Canadian high court's TPLF decision. The court finally issued its written opinion explaining its reasoning for approving Omni Bridgeway's litigation funding arrangement. According the Omni Bridgeway, the court "recognizes how litigation funding helps companies realize value from a litigation 'pot of gold.' [The case] is the first decision from the [Canadian high court] on litigation funding. While it arises in an insolvency context, this case underscores how dispute

financing can benefit any party as a tool to transfer the risk and cost of litigation or arbitration to a third party."

Litigation Funder Says He's As Busy As Ever Amid Pandemic (May 6, 2020)
Published by Law 360
Summary: This article provides some background on the litigation finance company Therium, and includes a Q&A with its U.S.-based CEO. Points of interest include the Chamber of Commerce described as the "archnemesis" of the TPLF industry and the "underwriting fundamentals" evaluated by funders (potential work product).

Hedge Fund Elliot Management to Finance Lawsuit Against Streamer Quibi (May 4, 2020)
Published by Wall Street Journal
Summary: The hedge fund Elliot Management is financing a lawsuit against the streaming service Quibi. The plaintiff Eko, an interactive video service, claims Quibi is violating its patented technology that allows viewers to see scenes from multiple perspectives. Quibi was founded by film producer Jeffrey Katzenberg, who previously engaged in high-stakes litigation with Disney. Elliot Management will receive equity in Eko as part of the litigation financing agreement.

PG&E Victims' Lawyer Scrutinized Over Wall Street Connections (May 2, 2020)
Published by San Francisco Chronicle
Summary: This article is related to the Deepwater Horizon article (below) in that it also involves attorney Mikal Watts. Here, Watts appears as attorney for 16,000 fire victims in a bankruptcy proceeding involving Pacific Gas & Electric Company. In an interview with the Chronicle, Watts said he took out a $100 million loan for his law firm from a St. Louis investment bank. He later learned that a financial firm, Apollo, had bought a "stake" in the loan. The potential problem is that Apollo also holds $600 million in PG&E debt.

A BP Oil-Spill Settlement Gone Wrong (May 2020)
Published by The Atlantic
Summary: This article is about the Deepwater Horizon litigation. It focuses on a Texas lawyer, Mikal Watts, who embarked on a campaign to get cases by connecting with a South Texas lawyer named Eloy Guerra, who "made a living pitching potential mass torts to lawyers, as well as recruiting plaintiffs for the cases." The article describes "[a] strange industry [that] has grown up around mass torts, consisting of middlemen who bring potential suits to big-deal lawyers, contractors who do the legwork of finding clients, and investors who help pay the expenses in return for a portion of the award from any victory. This last element – a form of financing called third-party litigation funding – proliferated during the 2008 recession, in part because lawsuits are somewhat insulated from the vicissitudes of the market. Investors might spread their money across a portfolio of cases to limit their vulnerability to any single one or, as in the arrangements Watts and his partners put together, take a cut of the contingency fee for an individual matter. Third-party litigation funding levels the playing field for people who can't afford to sue on their own – and thus is a tool to help hold corporations accountable. But the imperative to keep investors happy can prompt decisions that have little to do with 'making whole' those who have been harmed."

How Funding Can Help Companies in a Representation & Warranties Insurance Battle (April 30, 2020)

Posted by Omni Bridgeway[1]

Summary: This article focuses on insurance claims based on violations of representations and warranties in corporate mergers and acquisitions. Rather than holding 10–15% of the proceeds in escrow for a year or two to cover such claims, parties often buy insurance instead. Claims on such insurance policies have increased (perhaps doubling in 2019). Omni Bridgeway offers TPLF to pursue such claims when insurers deny them. Among other things, it urges that "unlike a bank loan, funding is flexible, and can be used to fund litigation and in some circumstances may be used for any other purpose the company sees fit – including operational expenses associated with a merger."

How Courts are Shaping Disclosure of 3rd-Party MDL Funding (April 16, 2020)

Published by Law 360

Summary: Though the disclosure of litigation finance arrangements is predominantly discussed in the fact discovery context, it has also been discussed in the multidistrict litigation context. This article cites specific instances of the latter and discusses the role of TPLF in multidistrict litigation.

Law Firms Flock to Litigation Funders Amid COVID-19 Outbreak (April 9, 2020)

Published by the National Law Journal

Summary: This article discusses the effect of the Covid-19 pandemic on litigation funding. Allison Chock of Omni Bridgeway (formerly Bentham) says that collectability has heightened importance. There is no such thing, she says, as a "no-problems-in-collection type of defendant." "Omni Bridgeway is now considering the potential effects of COVID-19 on businesses and what public statements they may have made." It also expects that litigation will take longer to resolve because federal courts will face a backlog of cases. Other topics covered include increase in funding requires for insolvency and insurance cases, as well as the accessibility shift due to quarantine-related orders.

Insight: Litigation Financing Can Fill Gap During Economic Turmoil (April 2, 2020)

Published by Bloomberg Law News

Summary: This article is similar to the March 24, 2020 article (below). It offers more of a practical "toolbox," including specific tips on how firms can use TPLF to offset problems associated with now-likely lower profits than projected for 2020, whereas the March 24 article took a more theoretical approach to TPLF as a means of enhancing the "litigation hedge" of the countercyclical practice playbook. Because TPLF has emerged since the 2008 recession (according to both articles), this will be a new, "supercharged" way for law firms and their clients alike to weather the storm.

Court Delays May Grow Lawsuit Funders' Returns, or Spur Disputes (March 24, 2020)

Published by Bloomberg Law News

Summary: This article adds to the dialogue of the impact on TPLF of the advent of the coronavirus shutdown, including how court delays could benefit litigation funders. "Litigation funders

[1] IMF Bentham merged with Omni Bridgeway in November 2019, and now operates under the global name Omni Bridgeway.

make money when the cases they invest in are resolved. And they typically earn higher returns as cases drag on, which plenty will do as the coronavirus pandemic causes widespread court delays and closures."

Insight: Litigation Finance in a Down Economy Benefits Lawyers, Clients Alike (March 24, 2020)
Published by Bloomberg Law News
Summary: This appears to be a pitch from a funder. The argument is that TPLF is just the solution for the present economic downturn brought on by the pandemic. The author says that TPLF "has come into its own" since the Great Recession of 2008. TPLF can now help "supercharge" the litigation hedge that law firms rely on in down markets.

Insight: Five Qualities Litigation Funders Seek in a Bankable Lawyer (March 12, 2020)
Published by Bloomberg Law News
Summary: This piece illustrates how work product issues might take precedence in terms of disclosure or discovery of TPLF arrangements. A funder's dive into the firm and case's merits could include many things that would raise work product concerns. Note: the Chamber of Commerce proposal calls for disclosure of the litigation finance agreement, and that disclosure is likely to lead to further discovery requests. The latter may raise work product issues.

Analysis: Firm Lawyers Wary of Portfolio Litigation Financing (March 5, 2020)
Published by Bloomberg Law News
Summary: The results of a 2019 litigation finance industry survey indicate that lawyers interested in litigation funding strongly prefer single-case funding over portfolio funding. The same survey showed that lawyers reported "ethical implications" as their principal concern when considering litigation funding. Because single-case funding is often client-directed, this type of litigation finance arrangement allows lawyers to avoid fee-sharing concerns.

Three Firms Get Attorneys' Fees Trimmed for Misleading Court (March 2, 2020)
Published by Bloomberg Law News
Summary: This article is not about TPLF, but it raises the issue of a firm agreeing to pay a lawyer a "finder's fee" for referring a client. The judge's decision focuses in large part on the Private Securities Litigation Reform Act, as well as nondisclosures and misstatements in the firm's fee application. The Labaton firm agreed to pay a lawyer a "finder's fee" for referring a client. By analogy, a litigation finance agreement could be subject to similar infirmities.

NY City Bar Group Backs Change to Aid Litigation Finance (March 2, 2020)
Published by Bloomberg Law News
Summary: A 2018 NYCBA Opinon (below) speculated that litigation finance could violate rules prohibiting fee sharing with non-lawyers. This article suggests that this opinion did not have as dramatic an impact on the litigation finance industry some had feared. It did not, for example, stamp out litigation funding in New York, a hub for the industry, or lead to disciplinary actions against lawyers.

New York City Bar Report – Working Group on Litigation Funding (February 28, 2020)
Released by the New York City Bar Association

Summary: This report, in addition to offering a historical overview of the TPLF industry and professional responsibility rule proposals, addresses disclosure issues in different types of cases and across jurisdictions. The disclosure section of the report will likely be most relevant to the advisory committee in crafting a potential rule. The working group's recommendation is to regard certain forms of litigation finance as acceptable under the rules of professional responsibility.

IMF Bentham and Bentham IMF to Become Omni Bridgeway (February 26, 2020)
Posted by Bentham IMF
Summary: This is the official announcement of the merger/rebranding of some of the largest global players in TPLF.

Decision Alert: Canadian Supreme Court Approves LFA in Insolvency Matter (February 26, 2020)
Posted by Bentham IMF
Summary: This raises a narrow but important topic: funding for petitioners in bankruptcy court whose main or sole asset is a claim for which they seek funding from a funder. The press release says that this decision "adds to the growing body of law pertaining to litigation funding in the international insolvency context." The high court of Canada upheld the bankruptcy court's approval of such a funding arrangement. Disclosure issues may not be implicated because the debtor likely must go to the court and disclose to get this approval.

Insight: Access to Justice Benefits from "Lawyer-Directed" Litigation Finance (February 25, 2020)
Published by Bloomberg Law News
Summary: This article discusses the dichotomy of lawyer-directed vs. client-directed financing arrangements. One basic problem is that a plaintiff may be indebted to a number of individuals or entities who would ordinarily stand ahead of the litigation funder in getting a share of proceeds of the litigation. The article focuses more on "commercial" litigation, with a business as the plaintiff. However, it's likely that "consumer" plaintiffs (i.e., personal injury plaintiffs) might present a similar profile if they have significant credit card or other debt. An alternative solution is to make a deal instead with the lawyer, who has a legally-recognized priority.

Insight: Litigation Financing - How to Get to "Yes" After Hearing "No" (February 14, 2020)
Published by Bloomberg Law News
Summary: A Burford Capital officer offers suggestions to those seeking litigation funding. In particular, she recommends a prospective client provide: (1) a substantive memo of the claims, including a comprehensive explanation of how the law firm counsel plans to tackle any legal hurdles that may arise; (2) a thoughtful and supported early-stage estimate of damages; and (3) a detailed budget for counsel's fees and costs, keyed to the stages of the litigation. What of this content is work product, and what is not relevant under Civil Rule 26(b)(1)? She also notes that the lowest level of funding request Burford will undertake is $2 million, but that the majority of Burford's investments range between $4 million and $10 million.

What Lawyers Can Learn from Burford's Financial Results (February 6, 2020)
Published by Bloomberg Law News
Summary: This article bears on the financial trajectory of the TPLF industry. Burford stock and 2019 profits dropped. Burford attributed the profit dip to bad timing.

Post-Settlement Litigation Funding by California Attorney Lending (February 5, 2020)
Received from CAL
Summary: California Attorney Lending, a litigation funding group, has advertised its post-settlement funding services. At the time, CAL's policy was that it would only get involved after entry of an initial judgment, and only if the judgment is over $500,000. Importantly, the post-settlement funding is non-recourse. It also has advertised itself as the "nation's largest attorney funding for plaintiffs' lawyers."

Litigation Funders Call on Big Law to Collect Global Judgments (January 31, 2020)
Published by Bloomberg Law News
Summary: Litigation funders can face challenges in extracting payments internationally. Third-party litigation funding is popular in international arbitration, and funders are particularly attracted to investor-state arbitration awards.

How a Conservative Legal Scholar Came to Embrace Litigation Finance (January 29, 2020)
Posted by Bentham IMF
Summary: Professor Fitzpatrick, promoting his new book, "The Conservative Case for Class Actions," puts forth an argument for class actions from a self-described conservative law and economics perspective. In his view, "class actions offer a market-solution to solve inequities in the court system." Leading up to this article, Professor Fitzpatrick participated in a podcast episode with Bentham IMF counsel.

Continental Circuits LLC v. Intel Corp., 435 F. Supp. 3d 1014 (D. Ariz. 2020) (January 27, 2020)
Decided by D. Ariz. (J. Campbell)
Summary: One pertinent issue is in this case is whether TPLF agreements are protected work product, an issue that lies in the background if the advisory committee pursues sort of disclosure rule. Another is whether TPLF agreements are relevant. "Litigation funding agreements in a case such as this [patent infringement] likely contain financial information related to the value of the litigation, and therefore to the value of the allegedly infringed patents, that will not be included in, or may contradict, the expert's report." *Id.* at 1019.

Insight: Litigation Funding Success Breeds New Set of Ethical Issues (January 13, 2020)
Published by Bloomberg Law News
Summary: The success and growth of litigation funding has bred new risks and a new set of ethical issues. The oversupply of investor money and limited number of meritorious lawsuits will inevitably result in litigation funders investing in riskier cases on leaner terms. This may disincentivize lawyers from more closely analyzing the merits of cases, and may encourage scorched-earth, expensive litigation.

NFL Concussion Lawyer's Bid to End Funder Suit Roundly Rejected (January 13, 2020)
Published by Bloomberg Law News
Summary: A litigation funder sued a lawyer for misrepresenting the medical diagnoses of his clients (NFL players) and thus giving an inaccurate picture of the likelihood of compensation via a concussion suit settlement. The Securities and Exchange Commission also sued the lawyer for defrauding the NFL players who invested in the lawyer's advisory firm.

Awash in Cash, Litigation Funders Eager to Strike Deals (November 19, 2019)
Published by Law360
Summary: A survey revealed a large disparity between the amount of money under management by litigation funders and the actual cash committed to ongoing litigation. This oversupply of capital and growing competition for "investment-grade" cases, funders face pressure to make deals and perhaps invest in riskier cases.

Using Litigation Funding to Level the Playing Field Against Insurers (April 2, 2019)
Published by Policy Holder Pulse (Pillsbury Winthrop Shaw Pittman blog)
Summary: This article argues that litigation funding can be used by insurance policyholders to counteract insurer's incentives to drag out litigation and delay paying claims. The author notes a few downsides: litigation funding may not be cost-effective; communications with funders may be discoverable; and the policyholder and the funder may have divergent interest and the policyholder could lose control of litigation strategy if he or she is not careful.

INSIGHT: Sensible Disclosure Rule for Litigation Finance Is Right Balance (March 15, 2019)
Published by Bloomberg Law
Summary: This article advocates for disclosure rules proposed by Michael German, a managing director at Vannin Capital who had made his proposal in the New York Law Journal shortly before this article was published. German argued that all litigants, whether plaintiffs or defendants, should be required to disclose the fact that they have engaged a professional litigation funder and the identity of that funder, but no additional information about the arrangement. According to this article this would "address all of the legitimate issues being raised regarding funding," forcing litigants to "take adequate inventory of their relative strengths and weaknesses on the merits of the case" and leveling the playing field. The author argues against the more extensive disclosures that the Litigation Funding Transparency Act of 2019 would have required on the grounds that disclosing too much information would unduly advantage defendants.

Litigation Finance 201: Risks and Controversies (February 26, 2019)
Litigation Finance 101 (February 19, 2019)
Published by Millionaire Doc (Blog)
Summary: These blog posts are aimed at introducing individual investors to the concept of litigation finance and to explaining how they might get in on the action should they be interested in doing so. The earlier of the two explains the basics of what litigation finance is. Among other things it describes three primary litigation finance products available to investors: (1) Lawsuit advances for tort plaintiffs; (2) Litigation Finance for Commercial Claims; and (3) Litigation Finance for Contingency Law Firms. It also provides details about the platforms that investors can use to invest in these products. The second post explains the risk to investors and some of the criticisms of the litigation finance industry including the possibility of increasing frivolous lawsuits, high costs of advances that amount to predator lending, and disputes about disclosure.

Senators Move to Shine a Light on the Litigation Funding Industry (February 13, 2019)
Published by U.S. Chamber Institute for Legal Reform

Summary: This article—perhaps better described as a press release—by the president of the U.S. Chamber Institute for Legal Reform (ILR) notes that a group of four Republican Senators reintroduced the Litigation Funding Transparency Act. The Chamber ILR strongly supports the disclosure provisions in the proposed bill, and the article explains that the Chamber "has long warned that third-party funding is a practice that threatens to undermine justice in our courts."

Legal Funding: A Cash Flow Solution for Plaintiffs and Attorneys (February 7, 2019)

Published by Forbes CommunityVoice

Summary: This article is a fairly broad introduction to the concept of litigation finance directed, in theory, at plaintiffs or attorneys, but it's really not very detailed.

General Counsel Push for Full Disclosure of Third-Party Litigation Funding in New Letter (January 31, 2019)

Published by The Recorder, Republished by Texans for Lawsuit Reform

Summary: This article notes a letter signed by in-house counsel from 30 major U.S. corporations which supported a proposed amendment to F.R.C.P. 26(a)(1)(A) that would require full disclosure of any third-party funding agreements in civil actions. The letter was signed by officers and general counsel from, among others, Google, Verizon, AT&T, Microsoft, and Shell Oil. The letter backed an earlier petition from 30 trade associations including the Chamber of Commerce.

Ethical Issues Arising in Litigation Funding (January 23, 2019)

Published by JD Supra (blog)

Summary: This blog post notes ongoing efforts to require litigation funding disclosures. It also notes a District of Delaware case from early 2018—*Acceleration Bay v. Activision Blizzard*—which was the first federal case to require a plaintiff to disclose communications with a third-party funder. This broke with previous cases that had treated such communications as privileged.

Courts Are Getting it Right on Litigation Funding Discovery (January 22, 2019)

Published by Law360 (paywalled)

Summary: This article identifies a trend of federal cases rejecting discovery into funding arrangements in cases where the party seeking discovery is not able to establish a connection between the funding arrangement and the merits of a claim or defense: *MLC Intellectual Property LLC v. Micron Technology, Inc.*, No. 14-cv-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 723-24 (N.D. Ill. 2014). These include a decision in the Northern District of Ohio's multidistrict litigation concerning the opioid epidemic. *In re National Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807 (N.D. Oh. May 7, 2018). In that decision, Judge Polster required that any litigation financing agreements be submitted for *in camera* review.

A Strategic Look at Champerty and Third-Party Litigation Financing (January 17, 2019)

Published by JD Supra (blog)

Summary: This blog post introduces the doctrine of champerty, which "prohibits outside parties from funding litigation in certain cases to which they are not a party." The doctrine is recognized in states including Alabama, Delaware, Georgia, Minnesota, Mississippi, New York, and

Pennsylvania. The post then describes some recent decisions from Delaware and New York Courts. *Charge Injection Techs., Inc. v. E.I. DuPont de Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400 (Del. Super. Ct. Mar. 9, 2016) (holding that a litigation funding agreement in a patent suit was not a champertous assignment because the funder did not encourage or control pursuit of the litigation); *Justinian Capital SPC v. WestLB AG*, 28 N.Y. 3d 160 (N.Y. 2016) (finding an agreement champertous where a plaintiff acquired securities for the sole purpose of bringing a lawsuit).

What's Happening with Litigation Funding? (January 22, 2019)

Published by Legal Executive Institute

Summary: This article notes increased competition in the litigation funding area, and also describes some developments. Among these, funding providers have shifted away from funding individual cases and toward funding portfolios of plaintiff litigation in order to minimize risk. The article also describes the potential benefits of litigation funding for law firms and concludes by noting the usual potential ethical issues involved.

Is Litigation Funding Legal? (December 27, 2018)

Published by JD Supra (blog)

Summary: This very short blog post noted that the legality of litigation finance agreements depends on the jurisdiction. Some states following the doctrine of champerty prohibit third party litigation financing. Texas has never recognized it, Ohio has regulated litigation financing by legislation. Litigation finance agreements have been invalidated in Kentucky and Pennsylvania.

2018 Litigation Funding Year in Review (December 13, 2018)

Published by Omni Bridgeway

Summary: This article reviews 2018, which it deems to have been a good year for litigation finance. It collects a number of 2018 cases in which courts rejected attempts to invalidate funding agreements or to protect them from discovery. These come from the Third Circuit, Ninth Circuit, W.D. Pa., N.D. Cal., N.D. Ohio, and New York Supreme Court. The authors predicted "continued momentum in the courts toward acceptance and enforcement of litigation funding agreements" in 2019 and an increase in champerty arguments from defendants.

Time for Sunshine on 3rd-Party Litigation Funding (July 23, 2018)

Published by Law360

Summary: This article a fairly straightforward introduction to the concept of litigation funding, in favor of increased disclosure, pegged to Wisconsin's legislative enactments requiring disclosure of funding agreements. The author notes that a court that is aware of any arrangements the parties have made for litigation funding will be better able to administer discovery under Rule 26(b)(1) and better able to shift discovery burdens appropriately. The author argues that the most important thing is that clear and uniform rules be established.

Third-Party Litigation Financing 101 (2019 (undated))

Published by Texans for Lawsuit Reform

Summary: This is a very short introduction to the concept of third-party litigation financing. Texans for Lawsuit Reform does not take a particularly strong stand one way or the other in this short post, but seems to be generally in favor of these arrangements. The authors argue that "[w]e should not allow a person's economic status to cut off their right to the courts" and also that "you . . . shouldn't have to sign away part of your settlement in order to afford to pursue your dispute in the first place."

Third Party Litigation Funding: Civil Justice and the Need for Transparency (January 3, 2019)
Published by Center for Law and Public Policy
Summary: This is a detailed and well-researched report, around 35 pages in length, from the DRI Center for Law and Public Policy Third Party Litigation Funding Working Group. DRI proposes that uniform disclosure of litigation funding agreements and, when appropriate, discovery of additional communications would facilitate fairness by curbing some of the litigation funding industry's less-reputable practices. DRI argues that disclosures should be required in all cases, not just class actions and MDL.

Third Party Litigation Funding Law Review (2018)
Published by Law Business Research Ltd
Summary: This is a law review–style publication which comprises nineteen chapters covering different countries. The chapter on the United States notes that the most recent major developments are funders "moving on from funding a discrete claim to repositioning themselves as 'financiers', investing in portfolios of claims" and an increase in funding for defendants as well as plaintiffs. For defendants, funders can indemnify against large judgments or can set benchmarks that create contingency-style incentives for defense lawyers.

Calls for Transparency Loom over Increase in Litigation Funding (October 11, 2018)
Published by American Bar Association (paywalled)
Summary: This paywalled article—which the author of this summary cannot access the entirety of—reports on a Wisconsin law requiring disclosure of litigation funding agreements, hailing it as "a groundbreaking move towards disclosure of outside litigation funding arrangements."

New Ethics Opinion on Litigation Funding Gets It Wrong (Archived Here) (August 31, 2018)
Published by New York Law Journal (Online)
Summary: An attorney and professor analyze and critique the New York City Bar ethics committee's Formal Opinion 2018-5, which determined that lawyer-funder arrangements are impermissible under the New York Rule of Professional Conduct 5.4 proscription on fee-sharing.

Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees (July 30, 2018)
Issued by New York City Bar Association
Summary: Opinion regarding permissibility of a lawyer entering into a financing agreement with a non-lawyer litigation funder, under with the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters. The Opinion concluded that such arrangements are impermissible under Rule 5.4(a) of the New York Rules of Professional Conduct.

Reform of Litigation Funding and Implications for Life Sciences Companies (November 1, 2011)
Published by Thomson Reuters Practical Law
Summary: This article covers proposed reforms to litigation funding regulation in England and Wales.