ADVISORY COMMITTEE
ON
CIVIL RULES

March 29, 2022

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Meeting of the Advisory Committee on Civil Rules
March 29, 2022

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David J. Burman	ESQ	Washington		2021	2023
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Kent A. Jordan	C	Third Circuit		2018	2024
Thomas R. Lee	JUST	Utah		2018	2024
Sara Lioi	D	Ohio (Northern)		2016	2022
R. David Proctor	D	Alabama (Northern)		2021	2024
Robin L. Rosenberg	D	Florida (Southern)		2018	2024
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A. Benjamin Spencer	ACAD	Virginia		2017	2023
Ariana J. Tadler	ESQ	New York		2017	2023
Helen E. Witt	ESQ	Illinois		2018	2024
Edward H. Cooper Reporter	ACAD	Michigan		1992	Open
Richard Marcus Associate Reporter	ACAD	California		1996	Open

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TAB 1

MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
January 4, 2022

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) met by videoconference on January 4, 2022. The following members were in attendance:

Judge John D. Bates, Chair
Elizabeth J. Cabraser, Esq.
Judge Jesse M. Furman
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Judge Carolyn B. Kuhl
Professor Troy A. McKenzie
Judge Patricia A. Millett
Hon. Lisa O. Monaco, Esq.*
Judge Gene E.K. Pratter
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

Professor Catherine T. Struve attended as reporter to the Standing Committee.

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 B. 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 Standing Committee included: Professors Daniel R. Coquillette, Bryan A. Garner, and Joseph Kimble, consultants to the Standing Committee; Bridget Healy, Rules Committee Staff Acting Chief Counsel; Julie Wilson and Scott Myers, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff; Burton S. DeWitt, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal

* Prior to the lunch break, 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. Deputy Attorney General Monaco represented DOJ after the lunch break. Andrew Goldsmith was also present on behalf of the DOJ.

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Judicial Center (FJC); Emery G. Lee, Senior Research Associate at the FJC; and Dr. Tim Reagan, Senior Research Associate at the FJC.

OPENING BUSINESS

Judge Bates called the virtual meeting to order and welcomed everyone. He welcomed new Standing Committee members Elizabeth Cabraser and Professor Troy McKenzie. He also noted that Deputy Attorney General Lisa O. Monaco would attend the afternoon session of the meeting and thanked the other Department of Justice (DOJ) representatives for joining. In addition, Judge Bates thanked the members of the public who were in attendance for their interest in the rulemaking process.

Judge Bates next acknowledged Julie Wilson, who would be leaving the Administrative Office of the U.S. Courts (AO) at the end of January. Judge Bates thanked Ms. Wilson for her years of tremendous service to the rules committees. Professor Struve seconded Judge Bates's sentiments on behalf of the reporters. The reporters and Advisory Committee Chairs expanded on these thanks at later points during the meeting.

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved the minutes of the June 22, 2021 meeting.**

Bridget Healy 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 56 of the agenda book. The chart lists rule amendments that went into effect on December 1, 2021. It sets out proposed amendments and proposed new rules that were recently approved by the Judicial Conference. Those proposed amendments and new rules were transmitted to the Supreme Court and will go into effect on December 1, 2022, provided they are adopted by the Supreme Court and Congress takes no action to the contrary. The chart also includes proposed amendments and new rules that are at earlier stages of the REA process.

Judge Bates noted that some public comments had been received on proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), and that he expected more comments to be received by the close of the public comment period in February. These comments will be reviewed and discussed by the relevant Advisory Committees at their spring meetings.

JOINT COMMITTEE BUSINESS

Electronic Filing by Self-Represented Litigants

Judge Bates introduced this agenda item, which concerns the Advisory Committees' consideration of several suggestions regarding electronic filing by "pro se" (or self-represented) litigants. Noting that he had asked Professor Struve to convene the committee reporters in order to

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coordinate their consideration of those suggestions, he invited Professor Struve to provide an update on those discussions.

Professor Struve thanked the commenters whose suggestions had brought this item back onto the rules committees' docket. She stated that at the group's first virtual meeting (in December 2021), the Advisory Committee reporters and researchers from the FJC had discussed how to formulate a research agenda on this topic. The goal is to share ideas on research questions, even though the four Advisory Committees in question may not necessarily reach identical views or formulate identical proposals for rule amendments.

Judge Bates highlighted the fact that the FJC researchers were being asked to devote time to this project and asked the Standing Committee if any members had any comments or concerns with utilizing the FJC's assistance. No members expressed any concern. Judge Bates also thanked Judge Kuhl for a thoughtful suggestion concerning terminology. Judge Kuhl reported that the state courts see a very high number of self-represented litigants, and that the courts are trying to phase out the use of Latin phrases (such as "pro se") that can be harder for lay people to understand. Judge Bates observed that the Advisory Committee chairs and reporters would take this point into account.

Juneteenth National Independence Day

Judge Bates introduced this agenda item, which concerns the proposal to amend the rules' definition of "legal holiday" to explicitly list Juneteenth National Independence Day. He noted that three of the four relevant Advisory Committees had already approved proposed amendments to add the new holiday to the list of legal holidays in their respective time-computation rules, and that the fourth Advisory Committee expects to do so at its spring 2022 meeting. Those proposals will come to the Standing Committee for consideration at its June 2022 meeting and will likely constitute technical amendments that can be forwarded for final approval without publication and comment.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met via videoconference on October 7, 2021. The Advisory Committee presented an action item along with multiple information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 100.

Action Item

Publication of Proposed Amendment to Rules 35 and 40, and Conforming Amendments to Rule 32 and the Appendix of Length Limits. In this action item, the Advisory Committee sought approval for publication of a package of proposed amendments that would consolidate the contents of Rule 35 into Rule 40 and that would make conforming changes to Rule 32 and to the Appendix of Length Limits. Judge Bybee explained that the Advisory Committee had been considering comprehensive amendments to Rules 35 and 40 for some time. Rule 35 addresses hearings and rehearings en banc, and Rule 40 addresses panel rehearings. The proposed amendments would

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transfer to Rule 40 the contents of Rule 35 so that the provisions regarding panel rehearing and en banc hearing or rehearing could be found in a single rule, Rule 40. Judge Bybee stated that as a result of discussion at the last Standing Committee meeting, the Advisory Committee acted with a freer hand to revise Rule 40 to clarify and simplify the rule. The result is a more linear rule that was unanimously approved by the Advisory Committee. Judge Bybee thanked the style consultants for their work on the proposed amended rule.

Judge Bates asked about the order of the subparts in Rule 40(b)(2). When listing potential reasons for rehearing en banc, would it not make more sense to list, first, instances when the panel decision conflicts with a decision of the Supreme Court, and then, instances when the decision creates a conflict within the circuit, and finally, instances when the decision creates a conflict with another court? Judge Bybee stated that the Advisory Committee considered the order when drafting the rule. The main reason behind the proposed structure is that an initial consideration for a court of appeals is to maintain consistency within its own docket. Hence, the Advisory Committee chose to list intra-circuit inconsistencies first (in 40(b)(2)(A)). Professor Hartnett agreed with Judge Bybee and added that subparagraph 40(b)(2)(A) is different because it addresses a situation that does not provide grounds for the Supreme Court to grant certiorari.

Judge Bates turned the discussion to proposed amended Rule 40(d)(1), which sets the presumptive deadline for filing a rehearing petition but provides for the alteration of that deadline "by order or local rule." He asked whether any circuits have local rules that alter that deadline and he questioned whether such local rulemaking was desirable. Professor Hartnett stated that this feature was carried over from current Rules 35(c) and 40(a)(1). A judge member noted that the 14-day limit to file a petition for rehearing is short, particularly for pro se prisoner litigants. In her circuit, there is a local rule that sets the limit at 21 days. This member recommended against precluding circuits from affording litigants a longer period by local rule.

A practitioner member asked whether the proposed Rule 40(g) should say "[t]he provisions of Rule 40(b)(2)(D) . . ." instead of just "[t]he provisions of Rule 40(b)(2)." As written, Rule 40(b)(2)(A)-(C) all refer to "the panel decision," which would be inapplicable in a petition for initial hearing en banc. Judge Bybee agreed that the wording of Rule 40(b)(2)(A) would not apply literally to a request for initial hearing en banc, but the intent of the Advisory Committee was to allow for an initial hearing en banc when there is an intra-circuit inconsistency. Judge Bybee noted that in his circuit, initial hearings en banc sometimes occur sua sponte when a panel notices two inconsistent opinions of the circuit and refers the inconsistency to the en banc court. The practitioner member agreed that it makes sense to be inclusive if there is a concern about intra-circuit conflict.

The practitioner member asked about Rule 40(b)(2)(C)'s use of the phrase "authoritative decision" when discussing a panel decision's conflict with a decision from another circuit. This phrase is not used elsewhere in the rule. Judge Bybee responded that this phrasing would rule out rehearing requests based on conflicts with unpublished decisions from other circuits. Professor Hartnett agreed that this provision was designed to exclude petitions asserting conflicts merely with unpublished (i.e., nonprecedential) opinions from other circuits. In response to a follow-up question, Judge Bybee acknowledged that the omission of "authoritative" from Rule 40(b)(2)(A) means that that provision can extend to intra-circuit splits involving unpublished decisions.

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The same practitioner member pointed out that Rule 40(d)(5) bars oral argument on whether to grant a rehearing petition and asked whether this prohibition should be revised to allow for local rules or orders to the contrary. In his recent experience, a circuit had ordered argument on whether to grant a petition for rehearing – and subsequently issued a decision that both granted the petition for rehearing and reached a different outcome on the merits. Such a process can be useful, this member said, so why remove this flexibility? Judge Bybee explained that the rule is drafted to discourage requests for argument on whether to grant rehearing. Professor Hartnett added that, under Rule 2, the court has authority to suspend the prohibition on oral arguments by order in a case. Based on these responses, the practitioner member stated that he did not see a need to revise proposed Rule 40(d)(5).

A judge member asked a pair of drafting questions. First, he asked why the proposed new title for Rule 40 ("Rehearing; En Banc Determination") used the word "determination." Professor Hartnett explained that "en banc determination" was selected to encompass an initial hearing en banc, which would not be a "rehearing." Second, the judge member noted that the timing provision in current Rule 35(c) says "must be filed" but the timing provision in current Rule 40(a)(1) says "may be filed." He asked why proposed Rule 40(d)(1) used "may be filed" (on lines 105 and 112 of the draft at page 128 of the agenda book). Professor Hartnett responded that one possible reason was to avoid the use of a word ("must") that might lead lay readers to think that the rule was requiring the filing of a rehearing petition. A judge member agreed that pro se litigants might misread "must" as a requirement that they file a petition for a rehearing even if they do not desire a rehearing, while "may" clarifies that they can file a petition, and if they do so, they must do so within fourteen days. The Standing Committee, along with Judge Bybee, Professor Hartnett, and the style consultants, discussed the competing virtues of "may" and "must," as well as a suggestion from the style consultants to change to "any petition … must" (at lines 103-05) rather than "a petition … must." As a result of the discussion, Judge Bybee and Professor Hartnett agreed to change "a" to "any" in line 103 and "may" to "must" in line 105. As to the use of "may" in line 112, further discussion noted that keeping this as "may" would parallel the use of "must" and "may" in, respectively, Rules 4(a)(1)(A) and 4(a)(1)(B). Ultimately the decision was made to retain "may" at line 112.

A practitioner member suggested that the wording of proposed Rule 40(c) seemed (in comparison to the current rule) to liberalize the standard for granting rehearing en banc. New Rule 40(c) says it "[o]rdinarily … will be ordered only if" a specified condition is met, whereas current Rule 35(a) says that it "is not favored and ordinarily will not be ordered unless" a specified condition is met. Saying "will not be ordered unless" would help emphasize that en banc rehearing is not preferred. Relatedly, the same member noted that the phrase "rehearing en banc is not favored" had been moved to proposed Rule 40(a), and he suggested that phrase should appear in Rule 40(c). Professor Hartnett stated that the first of the member's points was a style issue on which the Advisory Committee had deferred to the style consultants. As to the second point, Professor Hartnett explained that the Advisory Committee had moved "rehearing en banc is not favored" up to Rule 40(a) for emphasis. He recalled that an earlier draft may have featured that phrase in both Rule 40(a) and Rule 40(c), and he suggested that the Advisory Committee would prefer to include the phrase in both subparts (even if redundant) rather than simply moving it to Rule 40(c). Judge Bybee agreed with Professor Hartnett but noted he had no objection to including

"rehearing en banc is not favored" in both Rule 40(a) and Rule 40(c). A judge member who had participated in the Advisory Committee discussions voiced support for including the phrase in both places. In response to the practitioner member's first point, Professor Garner suggested changing "ordered" to "allowed" in line 98 ("[o]rdinarily … will be allowed only if"). Such a change would recognize that the court has discretion, but is not required, to order an en banc rehearing if one of the four criteria is met.

A judge member thanked the Advisory Committee and thought the proposed amended rule is more user friendly and clearer. She suggested that reinserting the word "panel" in the title would clarify the rule, particularly for self-represented litigants. Professor Hartnett and Judge Bybee agreed with the suggestion to add "panel" back into the title. Judge Bates voiced his support for adding the word "panel" back into the title as well; he observed that might assist users of the table of contents.

A judge member, stating that adverbs are over-used, questioned the use of "ordinarily" in the phrase about when rehearing en banc will be ordered; this member expressed a preference for "may be allowed." A different judge member disagreed and thought the word "ordinarily" should be retained. In rare cases the court may want to grant rehearing en banc even though none of the stated criteria are met. A practitioner member concurred in the latter view and said that "ordinarily" usefully preserves the court's discretion both in Rule 40(c) and in proposed Rule 40(d)(4), which provides that the court "ordinarily" will not grant rehearing without ordering a response to the petition. Judge Bates agreed that "ordinarily" should be retained.

After further discussion, Judge Bybee requested approval for publication of the proposed transfer of Rule 35's contents to Rule 40, the proposed amendments to Rule 40, and the proposed conforming amendments to Rule 32 and the Appendix of Length Limits. The rule amendments being voted on would include the following changes to Rule 40 compared with the version shown at pages 122-132 in the agenda book: (1) insertion of "Panel" in the title; (2) correction of typographical errors on lines 77, 85, and 86; (3) on lines 97-98, replacing "Ordinarily, rehearing en banc will be ordered" with "Rehearing en banc is not favored and ordinarily will be allowed;" (4) on line 103, changing "a" to "any," and (5) on line 105, changing "may" to "must"

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendments to Rules 35 and 40, with the changes as noted above, and conforming amendments to Rule 32 and the Appendix of Length Limits.**

Information Items

Amicus Disclosures. Judge Bybee invited Professor Hartnett to introduce the information item concerning potential amendments to Rule 29's disclosure requirements. Professor Hartnett underscored the Advisory Committee's interest in obtaining the Standing Committee's feedback on this topic. The Advisory Committee began a review of Rule 29 in 2019 following the introduction in both houses of Congress of the Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act). In 2021, Senator Sheldon Whitehouse and Representative

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Henry C. "Hank" Johnson, Jr. requested that the Advisory Committee review Rule 29's disclosure requirements for organizations that file amicus briefs.

Professor Hartnett explained that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. Countervailing concerns include First Amendment rights of persons who do not wish to reveal their identity.

Professor Hartnett stated that there are many approaches the Advisory Committee could take in amending Rule 29, depending on how these various issues are resolved. One approach is that the Advisory Committee could move forward with minimal amendments such as adding "drafting" to the current rule's disclosure requirement concerning persons that "contributed money that was intended to fund preparing or submitting the brief" – to foreclose the contention that this disclosure requirement only reaches funding for the costs of printing and filing a brief.

He advised that a more extensive revision to Rule 29 is possible, and he noted three issues that the Advisory Committee is reviewing. First, Rule 29 could be amended to address contributions beyond funds earmarked for a particular brief. However, if the Advisory Committee goes down this road, it raises the question of the contribution threshold that would trigger disclosure requirements. The sketch of a potential rule on page 106 of the agenda book would trigger disclosure if a party (or its counsel) contributed at least 10 percent of the amicus's gross annual revenue. That 10 percent trigger is borrowed from Rule 26.1, which deals with corporate disclosures. The purposes of the two rules are different, but the 10 percent number provides a starting point for the discussion.

Professor Hartnett noted that a second issue is whether any increased disclosure requirements should apply only to relationships between the parties and an amicus, or whether such increased requirements should also encompass disclosures relating to the relationship between non-parties and an amicus. Finally, he stated that the Advisory Committee is also looking at the issue of whether to retain the current rule's exemption from disclosure for nonparty members of an amicus. An exclusion avoids some of the constitutional issues regarding membership lists, but if any disclosure requirement excludes members, it would make it easy to avoid disclosure by converting contributions into membership fees.

Judge Bates noted that this is a particularly important and sensitive subject, and specifically so because it comes through the Supreme Court to the Advisory Committee. Judge Bates asked if members had any comments or suggestions.

A practitioner member stated that the three issues Professor Hartnett noted are important to consider, and the Advisory Committee should try to find middle ground. A broader amendment, particularly with respect to disclosure regarding non-parties, may not be successful.

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A judge member believed the Advisory Committee was asking the right questions and was right on point with its conclusions. Another judge member agreed that the Advisory Committee was heading in the right direction. As a judge, he would rather know who was behind a brief, though he noted that the importance of that question does get greatly overstated. He suggested that seeking the "middle ground" might prove to be quite a challenge because actors might structure their transactions to evade the disclosure requirement.

A practitioner member thought the middle ground route would be preferable. The member also noted that there is an uptick in the motions to file amicus briefs in district courts now, particularly in multi-district litigation and other complex litigation, and the district courts have less experience in dealing with amicus filings. Judge Bates noted the absence of any national rule governing amicus filings in the district court and observed that this may be a matter for other Advisory Committees and the Standing Committee to consider in the future. A judge member suggested that it is important for the Civil Rules to address amicus filings in the district courts, particularly to deal with the possibility that an amicus might file a brief for the purpose of triggering a recusal. (Discussion of amicus filings in the district court recurred later in the meeting, during the Civil Rules Advisory Committee's presentation, as noted below.) Another judge member suggested that it would be helpful to know more about the AMICUS Act's prospects of enactment.

A practitioner member noted that amicus filings often face a time crunch and increasing the disclosure requirements risks dissuading amici from undertaking the effort. For an organization with many members – such as a banking association – detailed disclosures could be burdensome.

A judge member suggested that one approach might be to adopt a rule that invites voluntary disclosures – that is, an amicus would either identify its principal members and funders or state that it is choosing not to disclose. This voluntary standard avoids constitutional issues while also allowing parties to disclose the information.

A judge member stated she liked the 10 percent rule. It is a significant trigger for recusal concerns, and it is already in use in the corporate disclosure requirements. Moreover, if the disclosure would require a judge to either recuse herself or to deny leave to file an amicus brief, it seems very "head-in-the-sand" to not require that disclosure.

A practitioner member stressed the importance of the distinction between parties and non-parties. As to parties, he observed that it is very easy to see the concern about a party using an amicus filing as an additional opportunity to make an argument. However, in practice there is a lot of coordination between amici and parties. Parties seek out potential amici whose voices they would like to get before the court. Though it is important to enforce the rule's current requirements, practical experience illustrates the limits of what can be done by rulemaking. As to non-parties, it would be useful for the court to know if there is a dominant, hidden figure lurking behind an amicus. But if the rule were to go beyond that level of detail, one would have to ask what problem the rule is trying to solve. If the court has never heard of the amicus, the court can simply assess the amicus brief on its own merits.

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Judge Bybee thanked the Standing Committee members for their comments and stated that he would relay them to the Advisory Committee.

Judge Bates asked for comments on the other information items outlined in the Advisory Committee's report in the agenda book. There were no further comments.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Advisory Committee on Evidence Rules, which last met in Washington, DC on November 5, 2021. The Advisory Committee's report presented multiple information items but no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 302.

Information Items

Rules Published for Public Comment in August 2021. Judge Schiltz reminded the Standing Committee that proposed amendments to Rules 106, 615, and 702 had been published for public comment in August 2021. The proposed amendments to Rule 702, which clarify the court's gatekeeping role for admitting expert testimony, will be controversial. The Advisory Committee has received a number of comments on that proposal and expects to hear testimony on it at its upcoming January 2022 hearing. Judge Schiltz stated that courts have frequently misconstrued Rule 702 requirements as going only to the weight, and not the admissibility, of the expert's testimony; those judges will admit the testimony if they think that a reasonable juror could conclude that the requirements are met. The proposed amendments to the rule emphasize that the court must determine that the reliability-based requirements for expert testimony are established by a preponderance of the evidence, and that the trial court must evaluate whether the expert's conclusion is properly derived from the basis and methodology that the expert has employed. The latter aspect of the proposal is designed to address the problem of overstatement by experts.

Judge Schiltz provided some detail concerning the comments received regarding Rule 702. He explained that there is some opposition, particularly from members of the plaintiffs' bar, to the concept of amending the rule. Judge Schiltz said that the Advisory Committee is unlikely to accept this point of view, because it believes that Rule 702 needs clarification. Courts frequently issue decisions interpreting Rule 702 incorrectly. Conversely, comments from the defense bar say that the Advisory Committee has not done enough to clarify the rule, and that the committee note should be more explicit that certain decisions are wrong and are rejected. The Advisory Committee does not think specifically singling out incorrect decisions in the committee note is the correct approach.

When discussing a draft of the proposed amendments, some Advisory Committee members had expressed concern that under the proposal as then formulated ("if the court finds"), some judges might think they need to make formal findings on the record that all the requirements of the rule are met, even if no party objects to the expert testimony. To address this concern, the proposed amendment as published for comment instead uses the phrase "if the proponent has demonstrated." A number of commentators have objected to this change. These comments note

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that the very problem the amendment is designed to fix is that often the judge delegates this responsibility to jurors when it should be the judge who determines whether the requirements are met. According to these commentators, because this language does not say who needs to make the determination, it does not in fact provide the clarification that the amended rule is intended to convey. Judge Schiltz asked whether the Standing Committee had comments on the proposed amendments to Rule 702 for the Advisory Committee's consideration at its next meeting.

A practitioner member noted that in mass tort litigation, there are complaints among defense lawyers that courts do not sufficiently screen expert testimony, choosing instead to say that objections go to weight, not admissibility. There are limits to how much can be done to legislate this issue, so the member agrees with the Advisory Committee's decision not to specifically criticize incorrect decisions in the committee note. However, some emphasis on enhancing the judicial role, even if only in situations where the testimony's admissibility is central and contested, would not be too much of an imposition on the court.

Rule 611 – Illustrative Aids. Judge Schiltz introduced this information item as one that the Advisory Committee will likely submit to the Standing Committee in June 2022 with a request for approval to publish for public comment. He explained that illustrative aids are not specifically addressed by any rules. Judges, himself included, often struggle to distinguish demonstrative evidence (offered to prove a fact) from illustrative aids. Additionally, judges have very different rules on whether parties must disclose illustrative aids prior to use at trial, as well as whether (and how) they can go to the jury. Finally, judges have different rules on whether illustrative aids are or can be part of the record. Judge Schiltz noted that there is a companion proposal to amend Rule 1006, which deals with summaries, that is also under consideration by the Advisory Committee.

A judge member applauded the proposed changes to Rule 611 and Rule 1006. He suggested that to the extent that the proposed addition to Rule 611 (as set out on pages 304-05 of the agenda book) sets conditions for the use of an illustrative aid, it seems odd to include items (3) and (4). Those two provisions—the prohibition on providing the aid to the jury over a party's objection unless the court finds good cause; and the requirement that the aid be entered into the record—are not conditions on the use of an illustrative aid but rather regulations of what happens after the use of the illustrative aid. Professor Capra agreed with the judge member that items (3) and (4) should be part of a separate subdivision.

A practitioner member noted that he does not turn over opening or closing slide presentations prior to using them in arguments. Also, during examination of a witness, he will often have an easel where he can write down highlights of the testimony as it is given. He asked whether these types of aids would be covered by the proposed rule. If these are considered illustrative aids, it is important to draft the rule in a way that does not discourage their use. Professor Capra acknowledged the validity of this concern, noted that these questions have been part of the Advisory Committee's discussions, and agreed that it would be important to ensure that the notice requirement would not be unduly rigid as applied to such situations. Judge Schiltz stated that the practitioner members on the Advisory Committee had expressed a similar concern, but the judge members favored requiring advance notice. Without advance notice, judges could have to deal with objections interpolated in the middle of an opening statement. In sum, Judge Schiltz

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stated, this is a challenging issue, but the Advisory Committee is very focused on the pros and cons of the notice requirement.

Another practitioner member emphasized that trial practice has moved toward very slick presentations, for openings and closings, with expert witnesses, and even with fact witnesses. He stated that advance disclosure to opposing counsel can be a good idea; otherwise, if counsel shows the jury slides that mischaracterize the evidence, there is a real risk of a mistrial. The member said that judges often impose notice requirements for slides used in opening arguments, although they may be more flexible about closing arguments. Slides have become crucial in trial practice. Something might be lost by disclosing, he said, but disclosure avoids sharp practices. Judge Schiltz stated that he requires attorneys to provide advance disclosure, but the disclosure can be made five minutes beforehand. A judge member concurred; in her view, this is a case management issue on which it is difficult to write a rule. The judge has to know the case and require advance disclosures by the lawyers.

Professor Bartell noted the proposed rule text does not define "illustrative aid." For example, if a lawyer stands 20 feet away from the witness and asks, "can you see my glasses," one might say that is illustrative. She suggested being careful to cabin the rule's scope.

Rule 1006 Summaries. Judge Schiltz introduced this information item as a companion proposal to the proposed amendment to Rule 611. Rule 1006 provides that certain summaries are admissible as evidence if the underlying records are admissible and if they are too voluminous to be conveniently examined at trial. This rule is often misapplied. Some judges erroneously instruct the jury that a summary admitted under Rule 1006 is not evidence. Some judges will not admit a Rule 1006 summary unless all the underlying records have been admitted into evidence, which runs contrary to the purpose of Rule 1006. Other judges do the opposite and will not allow Rule 1006 summaries if any of the underlying records have been admitted into evidence. The confusion over Rule 1006 is closely related to the confusion over illustrative aids, and the Advisory Committee hopes to clarify both topics.

Rule 611 – Safeguards to Apply When Jurors Are Allowed to Pose Questions to Witnesses. Judge Schiltz provided the update on this information item, explaining that the proposed amendment would list the safeguards that a court must use when it allows jurors to ask questions. The proposed rule would not take any position on whether jurors should be allowed to ask questions, but rather would provide a floor of safeguards that must apply if the judge does allow juror questions. These safeguards were taken from caselaw.

A judge member stated that it makes sense to have a rule regarding juror questions because it is an important and perilous area. He noted that there are various possible approaches to juror questions; one is to allow the lawyers to take the juror's question under advisement and allow the lawyers to decide whether they will cover that topic in their own questioning of the witness. This seems like it might often be the prudent course, but proposed Rule 611(d)(3) appears to foreclose it. Professor Capra said he would look into this issue. His understanding was that judges that permit juror questions generally read the questions to the witness, and then allow for follow-up questioning from counsel.

Judge Bates asked whether proposed Rule 611(d)(1)(D) should be a bit broader. He suggested that instead of saying that no "negative inferences" should be drawn, it should say "no inferences" should be drawn. Professor Capra agreed that "negative" should be omitted. Following up on Judge Bates's suggestion, a judge member added that it would be better to be even broader and suggested that Rule 611(d)(1)(D) say that no inference should be drawn from anything the judge does with a juror's question (whether asking, not asking, or rephrasing it). Judge Bates stated his agreement with the judge member's suggestion.

A judge member asked a question about Rule 611(d)(1). As she read the rule, it seems to prohibit juror questions outright unless the judge provides the required instructions "before any witnesses are called." She asked how the rule would handle instances where the issue of juror questioning arises mid-trial; also, she wondered whether this timing requirement should be placed elsewhere in the rule. Professor Capra promised to take this issue into account.

Judge Schiltz referred the Standing Committee to the Advisory Committee's report in the agenda book for information regarding the remainder of the information items, and there were no further comments.

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 September 14, 2021. The Advisory Committee presented one action item and 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 157.

Action Item

Rule 7001. Judge Dow introduced this action item to request approval to publish for public comment an amendment to Rule 7001. The proposed amendment responds to Justice Sotomayor's suggestion in her concurring opinion in *City of Chicago v. Fulton*, 141 S. Ct. 585 (2021), that the rulemakers "consider amendments to the Rules that ensure prompt resolution of debtors' requests for turnover under § 542(a), especially where debtors' vehicles are concerned," because the delay in resolving turnover proceedings can present a problem for a debtor's ability to recover the car that the debtor needs to get to work in order to earn money to fund a Chapter 13 plan. Before the Advisory Committee had a chance to address Justice Sotomayor's comment, a group of law professors submitted a suggestion, which later was generally endorsed by another suggestion submitted by the National Bankruptcy Conference. The law professors recommended a new rule to allow all turnover proceedings to be brought by motion rather than adversary proceeding. The Advisory Committee decided on a narrower approach tailored to the issues raised by Justice Sotomayor and proposed amending Rule 7001 to provide that turnover of tangible personal property of an individual debtor could be sought by motion as opposed to adversary proceeding. The Advisory Committee decided not to adopt a national procedure for these turnover motions, preferring instead to allow them to remain governed by local rules.

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An academic member stated that this rule will be a huge improvement over current procedure. He asked what would happen, under the proposal, in a Chapter 7 case when the trustee is seeking turnover of tangible property. The member expressed an expectation that the motion procedure would not apply to the trustee's turnover proceeding, because the proposal only extends to proceedings "by an individual debtor." Judge Dow agreed that under the proposed amendment, the trustee would need to seek turnover by adversary proceeding.

Upon motion, seconded by another, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 7001.**

Information Items

Rule 9006(a)(6) (Legal Holidays). Judge Dow stated that the Advisory Committee has approved a technical amendment to Rule 9006(a)(6) adding Juneteenth National Independence Day to the list of legal holidays. The Advisory Committee is not asking for approval at this time; rather, it will make that request in June 2022 in coordination with the other Advisory Committees' parallel proposals.

Electronic Signatures. Judge Dow introduced this information item, which concerns electronic signatures by debtors and others who do not have a CM/ECF account. Judge Dow noted that this issue connects to the question of electronic filing by self-represented litigants, but he observed that the working group of reporters and FJC researchers is addressing the latter topic, so the Advisory Committee's focus in this information item was on the electronic-signature topic. The Advisory Committee is looking at the practice of requiring the debtor's counsel to retain a wet signature for documents signed by the debtor and filed electronically. Previously, when the Advisory Committee last considered amendments to Rule 5005(a) that would have allowed the filing of debtors' scanned signatures without the retention of the original "wet" signature, the DOJ raised concerns with technologies available for verifying those signatures. The Advisory Committee has asked the DOJ whether its concerns have been alleviated by intervening technical advances. The pandemic has given us some experience with courts relaxing the wet-signature-retention requirement, and the FJC is assisting the Advisory Committee in studying the issue. There is a preliminary draft of a possible amendment to Rule 5005(a) on page 161 of the agenda book.

Professor Gibson stated the Advisory Committee found this to be a challenging problem. With documents that are filed electronically, what constitutes a valid signature for purposes of the rules? Under all rule sets, a CM/ECF account holder's signature is associated with that holder's unique account. A filing made through the account holder's account, and authorized by that person, constitutes the person's signature. But that does not address the common situation in bankruptcy where the *attorney* is filing a document with the *debtor's* signature, as the debtor is not the account holder. (Also, a pro se litigant might be allowed by some courts to submit documents through some electronic means other than CM/ECF—for instance, via email.) The Advisory Committee is not sure where it stands with wet signature requirements, but it is continuing to explore. Professor Gibson also noted that the Advisory Committee needs to learn more about lawyers' views concerning the requirement that the attorney for a represented debtor retain a wet signature.

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An academic member noted that the DOJ's concern the last time this issue came before the Advisory Committee was that without a requirement for the retention of a wet signature, the Department's experts in bankruptcy fraud prosecutions would not be able to verify the authenticity of a signature. He asked whether the possible change in approach now would flow from a change in what a handwriting expert was willing to testify to, or whether it would flow from the advent of electronic methods for verifying the signature. Professor Gibson answered that technology has improved since the last time the Advisory Committee addressed this issue, and now there are electronic-signing software programs that offer a means to trace electronic signatures back to the signer. DOJ has told the Advisory Committee that the proposal is no longer dead from the beginning, meaning there does not always have to be a wet signature for its experts to be able to verify the authenticity of the signature. But it depends on the technology. Software that enables verification of electronic signatures may not currently be incorporated into the software that consumer lawyers are using to prepare bankruptcy filings. The technology exists, however. Therefore, the Advisory Committee felt it is worth pursuing the amendment. Judge Dow noted that the Advisory Committee has included the DOJ in the discussions of this item from the outset and has stressed to the DOJ that its input is necessary.

Professor Coquillette applauded Professor Gibson's attention to state ethics requirements and cautioned that the Advisory Committee needs to be careful not to amend the rules in ways that could conflict with state-law professional-responsibility requirements. State-law professional-responsibility requirements may, for example, address the lawyer's retention of a client's "wet" signature.

Deputy Attorney General Monaco said she is hopeful that the Department can work through some of the technology issues that this proposal would raise. The Department has convened an internal working group to review the issue.

A judge member noted that he understands the point that the Advisory Committee does not want to have rules that require adoption of new software, but might the rules incentivize it? What if the rule says that if counsel use software that enables electronic signature verification, then they do not have to retain a wet signature? That could be a good development.

Restyling. Judge Dow introduced the final information item: an update on the restyling project. The project is going well. Parts I and II have gone through the entire process up to (but not including) transmission to the Judicial Conference, which will happen once the remaining parts have also passed through the entire process. Parts III through VI are out for public comment and are on track to go to the Standing Committee at the next meeting. Parts VII, VIII, and IX will come to the Advisory Committee this spring and should be ready for Standing Committee approval for publication this summer.

Professor Bartell added that while the restyling project has been ongoing, some of the restyled rules have been subsequently amended. The Advisory Committee still needs to decide how it wants to handle these amended rules. One possibility will be to request to republish for public comment all the restyled rules that have been subsequently amended.

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Professor Kimble stated that the style consultants will conduct one final top-to-bottom review of all the restyled rules for consistency and any other minor issues. They are currently doing so for Parts I and II.

Judge Bates thanked the style consultants for their work on the restyling project.

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 October 5, 2021. The Advisory Committee presented one action item and three information items. The Advisory Committee briefly noted other items on its agenda, one of which elicited discussion. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 184.

Action Item

Publication of Rule 12(a). Judge Dow introduced the only action item, a proposed amendment to Rule 12(a) that the Advisory Committee was requesting approval to publish for public comment. Rule 12(a) sets the time to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern, but subdivisions 12(a)(2) and (3) do not recognize the possibility of conflicting statutes. However, there are in fact statutes that set times shorter than the time set by Rule 12(a)(2). While not every glitch in the rules requires a fix, this is one that would be an easy fix. The Advisory Committee decided unanimously to request publication for public comment.

Professor Cooper added there is an argument that Rule 12(a)(2) as currently drafted supersedes the statutes that set a shorter response time, and the Advisory Committee never intended such a supersession. In addition to fixing the glitch, the proposed amendment will avoid the potential awkwardness of arguments concerning unintended supersession.

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

Information Items

Multi-District Litigation (MDL) Subcommittee. Judge Dow introduced the work of the MDL Subcommittee as the first information item. Two major topics remain on the subcommittee's agenda. First, the subcommittee is looking at the idea of an "initial census" (what used to be known as "early vetting")—that is, methods for the MDL transferee judge to get a handle on the cases that are included in the MDL. There are three current MDLs where some version of this is in use—the *Juul MDL* before Judge Orrick in the Northern District of California, the *3M MDL* before Judge Rodgers in the Northern District of Florida, and the *Zantac MDL* before Judge Rosenberg (who chairs the MDL Subcommittee) in the Southern District of Florida. Second, the subcommittee is reviewing issues concerning the court's role in the appointment and compensation of leadership

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counsel. Several meetings ago, the Advisory Committee discussed what it called a "high impact" sketch of a potential new Rule 23.3 that would extensively address court appointment of leadership counsel, establishment of a common benefit fund to compensate lead counsel, and court rulings on attorney fees. More recently, the subcommittee has been considering a sketch of a "lower impact" set of rules amendments that focuses on Rules 16(b) and 26(f). It would deal with both the initial census and issues of appointing, managing, and compensating leadership counsel throughout an MDL proceeding.

The approach taken in the lower impact sketch is similar to what the Advisory Committee did with Rule 23 a few years ago: operate at a high level of generality and not try to prescribe too much, but put prompts in the rules so that lawyers and judges know from day one a lot of the important things that they will encounter over the number of years it will take for an MDL to conclude. The subcommittee is trying to preserve flexibility. Much of what is in the rule sketch will not apply in any single given MDL. The prompts in the rule will guide MDL participants, and the committee note will provide more detail on how the court might apply these prompts. The subcommittee has met with Lawyers for Civil Justice and will meet with American Association for Justice and others in the coming months.

Professor Marcus observed, with respect to the call for rulemaking with respect to matters such as attorney compensation in MDLs, that rulemaking on such topics is challenging. One approach would be to amend Rule 26(f) so as to require the lawyers to address such matters in their proposed discovery plan; this could then inform the judge's consideration of how to address those matters in the Rule 16(b) order. As to oversight of the settlement, Judge Dow noted that the subcommittee initially considered giving the judge oversight of the substance of the settlement, but now is focusing instead on whether to provide for judicial oversight of the process for arriving at the settlement. In current practice, some judges exert indirect influence on the settlement, for example through their orders appointing leadership counsel. But whether to make rules concerning settlement in MDLs is the most controversial issue the subcommittee is considering, and its members do not agree on how best to proceed. Professor Cooper added that the rules do not currently define what obligations, if any, leadership counsel has to plaintiffs other than their own clients.

Judge Bates said he agrees with the Civil Rules Committee report's observation that the absence of any mention of MDLs in the Civil Rules is striking, given that MDLs make up a third or more of the federal civil caseload. He commended the Advisory Committee and subcommittee on their work on these issues.

A judge member suggested that the Advisory Committee consider addressing appointment of special masters. The role that courts have delegated to special masters in some large MDLs is significant. If the Advisory Committee addresses special masters, a rule could deal with whether and when special masters should have *ex parte* communications with counsel. There is the potential for an appearances problem if the special master is viewed as favoring one side or the other. A poor decision concerning the use of a special master can have significant consequences. Professor Marcus noted that Rule 53 requires that the order appointing a special master must address the circumstances, if any, in which the master may engage in *ex parte* communications.

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However, the question then is whether Rule 53 is sufficient to address the issue in the MDL context.

A judge member thanked the subcommittee for its work on the MDL rules. He expressed skepticism concerning the desirability of rules specific to MDLs, noting that one size does not fit all as the cases range from quite simple to large and complicated. The current rules are flexible and capacious enough to accommodate the differences. Judge Chhabria's point (in the *Roundup MDL*) concerning the transferee judge's learning curve is well taken, but the judge member questioned whether a rule change could really make that learning curve any easier.

Apart from that big-picture skepticism, this judge member also made some more specific suggestions. First, the question of who should speak for the plaintiffs during the early meet-and-confer is a big one, and whether any rule should address that is a worthy issue that may warrant treatment if the Advisory Committee is going to be addressing MDLs. Second, in some MDLs the court has appointed lead counsel on the defense side, and the judge member queried whether the rules should address that. Third, if the rules will be amended to address table-setting issues that counsel and the court should consider early on, one such issue is whether there will be a master consolidated complaint and what its effect will be (a topic touched on in *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 413 n.3 (2015)). Fourth, the judge member stressed that the common benefit fund order should be clear as to whether plaintiffs' lawyers will be required to submit to the common benefit fund a portion of their fees arising from the settlement of cases pending in other courts; he expressed doubt, however, as to whether the question of court authority to impose such a requirement is an appropriate topic for rulemaking. Lastly, the member noted that in the current rule sketch of proposed Rule 16(b)(5)(F) provided in the agenda book (at p. 197) it seemed a little odd to require the court in an initial order to provide a method for the court to give notice of its assessment of the fairness of the process that led to any proposed settlement.

A practitioner member stated that the judge member whose comments preceded hers had raised all the issues that she had in mind. She suggested that the Rule 16 approach is particularly well taken. It will cause more lawyers to read Rule 16 earlier and to pay attention to it. Rule 16 is "the Swiss Army knife" for active case management, and it is precisely the right context for adding provisions to deal with MDLs. Right now, judges are innovating in their MDL case-management orders, but that procedural common law is not as well disseminated as it should be amongst the people who need it the most: transferee judges and the lawyers practicing before them. If Rule 16 addresses MDL practice, judges will cite the rule in their orders, and in turn these orders will more likely be published and found in searches. Moreover, the proposed approach will not stifle the flexibility that exists in the absence of a rule. No two MDLs are the same. She noted that she wishes there were a repository of all MDL case-management orders. Getting MDLs into the rules in a very flexible way may confer at least some of that benefit.

Professor Coquillette seconded Professor Cooper's point concerning the significance of conflict-of-interest issues with lead counsel in MDLs. Questions percolate regarding American Bar Association (ABA) Model Rule 1.7. The rulemakers should always be aware that attorney conduct is subject to another regulatory system, which applies broadly because most federal courts adopt by local rule either the ABA Model Rules or the rules of attorney conduct of the State in which they sit. Professor Marcus noted the added complication that the lawyers in an MDL may

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be based in many different states. Professor Coquillette observed that the ABA Model Rules do have a choice-of-law provision, but it can be challenging to apply.

An academic member expressed his appreciation for the work of the subcommittee and reporters on this. He echoed the suggestion that, in this area, less is more. With the complexity and variation of MDLs, encasing things in formal rules is probably not a good idea. The goal should be to provide transparency and give some guidance to judges who do not have prior experience in MDLs. However, it would be a mistake to try to make something concrete when it should be plastic. Thus, the Manual for Complex Litigation seems to be the natural place to locate much of the guidance concerning best practices. This member also cautioned against trying to assimilate MDLs to Rule 23 class actions. Class action practice should not be the model for MDLs, because MDLs require flexibility.

Judge Bates acknowledged that the range of MDLs is daunting and that is a reason to question whether rules that apply to all MDLs can be formulated. However, that view is in tension with the Federal Rules of Civil Procedure themselves, which are a set of rules that apply to an even wider variety of cases.

A judge member echoed the comment on having a "best practices" guide outside the rules, and stated that the Advisory Committee should resist writing rules specific to MDLs.

Another judge member applauded the effort to continue to think about this important but difficult topic. The draft Rule 16(b)(5) is a little unusual in that it is a precatory statement about what a judge should consider, but it does not give the judge any additional tools that the judge does not already have. In this sense, the sketch of Rule 16(b)(5) resembles the Manual for Complex Litigation. This member suggested that, instead, the focus should be on whether there are tools that MDL transferee judges want but do not currently have, and whether those tools are something that an amendment under the Rules Enabling Act process can provide. Judge Dow observed that although a new edition of the Manual for Complex Litigation is in process, it will be several years before it comes out. The Judicial Panel on Multidistrict Litigation, likewise, has tried to provide guidance on best practices, but has held conferences only intermittently. He noted that the Standing Committee's discussion overall evinced more support for the low-impact (Rule 16) approach than the high-impact (Rule 23.3) approach. Director Cooke reported that the FJC is in the preliminary stages of organizing a committee to assist in the preparation of a new edition of the Manual for Complex Litigation.

Discovery Subcommittee. Judge Dow briefly discussed the Discovery Subcommittee's work on privilege log issues. Plaintiffs' and defendants' lawyers have very different views as to whether the current rules present problems. However, there are areas of consensus—that it could be valuable to encourage the parties to discuss privilege-log issues early on, perhaps with the

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judge's guidance, and that a system of rolling privilege logs is useful. These areas are the subcommittee's current focus.

Judge Dow also noted the subcommittee's work on sealing. The AO is already reviewing issues related to sealing documents. The Advisory Committee is going to hold off on further consideration of sealing issues and will monitor the progress of the broader AO project.

Rule 9(b) Subcommittee. Judge Dow introduced the work of the new Rule 9(b) Subcommittee (chaired by Judge Lioi). The subcommittee is considering a proposal by Dean Benjamin Spencer to amend Rule 9(b)'s provision concerning pleading conditions of the mind ("[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally"). The subcommittee has had its first meeting and will report to the Advisory Committee at its March meeting.

Other Items

Judge Dow briefly noted a multitude of other projects under consideration by the Advisory Committee, including proposals regarding Rules 41, 55, and 63, as well as one regarding amicus briefs in district courts and one involving the standards and procedures for granting petitions to proceed as a poor person ("in forma pauperis"). Judge Dow also noted that the Advisory Committee is awaiting public comments on the proposed new emergency rule, Rule 87.

Professor Cooper asked whether amicus practice in the district court may present very different questions from amicus practice in appellate courts. In addition to the relative rarity of amicus filings in the district court, he suggested there might be more of a risk that an amicus's participation could interfere with the parties' opportunity to shape the record and develop the issues germane to the litigation in the district court. The discussion during the Appellate Rules Committee's presentation left Professor Cooper concerned about drafting a Civil Rule to address amicus issues.

Judge Bates agreed that amicus filings in the district court could present different issues. He doubted whether there would be many instances where anything in an amicus brief could help to develop the record of the case. For example, in an administrative review case, the record is already set by what was before the administrative agency. And in most other civil cases, the factual record will be developed by the parties through discovery. On the other hand, amicus filings could help to frame or identify issues.

A judge member noted that he too was skeptical about addressing amicus filings in the Civil Rules. This seems to be a solution in search of a problem. If an organization wants to file an amicus brief, it requests leave to file the brief, and the judge decides whether to grant leave and how to handle ancillary issues such as affording the parties an opportunity to respond. Especially given that amicus filings in the district courts are relatively rare, why should the Civil Rules

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address this topic when they do not address the general topic of briefs? The judge member also noted that having a rule regarding amicus briefs might encourage people to file more of them.

Judge Bates echoed the judge member's skepticism. Amicus briefs in district courts are almost all filed in just a few courts nationwide, including the District of Columbia (which has a local rule) and the Southern District of New York. This may be something where it is best to leave the practice to local rules in the few courts that see most of the amicus briefs.

Judge Dow stated that he agreed with the comments of the judge member and of Judge Bates. He noted that if a person has the resources to draft an amicus brief, it will have the resources to figure out how to request leave to file it.

A practitioner member stated that amicus briefs are being filed with increasing frequency in MDLs. This is not to say that there should be a Civil Rule on point, but it may be useful to keep in mind that the Appellate Rules' treatment of amicus briefs can be a useful resource for district judges. This member stated that amicus filings in the district court may sometimes attempt to contribute to the record by requesting judicial notice of particular matters; and amicus filings might sometimes add to the complexity in MDLs that are already complex enough. However, trying to craft a Civil Rule to address such issues may be borrowing trouble.

Professor Hartnett returned to the concern (that a member had raised during the discussion of the Appellate Rules Committee's report) that an amicus filing might be made in the district court with the goal of triggering the judge's recusal. Appellate Rule 29 allows the court of appeals to disallow or strike an amicus brief when that brief would require a judge's disqualification. Amicus filings designed to trigger recusal—if they became a common practice—would be more dangerous at the district court level when the case is before a single judge.

Another practitioner member stated that it would be a big mistake to have a national rule governing amicus briefs in district courts. Amicus briefs can be taken for what they are worth, and judges can either read them or not read them. To regulate this on a national basis just does not make sense.

Turning to matters covered in the Civil Rules Committee's written report, Judge Bates noted the Civil Rules Committee's decision not to proceed with a proposal to amend Rule 9 to set a pleading standard for certain claims under the Americans with Disabilities Act. He requested that the Civil Rules Committee coordinate with the Rules Committee Staff at the AO to communicate this decision to Congress. The proposal in question, he noted, initially came from members of the Senate.

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 in Washington, DC on November 4, 2021. The Advisory Committee presented several information items and no action items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 258.

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Information Items

Grand Jury Secrecy Under Rule 6(e). Judge Kethledge described the Advisory Committee's decision not to proceed with a proposed amendment to Rule 6 regarding an exception to grand jury secrecy for materials of exceptional historical or public interest. The Advisory Committee had received multiple proposals for such an exception. Both the Rule 6 Subcommittee (chaired by Judge Michael Garcia) and the full Advisory Committee extensively considered the proposals. The subcommittee held an all-day miniconference where it heard a wide range of perspectives, including from former prosecutors, defense attorneys, the general counsel for the National Archives, a historian, Public Citizen Litigation Group, and the Reporters Committee for Freedom of the Press. The subcommittee thereafter met by phone four times. It had two main tasks. First, it tried to draft the best proposed amendment. Second, it had to decide whether to recommend to the full Advisory Committee whether to proceed with a proposed amendment. The draft rule that the subcommittee worked out would have allowed disclosure only 40 years after a case was closed, and only if the grand jury materials had exceptional historical importance. However, a majority of the subcommittee decided not to recommend that the full Advisory Committee proceed with an amendment.

At its fall 2022 meeting, the Advisory Committee discussed the matter fully and voted 9-3 not to proceed with an amendment. Judge Kethledge noted that the Advisory Committee benefited from a wealth and broad range of relevant experience on the part of its members. The Advisory Committee understood the proposal's appeal and found it to present a close question. The members identified "back end" concerns – that is to say, possible risks that could arise at the time of the disclosure of the grand jury materials – and noted that those concerns could be addressed (although not fully avoided) by employing safeguards. However, Advisory Committee members were concerned that on the "front end" – that is, when a grand jury proceeding is contemplated or ongoing – the potential for later disclosure pursuant to the proposed exception would complicate conversations with witnesses and jeopardize the witnesses' cooperation. A number of members also noted that this exception would be different in kind from those that are currently in the rule. The other exceptions relate to the use of grand jury materials for other criminal prosecutions or national security interests. Historical interest would be an altogether different kind of exception. There was the sense that a historical significance exception would signal a relaxation of grand jury secrecy and could lead to unintended consequences. The grand jury is an ancient institution that advances its purposes in ways that we are often unaware of; this heightens the risk of unintended consequences from a rule amendment. The DOJ has consistently supported a historic significance exception, but all eight former federal prosecutors on the Advisory Committee opposed having an amendment along these lines. In sum, the Advisory Committee voted to not make an amendment, subject to input from the Standing Committee.

Judge Bates stated that he thought this was a carefully considered decision by the Advisory Committee.

A practitioner member expressed agreement with the recommendation not to proceed. This is a hard issue, and he recognizes the appeal of having an exception, but as a former federal prosecutor who is now on the other side of the bar, he does not feel comfortable having an

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exception that only touches certain cases, namely those of exceptional historical interest, and therefore treats some grand jury participants differently than others.

A judge member praised the Advisory Committee's report for its thoroughness. This member asked how categorically the Advisory Committee had rejected the possibility of disclosures of very old materials of great public interest. Did the Advisory Committee believe that, had there been a grand jury investigation into the assassination of President Lincoln, disclosing those grand jury materials now would create "front end" problems with the cooperation of current-day witnesses? Judge Kethledge stated that it was the sense of the Advisory Committee that it should not add a new exception to Rule 6, even for material of great historical interest. One can think of examples where one would be glad for materials of such strong historical interest to be disclosed, but that does not mean that there should be a rule permitting such disclosure. As an analogy, take President Lincoln suspending habeas corpus during the Civil War. Many people would say they are glad that he did so because things may have turned out differently if he had not done so. Yet at the same time, most people would not want a general rule allowing the President to suspend habeas corpus when he sees fit.

Additionally, Judge Kethledge noted that although the Advisory Committee decided not to recommend a rule amendment, that does not exclude the possibility of common-law development of an exception. There is a circuit split as to whether federal courts have inherent authority to authorize disclosure of grand jury materials. Justice Breyer thought that the Advisory Committee should resolve the circuit split via rulemaking. However, Judge Kethledge stated his view, which he believed the Advisory Committee shares, that the underlying question of inherent authority was outside the purview of Rules Enabling Act rulemaking. If the Supreme Court resolves the circuit split in favor of recognizing inherent authority to authorize disclosure, the courts will be free to take a case-by-case approach.

Professor Beale added that a number of Advisory Committee members had noted that they felt comfortable with the state of the law prior to *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), and probably would have concluded (as the Advisory Committee had in 2012) that there was not a problem with courts very occasionally authorizing disclosure. Yet writing it out in a rule is fundamentally different: It would change the calculus and change the context under which the grand jury would operate going forward. It is unclear how changing that calculus and context would affect the grand jury as an institution.

A judge member said he thought that the Advisory Committee should consider a rule. He recalled from the Advisory Committee's discussions a shared sense that it is actually a good thing that grand jury materials have been released in certain cases of exceptional historical significance. The problem under the current regime is the circuit-to-circuit variation on whether disclosure is ever possible. Additionally, by not resolving the issue the Advisory Committee is just kicking the can down the road. If the Supreme Court rules that courts lack inherent authority to authorize disclosures not provided for in the Rule, then there will be renewed pressure for a rule amendment. If the Supreme Court instead rules that courts do have such inherent authority, there will still be demands for a rule amendment so as to provide a common approach to disclosure decisions. Therefore, either way, the rulemakers will end up having to take up this issue again.

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The same member also stated he was less persuaded by the argument that an exception for materials of exceptional historical interest will dissuade witnesses from testifying. As it is, there are exceptions to grand jury secrecy, including—in some circuits—a multifactor test for whether to release grand-jury materials to the defendant once the defendant has been indicted. Thus, prosecutors already are unable to tell witnesses that there are no circumstances under which their testimony could become public. Furthermore, the comment that certain organizations, such as Al Qaeda or gangs, have long memories is a red herring: These are not the types of cases of exceptional historical interest that would fit within the contemplated exception. The member closed, however, by thanking the Advisory Committee for its thoughtful consideration of the issue.

Professor Hartnett advocated precision in the use of the phrase "inherent authority." It can mean two different things: first, the court's authority to act in the absence of authorization by a statute or rule; and second, the court's authority to act despite a statute or rule that purports to prohibit it from acting. The latter type of inherent authority is much narrower and its scope presents a constitutional question. Judge Kethledge acknowledged this distinction, but noted that the question addressed by the Advisory Committee was only whether to adopt a provision of positive law, in the Criminal Rules, recognizing the exception in question.

Clarification of Court's Authority to Release Redacted Versions of Grand Jury-Related Judicial Opinions. Judge Kethledge introduced this information item, which stems from a suggestion by Chief Judge Howell and former Chief Judge Lamberth of the District of Columbia District Court. The suggestion requested that Rule 6(e) be amended to clarify the court's authority to issue opinions that discuss and potentially reveal matters before the grand jury. Both the subcommittee and entire Advisory Committee considered the issue. The Advisory Committee's conclusion was that the issue is not yet ripe. There has not been any indication so far that redaction is inadequate as a means to avoid contentions that the release of a judicial opinion somehow violates Rule 6. Absent any recent contentions that the release of a judicial opinion violated Rule 6, the Advisory Committee did not think it should act on the suggestion at this time.

Rule 49.1 and CACM Guidance Referenced in the Committee Note. Judge Kethledge introduced this information item, which arises from a suggestion by Judge Furman. Judge Furman suggested amending Rule 49.1 and its committee note to clarify that courts cannot allow parties to file under seal documents to which the public has either a common law or First Amendment right of access. The Advisory Committee appointed a subcommittee to review the issue. Judge Kethledge noted that in his experience, there does seem to be a problem of parties filing documents under seal that should not be so filed.

Judge Furman clarified that the issue is more with the committee note than the text of the rule. The committee note specifies that a financial affidavit in connection with a request for representation under the Criminal Justice Act should be filed under seal. This is in tension with the approach of most courts, which have found that these affidavits are judicial documents and therefore subject to a public right of access under the Constitution. However, at least one court in reliance on the committee note has allowed defendants to file CJA-related financial affidavits under seal.

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OTHER COMMITTEE BUSINESS

Legislative Report. The Rules Law Clerk delivered a legislative report. The chart in the agenda book at page 332 summarized most of the relevant information, but an additional bill had been introduced since the finalization of the agenda book. The AMICUS Act, which had been introduced in the previous Congress, was reintroduced in December, albeit with some differences compared to the previous version. As relevant to the Standing Committee, the new bill would apply to any potential amicus in the Courts of Appeals or Supreme Court, regardless of how many briefs it filed in a given year. The Rules Law Clerk also specifically noted the Protecting Our Democracy Act, which had passed the House in December 2021 and now awaits action in the Senate. That bill would prohibit any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of grand jury materials related to the prosecution of certain individuals that the President thereafter pardons. Additionally, the bill would direct the Judicial Conference to promulgate under the Rules Enabling Act rules to facilitate the expeditious handling of civil suits to enforce Congressional subpoenas.

Judiciary Strategic Planning. Judge Bates addressed the Judiciary Strategic Planning item, which appeared in the agenda book at page 339. The Judicial Conference has asked all its committees to provide any feedback on lessons learned over the past two years that may assist it in planning for future pandemics, natural disasters, and other crises that threaten to significantly impact the work of the courts.

Judge Bates asked the Standing Committee whether there was anything the members thought the Standing Committee should focus on in responding to the Judicial Conference. No members had any comments or questions regarding this item.

Judge Bates then asked the Standing Committee members whether there was any concern with delegating to him, Professor Struve, and the Rules Committee Staff the matter of communicating with the Judicial Conference. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Judicial Conference Committee Self-Evaluation Questionnaire. Every five years, the Judicial Conference requires all its committees to complete a self-evaluation. Judge Bates stated that he had circulated to the Standing Committee members a draft of that response.

The main item to address in the current draft is the modest adjustments to the jurisdictional statement for the Standing Committee and the Advisory Committees. First, the draft deletes the reference to receiving rule amendment suggestions "from bench and bar" because the Advisory Committees receive suggestions from others as well. Second, the draft clarifies that the Standing Committee, rather than the Advisory Committees, approves rules for publication for public comment. Third, the draft's descriptions of the duties of the Standing Committee and Advisory Committees have been revised to reflect the discussion of those duties in the Judicial Conference's procedures governing the rulemaking process.

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Judge Bates asked the Standing Committee whether there were any comments regarding the draft response to the Judicial Conference's committee self-evaluation questionnaire. There were none.

Judge Bates requested that the Standing Committee members delegate to him, Professor Struve, the Advisory Committee chairs, and the Rules Committee Staff the matter of responding to the self-evaluation questionnaire. Judge Bates noted that the Advisory Committee chairs had already weighed in on the draft response. With no objections raised, Judge Bates said that he would consider that the approval of the Standing Committee.

Update on Judiciary's Response to COVID-19 Pandemic. Julie Wilson provided an update on the judiciary's response to the COVID-19 pandemic. She observed that the federal judge members of the Standing Committee had access to a number of resources on this topic via the "JNet" (the federal judiciary's intranet website). There is a COVID-19 task force studying a wide range of items relevant to the judiciary's response to the pandemic. Its current focus is on issues related to returning to the workplace. The task force has a virtual judiciary operations subgroup ("VJOS") that includes representatives from the courts, federal defenders' offices, and DOJ, and it is studying the use of technology for remote court operations. Ms. Wilson noted that she has highlighted for the VJOS participants the relevant Criminal Rules concerning remote versus in-person participation, and she predicted that suggestions on this topic are likely to reach the rulemakers in the future.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Standing Committee members and other attendees for their patience and attention. The Standing Committee will next meet on June 7, 2022. Judge Bates expressed the hope that the meeting would take place in person in Washington, DC.

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TAB 2

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on January 4, 2022. 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; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Burton DeWitt, Law Clerk to the Standing Committee; John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, Federal

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Judicial Center (FJC); and Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, and Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, Department of Justice (DOJ).

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 received an update on three items of coordinated work among the Appellate, Bankruptcy, Civil, and Criminal Rules Committees: (1) the proposed emergency rules developed in response to the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and published for public comment in August 2021; (2) consideration of suggestions to allow electronic filing by pro se litigants; and (3) consideration of amendments to list Juneteenth National Independence Day in the definition of "legal holiday" in the federal rules. Finally, the Committee was briefed on the judiciary's ongoing response to the COVID-19 pandemic.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 32, 35, and 40, and the Appendix of Length Limits, with a recommendation that they be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendment to Rule 32 is a conforming amendment that reflects the proposed transfer of Rule 35's contents into a restructured Rule 40. In Rule 32(g)'s list of papers that require a certificate of compliance, the amendment would replace the reference to papers

submitted under Rules 35(b)(2)(A) or 40(b)(1) with a reference to papers submitted under Rule 40(d)(3)(A).

Rule 35 (En Banc Determination)

The proposed amendment to Rule 35 would transfer its contents to Rule 40 in an effort to provide clear guidance in one rule that will cover en banc hearing and rehearing and panel rehearing.

Rule 40 (Petition for Panel Rehearing)

The proposed amendment to Rule 40 would expand that rule by incorporating into it the provisions of current Rule 35. The proposed amended Rule 40 would govern all petitions for rehearing as well as the rare initial hearing en banc.

Proposed amended Rule 40(a) would provide that a party may petition for panel rehearing, rehearing en banc, or both. It sets a default rule that a party seeking both types of rehearing must file the petitions as a single document. Proposed amended Rule 40(b) would set forth the required content for each kind of petition for rehearing; the requirements are drawn from existing Rule 35(b)(1) and existing Rule 40(a)(2).

Proposed amended Rule 40(c)—which is drawn from existing Rules 35(a) and (f)—would describe the reasons and voting protocols for ordering rehearing en banc. Rule 40(c) makes explicit that a court may act sua sponte to order rehearing en banc; this provision also reiterates that rehearing en banc is not favored. Proposed amended Rule 40(d)—drawn from existing Rules 35(b), (c), (d), and existing Rules 40(a), (b), and (d)—would bring together in one place uniform provisions governing matters such as the timing, form, and length of the petition. A new feature in Rule 40(d) would provide that a panel's later amendment of its decision restarts the clock for seeking rehearing.

Proposed Rule 40(e)—which expands and clarifies current Rule 40(a)(4)—addresses the court's options after granting rehearing. Proposed Rule 40(f) is a new provision addressing a panel's authority to act after the filing of a petition for rehearing en banc. Proposed Rule 40(g) carries over (from existing Rule 35) provisions concerning initial hearing en banc.

Appendix of Length Limits Stated in the Federal Rules of Appellate Procedure

The proposed amendments are conforming amendments that would reflect the relocation of length limits for rehearing petitions from Rules 35(b)(2) and 40(b) to proposed amended Rule 40(d)(3).

Information Items

The Advisory Committee met by videoconference on October 7, 2021. In addition to the matters discussed above, agenda items included the consideration of two suggestions related to the filing of amicus briefs, several suggestions regarding in forma pauperis issues, including potential changes to Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis), and a new suggestion regarding costs on appeal.

Amicus Briefs

The Advisory Committee reported that, in response to a suggestion from Senator Sheldon Whitehouse and Representative Henry Johnson, Jr., it is continuing its consideration of whether additional disclosures should be required for amicus briefs. Proposed legislation regarding disclosures in amicus briefs has been filed in the Senate and House, most recently in December 2021.

The Advisory Committee reported that the question of amicus disclosures involves important and complicated issues. One issue is that insufficient amicus disclosure requirements can enable parties to evade the page limits on briefs or permit an amicus to file a brief that appears independent of the parties but is not. Another issue is that, without sufficient

disclosures, one person or a small number of people with deep pockets can fund multiple amicus briefs and give the misleading impression of a broad consensus. On the other hand, when considering any disclosure requirement, it is necessary to consider the First Amendment rights of those who do not wish to disclose themselves.

The Advisory Committee sought the Committee's feedback on these issues. In doing so, the Advisory Committee highlighted the distinction between disclosure regarding an amicus's relationship to a party and disclosure regarding an amicus's relationship to a nonparty. The Advisory Committee also noted that any proposed amendments to Rule 29 would have to be based on careful identification of the governmental interest being served and be narrowly tailored to serve that interest. Various members of the Committee voiced their perspectives on these issues, and expressed appreciation for the Advisory Committee's ongoing work on these topics.

The Advisory Committee also has before it a separate suggestion regarding amicus briefs and Rule 29. In 2018, Rule 29 was amended to empower a court of appeals to prohibit the filing of an amicus brief or strike an amicus brief if that brief would result in a judge's disqualification. The suggestion proposes adopting standards for when judicial disqualification would require a brief to be stricken or its filing prohibited. This suggestion is under consideration by the Advisory Committee.

Appellate Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis)

The Advisory Committee is continuing to consider suggestions to regularize the criteria for granting in forma pauperis status, including possible revisions to Form 4 of the Federal Rules of Appellate Procedure. It is gathering information on how courts handle such applications, including what standards are applied and how Appellate Form 4 is used.

Costs on Appeal

In a recent decision, the Supreme Court stated that the current rules could specify more clearly the procedure that a party should follow to bring arguments about costs to the court of appeals. *See City of San Antonio v. Hotels.com L. P.*, 141 S. Ct. 1628 (2021). Accordingly, the Advisory Committee created a subcommittee to explore the issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted a proposed amendment to Rule 7001 (Types of Adversary Proceedings) with a recommendation that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendment to Rule 7001 addresses a concern raised by Justice Sotomayor in *City of Chicago v. Fulton,* 141 S. Ct. 585 (2021). The *Fulton* Court held that a creditor's continued retention of estate property that it acquired prior to bankruptcy does not violate the automatic stay under § 362(a)(3). In so ruling, the Court found that a contrary reading of § 362(a)(3) would render largely superfluous § 542(a)'s provisions for the turnover of estate property from third parties. In a concurring opinion, Justice Sotomayor noted that under current procedures turnover proceedings can be very slow because, under Rule 7001(1), they must be pursued by an adversary proceeding. Addressing the need of chapter 13 debtors, such as those in *Fulton,* to quickly regain possession of a seized car in order to work and earn money to fund a plan, she stated that the Advisory Committee on Rules of Bankruptcy Procedure should consider rule amendments that would ensure prompt resolution of debtors' requests for turnover under § 542(a). Post-*Fulton*, two suggestions were submitted that echo Justice Sotomayor's call for amendments; these suggestions advocate that the rules be amended to allow all turnover

proceedings to be brought by a quicker motion-based practice rather than by adversary proceeding.

Members of the Advisory Committee generally agreed that debtors should not have to wait an average of a hundred days to get a car needed for a work commute, and they supported a motion-based turnover process in that and similar circumstances involving tangible personal property. There was less support, however, for broader rule changes that would allow all turnover proceedings to occur by motion. The Advisory Committee ultimately recommended an amendment to Rule 7001 that would exempt, from the list of adversary proceedings, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."

Information Items

The Advisory Committee met by videoconference on September 14, 2021. In addition to the recommendation discussed above, the Advisory Committee considered possible rule amendments in response to a suggestion from the Committee on Court Administration and Case Management (CACM Committee) regarding the use of electronic signatures in bankruptcy cases by individuals who do not have a CM/ECF account and discussed the progress of the Restyling Subcommittee.

Electronic Signatures

The Bankruptcy Rules now generally require electronic filing by represented entities and authorize local rules to allow electronic filing by unrepresented individuals. Documents that are filed electronically and must be signed by debtors or others without CM/ECF privileges will of necessity bear electronic signatures. They may be in the form of typed signatures, /s/, or images of written signatures, but none is currently deemed to constitute the person's signature for rules purposes. The issue the Advisory Committee has been considering, therefore, is whether the rules should be amended to allow the electronic signature of someone without a CM/ECF

account to constitute a valid signature and, if so, under what circumstances. The Advisory Committee's Technology Subcommittee is studying this issue.

Bankruptcy Rules Restyling Update

The 3000, 4000, 5000, and 6000 series of the restyled Bankruptcy Rules have been published for comment. The Advisory Committee will be reviewing the comments at its spring 2022 meeting.

In fall 2021, the Restyling Subcommittee completed its initial review of the 7000 and 8000 series and began its initial review of the 9000 series. The subcommittee will continue to meet until the subcommittee and style consultants have agreed on draft amendments. The subcommittee expects to present the 7000, 8000, and 9000 series of restyled rules—the final group of the restyled bankruptcy rules—to the Advisory Committee at its spring 2022 meeting with a request that the Advisory Committee approve those proposed amendments and submit them to the Standing Committee for approval for publication.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 12 (Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing) with a request that it be published for public comment in August 2022. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 12(a) prescribes the time to serve responsive pleadings. Paragraph (1) provides the general response time, but recognizes that a federal statute setting a different time governs. In contrast, neither paragraph (2) (which sets a 60-day response time for the United States, its agencies, and its officers or employees sued in an official capacity) nor paragraph (3) (which sets

a 60-day response time for United States officers or employees sued in an individual capacity for acts or omissions in connection with federal duties) recognizes the possibility of conflicting statutory response times.

The current language is problematic for several reasons. First, while it is not clear whether any statutes inconsistent with paragraph (3) exist, there are statutes setting shorter times than the 60 days provided by paragraph (2); one example is the Freedom of Information Act. Second, the current language fails to reflect the Advisory Committee's intent to defer to different response times set by statute. Third, the current language could be interpreted as a deliberate choice by the Advisory Committee that the response times set in paragraphs (2) and (3) supersede inconsistent statutory provisions.

The Advisory Committee determined that an amendment to Rule 12(a) is necessary to explicitly extend to paragraphs (2) and (3) the recognition now set forth in paragraph (1), namely, that a different response time set by statute supersedes the response times set by those rules.

Information Items

The Advisory Committee met by videoconference on October 5, 2021. In addition to the action item discussed above, the Advisory Committee considered reports on the work of the Multidistrict Litigation Subcommittee and the Discovery Subcommittee, and was advised of the formation of an additional subcommittee that will consider a proposal to amend Rule 9(b). The Advisory Committee also retained on its agenda for consideration a suggestion for a rule establishing uniform standards and procedures for filing amicus briefs in the district courts, suggestions that uniform in forma pauperis standards and procedures be incorporated into the Civil Rules, and suggestions to amend Rules 41, 55, and 63.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over time, the subcommittee has narrowed the list of issues on which its work is focused to two, namely (1) efforts to facilitate early attention to "vetting" (through the use of "plaintiff fact sheets" or "census"), and (2) the appointment and compensation of leadership counsel on the plaintiff side. To assist in its work, the subcommittee prepared a sketch of a possible amendment to Rule 16 (Pretrial Conferences; Scheduling; Management) that would apply to MDL proceedings. The amendment sketch encourages the court to enter an order (1) directing the parties to exchange information about their claims and defenses at an early point in the proceedings, (2) addressing the appointment of leadership counsel, and (3) addressing the methods for compensating leadership counsel. The subcommittee drafted a sketch of a corollary amendment to Rule 26(f) (Conference of the Parties; Planning for Discovery) that would require that the discovery plan include the parties' views on whether they should be directed to exchange information about their claims and defenses at an early point in the proceedings. For now, the sketches of possible amendments are only meant to prompt further discussion and information gathering. The subcommittee has yet to determine whether to recommend amendments to the Civil Rules.

Discovery Subcommittee

In 2020, the Discovery Subcommittee was reactivated to study two principal issues. First, the Advisory Committee has received suggestions that it revisit Rule 26(b)(5)(A), the rule that requires that parties withholding materials on grounds of privilege or work product protection provide information about the materials withheld. Though the rule does not say so and the accompanying committee note suggests that a flexible attitude should be adopted, the suggestions state that many or most courts have treated the rule as requiring a document-by-

document log of all withheld materials. One suggestion is that the rule be amended to make it clearer that such a listing is not required, and another is that the rule be amended to provide that a listing by "categories" is sufficient.

As a starting point, the subcommittee determined that it needed to gather information about experience under the current rule. In June 2021, the subcommittee invited the bench and bar to comment on problems encountered under the current rule, as well as several potential ideas for rule changes. The subcommittee received more than 100 comments. In addition, subcommittee members have participated in a number of virtual conferences with both plaintiff and defense attorneys.

While the subcommittee has not yet determined whether to recommend rule changes, it has begun to focus on the Rule 26(f) discovery plan and the Rule 16(b) scheduling conference as places where it might make the most sense for the rules to address the method that will be used to comply with Rule 26(b)(5)(A).

The second issue before the subcommittee is a suggestion for a new rule setting forth a set of requirements for motions seeking permission to seal materials filed in court. In its initial consideration of the suggestion, the subcommittee learned that the AO's Court Services Office is undertaking a project to identify the operational issues related to the management of sealed court records. The goals of the project will be to identify guidance, policy, best practices, and other tools to help courts ensure the timely unsealing of court documents as specified by the relevant court order or other applicable law. Input on this new project was sought from the Appellate, District, and Bankruptcy Clerks Advisory Groups and the AO's newly formed Court Administration and Operations Advisory Council (CAOAC). In light of this effort, the subcommittee determined that further consideration of the suggestion for a new rule should be deferred to await the result of the AO's work.

Amicus Briefs

The Advisory Committee has received a suggestion urging adoption of a rule establishing uniform standards and procedures for filing amicus briefs in the district courts. The proposal is accompanied by a draft rule adapted from a local rule in the District Court for the District of Columbia, and informed by Appellate Rule 29 (Brief of an Amicus Curiae) and the Supreme Court Rules. The Advisory Committee determined that the suggestion should be retained on its study agenda. The first task will be to determine how frequently amicus briefs are filed in district courts outside the District Court for the District of Columbia.

Uniform In Forma Pauperis Standards and Procedures

The Advisory Committee has on its study agenda suggestions to develop uniform in forma pauperis standards and procedures. The Advisory Committee believes that serious problems exist with the administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees upon submitting an affidavit that states "all assets" the person possesses and states that the person is unable to pay such fees or give security therefor. For example, the procedures for gathering information about an applicant's assets vary widely. Many districts use one of two AO Forms, but many others do not. Another problem is the forms themselves, which have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. Further, the standards for granting leave to proceed in forma pauperis vary widely, not only from court to court but often within a single court as well.

The Advisory Committee retained the topic on its study agenda because of its obvious importance and because it is well-timed to the ongoing work of the Appellate Rules Committee (discussed above) relating to criteria for granting in forma pauperis status. There is clear potential for improvement, but it is not yet clear whether that improvement can be effectuated

through the Rules Enabling Act process.

Rule 41(a) (Dismissal of Actions – Voluntary Dismissal)

Rule 41(a) governs voluntary dismissals without court order. The Advisory Committee is considering a suggestion that Rule 41(a) be amended to make clear whether it does or does not permit dismissal of some, but not all claims in an action. There exists a division of decisions on the question whether Rule 41(a)(1)(A)(i) authorizes dismissal by notice without court order and without prejudice of some claims but not others. That provision states, in relevant part, that "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 . . . ." The preponderant view is that the rule authorizes dismissal only of all claims and that anything less is not dismissal of "an action"; however, some courts allow dismissal as to some claims while others remain. The Advisory Committee will consider these and other issues relating to Rule 41, including the practice of allowing dismissal of all claims against a particular defendant even though the rest of the action remains.

Rule 55 (Default; Default Judgment)

Rule 55(a) directs the circumstances under which a clerk "must" enter default, and subdivision (b) directs that the clerk "must" enter default judgment in narrowly defined circumstances. The Advisory Committee has learned that at least some courts restrict the clerk's role in entering defaults short of the scope of subdivision (a), and many courts restrict the clerk's role in entering default judgment under subdivision (b). The Advisory Committee has asked the FJC to survey all of the district courts to better ascertain actual practices under Rule 55. The information gathered will guide the determination whether to pursue an amendment to Rule 55.

FEDERAL RULES OF CRIMINAL PROCEDURE

Information Items

The Advisory Committee on Criminal Rules met in person (with some participants joining by videoconference) on November 4, 2021. A majority of the meeting was devoted to consideration of the final report of the Rule 6 Subcommittee. The Advisory Committee also decided to form a subcommittee to consider a suggestion to amend Rule 49.1.

Rule 6 (The Grand Jury)

Rule 6(e) (Recording and Disclosing the Proceedings). The Advisory Committee last considered whether to amend Rule 6(e) to allow disclosure of grand jury materials of exceptional historical importance in 2012, when it considered a suggestion from the DOJ to recommend such an amendment. At that time, the Advisory Committee concluded that an amendment would be "premature" because courts were reasonably resolving applications "by reference to their inherent authority" to allow disclosure of matters not specified in the exceptions to grand jury secrecy listed under Rule 6(e)(3). Since then, *McKeever v. Barr*, 920 F.3d 842 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 597 (2020), and *Pitch v. United States*, 953 F.3d 1226 (11th Cir. 2020) (en banc), *cert. denied*, 141 S. Ct. 624 (2020), overruled prior circuit precedents and held that the district courts have no authority to allow the disclosure of grand jury matters not included in the exceptions stated in Rule 6(e)(3), thereby deepening a split among the courts of appeals with regard to the district courts' inherent authority. Moreover, in a statement respecting the denial of certiorari in *McKeever*, Justice Breyer pointed out the circuit split and 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." *McKeever*, 140 S. Ct. at 598 (statement of

Breyer, J.).

In 2020 and 2021, the Advisory Committee received suggestions seeking an amendment to Rule 6(e) that would address the district courts' authority to disclose grand jury materials because of their exceptional historical or public interest, as well as a suggestion seeking a broader exception that would ground a new exception in the public interest or inherent judicial authority. The latter urged an amendment "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." In contrast, over the past three administrations (including the suggestion the Advisory Committee considered in 2012), the DOJ has sought an amendment that would abrogate or disavow inherent authority to order disclosures not specified in the rule. The DOJ's most recent submission advocates that "any amendment to Rule 6 should contain an explicit statement that the list of exceptions to grand jury secrecy contained in the Rule is exclusive."

After the Rule 6 Subcommittee was formed in May 2020 in reaction to *McKeever* and *Pitch*, two district judges suggested an amendment that would explicitly permit courts to issue judicial opinions when even with redaction there is potential for disclosure of matters occurring before the grand jury.

As reported to the Conference in September 2021, the subcommittee's consideration of the proposals included convening a day-long virtual miniconference in April 2021 at which the subcommittee obtained a wide range of perspectives based on first-hand experience. Participants included 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. In addition, the subcommittee held four meetings over the summer of 2021.

Part of its work included preparing a discussion draft of an amendment that defined a limited exception to grand jury secrecy for historical records meant to balance the interest in disclosure against the vital interests protected by grand jury secrecy. The draft proposal would have (1) delayed disclosure for at least 40 years, (2) required the court to undertake a fact-intensive inquiry and to determine whether the interest in disclosure outweighed the public interest in retaining secrecy, and (3) provided for notice to the government and the opportunity for a hearing at which the government would be responsible for advising the court of any impact the disclosure might have on living persons. In the end, a majority of the subcommittee recommended that the Advisory Committee not amend Rule 6(e).

After careful consideration and a lengthy discussion, a majority of the Advisory Committee agreed with the recommendation of the subcommittee and concluded that even the most carefully drafted amendment would pose too great a danger to the integrity and effectiveness of the grand jury as an institution, and that the interests favoring more disclosure are outweighed by the risk of undermining an institution critical to the criminal justice system.

Further, a majority of members expressed concern about the increased risk to witnesses and their families that would result from even a narrowly tailored amendment such as the discussion draft prepared by the subcommittee. A majority of the members concluded that the dangers of expanded disclosure would remain, and that the addition of the exception would be a significant change that would both complicate the preparation and advising of witnesses and reduce the likelihood that witnesses would testify fully and frankly. Moreover, as drafted, the proposed exception was qualitatively different from the existing exceptions to grand jury secrecy, which are intended to facilitate the resolution of other criminal and civil cases or the investigation of terrorism.

Consideration of these suggestions by both the subcommittee and the full Advisory Committee revealed that this is a close issue. Although many members recognized that there are rare cases of exceptional historical interest where disclosure of grand jury materials may be warranted, the predominant feeling among the members was that no amendment could fully replicate current judicial practice in these cases. Moreover, members felt that, even with strict limits, an amendment expressly allowing disclosure of these materials would tend to increase both the number of requests and actual disclosures, thereby undermining the critical principle of grand jury secrecy.

Members also discussed a broader exception for disclosure in the public interest. The subcommittee had recommended against such a broad exception, and members generally agreed that a broader and less precise exception would be an even greater threat to the grand jury.

Finally, the Advisory Committee chose not to address the question whether federal courts have inherent authority to order disclosure of grand jury materials. In the Advisory Committee's view, this question concerns the scope of "[t]he judicial power" under Article III. That is a constitutional question, not a procedural one, and thus lies beyond the Advisory Committee's authority under the Rules Enabling Act.

The Advisory Committee further declined the suggestion that subdivision (e) be amended to authorize courts "to release judicial decisions issued in grand jury matters" when, "even in redacted form," those decisions reveal "matters occurring before the grand jury." The Advisory Committee agreed with the subcommittee's determination that the means currently available to judges—particularly redaction—were generally adequate to allow for sufficient disclosure while complying with Rule 6(e).

Rule 6(c) (Foreperson and Deputy Foreperson). Also before the Advisory Committee was a suggestion to amend Rule 6(c) 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 Advisory Committee agreed with the recommendation of the subcommittee that at present there is no reason to disrupt varying local practices with a uniform national rule.

Rule 49.1 (Privacy Protections for Filings Made with the Court)

Rule 49.1 was adopted in 2007, as part of a cross-committee effort to respond to the E-Government Act of 2002. The committee note incorporates the *Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files* (March 2004) issued by the CACM Committee that "sets out limitations on remote electronic access to certain sensitive materials in criminal cases," including "financial affidavits filed in seeking representation pursuant to the Criminal Justice Act." The guidance states in part that such documents "shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access."

Before the Advisory Committee is a suggestion to amend the rule to delete the reference to financial affidavits in the committee note because the guidance as to financial affidavits is "problematic, if not unconstitutional" and "inconsistent with the views taken by most, if not all, of the courts that have ruled on the issue to date." *See United States v. Avenatti*, No. 19-CR-374-1 (JMF), 2021 WL 3168145 (S.D.N.Y. July 27, 2021) (holding that the defendant's financial affidavits were "judicial documents" that must be disclosed (subject to appropriate redactions) under both the common law and the First Amendment).

The Advisory Committee formed a subcommittee to consider the suggestion. Its work will include consideration of the privacy interests of indigent defendants and their Sixth Amendment right to counsel, and the public rights of access to judicial documents under the First Amendment and the common law. The subcommittee plans to coordinate with the Bankruptcy

and Civil Rules Committees since their rules have similar language, and will also inform both the CACM Committee and the CAOAC that it is considering this issue.

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee on Evidence Rules met in person (with some non-member participants joining by videoconference) on November 5, 2021. In addition to an update on Rules 106, 615, and 702, currently out for public comment, the Advisory Committee discussed possible amendments to Rule 611 to regulate the use of illustrative aids and Rule 1006 to clarify the distinction between summaries that are illustrative aids and summaries that are admissible evidence. The Advisory Committee also discussed possible amendments to Rule 611 to provide safeguards when jurors are allowed to pose questions to witnesses, Rule 801(d)(2) to provide for a statement's admissibility against the declarant's successor in interest, Rule 613(b) to provide a witness an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of the statement is admitted, and Rule 804(b)(3) to require courts to consider corroborating evidence when determining admissibility of a declaration against penal interest in a criminal case.

Rule 611 (Mode and Order of Examining Witnesses and Presenting Evidence)

The Advisory Committee is considering two separate proposed amendments to Rule 611. First, the Advisory Committee is considering adding a new provision that would provide standards for allowing the use of illustrative aids, along with a committee note that would emphasize the distinction between illustrative aids and admissible evidence (including demonstrative evidence). Second, the Advisory Committee is considering adding a new provision to set forth safeguards that must be employed when the court has determined that jurors will be allowed to pose questions to witnesses.

Rule 1006 (Summaries to Prove Content)

The Advisory Committee determined that courts frequently misapply Rule 1006, and most of these errors arise from the failure to distinguish between summaries of evidence that are admissible under Rule 1006 and summaries of evidence that are inadmissible illustrative aids. It is considering amending Rule 1006 to address the mistaken applications in the courts.

Rule 801 (Definitions That Apply to This Article; Exclusions from Hearsay)

The Advisory Committee is considering a proposed amendment to Rule 801(d)(2) regarding the hearsay exception for statements of party-opponents. The issue arises in cases in which a declarant makes a statement that would have been admissible against him as a party-opponent, but he is not the party-opponent because his claim or defense has been transferred to another, and it is the transferee that is the party-opponent. The Advisory Committee is considering an amendment to provide that if a party stands in the shoes of a declarant, then the statement should be admissible against the party if it would be admissible against the declarant.

Rule 613 (Witness's Prior Statement)

The Advisory Committee is considering a proposed amendment to Rule 613(b), which currently permits extrinsic evidence of a prior inconsistency so long as the witness is given an opportunity to explain or deny it. However, courts are in dispute about the timing of that opportunity. The Advisory Committee determined that the better rule is to require a prior opportunity to explain or deny the statement (with the court having discretion to allow a later opportunity), because witnesses will usually admit to making the statement, thereby eliminating the need for extrinsic evidence.

Rule 804 (Hearsay Exceptions; Declarant Unavailable)

The Advisory Committee is considering a proposed amendment to Rule 804(b)(3). The rule provides a hearsay exception for declarations against interest. In a criminal case in which a

declaration against penal interest is offered, the rule requires that the proponent provide "corroborating circumstances that clearly indicate [the] trustworthiness" of the statement, but there is a dispute about the meaning of the "corroborating circumstances" requirement. The Advisory Committee is considering a proposed amendment to Rule 804(b)(3) that would parallel the language in Rule 807 and require the court to consider the presence or absence of corroborating evidence in determining whether "corroborating circumstances" exist.

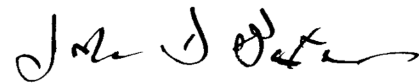
JUDICIARY STRATEGIC PLANNING

The Committee was asked to consider a request by the Judiciary Planning Coordinator, Chief Judge Jeffrey R. Howard (1st Cir.), regarding pandemic-related issues and lessons learned for which Committee members recommend further exploration through the judiciary's strategic planning process. The Committee's views were communicated to Chief Judge Howard by letter dated January 11, 2022.

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

In 1987, the Judicial Conference established a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." JCUS-SEP 1987, p. 60. Because this review is scheduled to occur again in 2022, the Committee was asked to evaluate the continuing importance of its mission as well as its jurisdiction, membership, operating procedures, and relationships with other committees so that the Executive Committee can identify where improvements can be made. To assist in the evaluation process, the Committee was asked to complete the 2022 Judicial Conference Committee Self-Evaluation Questionnaire. The Committee provided the completed questionnaire to the Executive Committee.

Respectfully submitted,



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Patricia A. Millett
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Kosta Stojilkovic
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TAB 3

Effective December 1, 2021

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2021)
- Approved by Judicial Conference (Sept 2020) and transmitted to Supreme Court (Oct 2020)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3	Amendment addresses the relationship between the contents of the notice of appeal and the scope of the appeal. The structure of the rule is changed to provide greater clarity, expressly rejecting the *expressio unius* approach, and adds a reference to the merger rule.	AP 6, Forms 1 and 2
AP 6	Amendment conforms the rule to amended Rule 3.	AP 3, Forms 1 and 2
AP Forms 1 and 2	Amendments conform the forms to amended 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	Subdivision (c) amended to replace 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	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	Amendment conforms the rule to recent amendments to Rule 8012 and Appellate Rule 26.1.	AP 26.1, BK 8012
BK 9036	Amendment requires high-volume paper notice recipients (initially designated as recipients of more than 100 court papers notices in calendar month) to sign up for electronic service and noticing, unless the recipient designates a physical mailing address if so authorized by statute.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2021)

REA History:

- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- 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.	

Effective (no earlier than) December 1, 2022

Current Step in REA Process:
- Transmitted to Supreme Court (Oct 2021)

REA History:
- Approved by Judicial Conference (Sept 2021 unless otherwise noted)
- Approved by Standing Committee (June 2021 unless otherwise noted)
- 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 were published along with the SBRA Rules in order to give the public a full opportunity to comment. The proposed change to Form 122B was approved at all stages after the public comment period closed in February 2021, and when into effect December 1, 2021. There were no comments on the remaining SBRA forms and they remain in effect as approved in 2019.	
CV 7.1	An amendment to subdivision (a) was published for public comment in Aug 2019 – Feb 2020. 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.	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

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 subdivision (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, 2022.	
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 22nd 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	

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
	not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than."	
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).	

PROPOSED AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2024

Current Step in REA Process:

- To be published for public comment (Aug 2022 – Feb 2023)

REA History:

- Approved by Standing Committee (January 2022 unless otherwise noted)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 32	Conforming proposed amendment to (g) to reflect the consolidation of Rules 35 and 40.	Rules 35 and 40
AP 35	The proposed amendment would transfer the contents of the rule to Rule 40 to consolidate the rules for panel rehearings and rehearings en banc together in a single rule.	Rule 40
AP 40	The proposed amendments address panel rehearings and rehearings en banc together in a single rule, consolidating what had been separate provisions in Rule 35 (hearing and rehearing en banc) and Rule 40 (panel rehearing). The contents of Rule 35 would be transferred to Rule 40, which is expanded to address both panel rehearing and en banc determination.	Rule 35
Appendix: Length Limits Stated in the Federal Rules of Appellate Procedure	Conforming proposed amendments would reflect the consolidation of Rules 35 and 40 and specify that the limits apply to a petition for initial hearing en banc and any response, if requested by the court.	Rules 35 and 40.
BK 7001	The proposed amendment would exempt from the list of adversary proceedings in Rule 7001, "a proceeding by an individual debtor to recover tangible personal property under § 542(a)."	
CV 12	The proposed amendment would clarify that a federal statute setting a different time should govern as to all subparts of the rule, not just to subpart (a).	

Revised March 1, 2022

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
Mutual Fund Litigation Reform Act	H.R. 699 *Sponsor:* Emmer (R-MN)	CV 8 & 9	**Bill Text:** https://www.congress.gov/117/bills/hr699/BILLS-117hr699ih.pdf **Summary:** This bill provides a heightened pleading standard for actions alleging breach of fiduciary duty under the Investment Company Act of 1940, requiring that "all facts establishing a breach of fiduciary duty" be "state[d] with particularity."	• 2/2/21: Introduced in House; referred to Judiciary Committee and Financial Services Committee • 3/22/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet

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 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 Administrators 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 • 6/24/21: Ordered to be reported without amendment favorably by Judiciary Committee

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
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)		**Bill Text:** https://www.congress.gov/117/bills/s840/BILLS-117s840is.pdf [Senate] https://www.congress.gov/117/bills/hr2025/BILLS-117hr2025ih.pdf [House] **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 • 10/19/21: Referred by House Judiciary Committee to Subcommittee on Courts, Intellectual Property, and the Internet
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	• 4/8/21: Introduced in House; referred to Judiciary Committee and to Committee on Science, Space, and Technology • 10/19/21: Referred by Judiciary Committee to Subcommittee on Crime, Terrorism, and Homeland Security

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			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."	
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) *Co-Sponsors:* Buck (R-CO) Perlmutter (D-CO) Neguse (D-CO) Cooper (D-TN) Thompson (D-CA) Burgess (R-TX) Bishop (R-NC) **S. 2827** *Sponsor:* Cornyn (R-TX) *Co-sponsor:* Warren (D-MA)	BK	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/4193/text?r=453 [House] https://www.congress.gov/117/bills/s2827/BILLS-117s2827is.pdf [Senate] **Summary:** Modifies venue requirements relating to Bankruptcy proceedings. Senate version includes a limitation absent from the House version giving "no effect" for purposes of establishing venue to certain mergers, dissolutions, spinoffs, and divisive mergers of entities. Would require the Supreme Court to prescribe rules, under § 2075, to allow an attorney to appear on behalf of a governmental unit and intervene without charge or meeting local rule requirements in Bankruptcy Cases and arising under or related to proceeding before bankruptcy and district courts and BAPS.	• 6/28/21: H.R. 4193 introduced in House; referred to Judiciary Committee • 9/23/21: S. 2827 introduced in Senate; referred to Judiciary Committee

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
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
Protecting Our Democracy Act	**H.R. 5314** *Sponsor:* Schiff (D-CA) *Co-Sponsors:* [168 co-sponsors] **S. 2921** *Sponsor:* Klobuchar [D-MN] *Co-Sponsors:* Blumenthal [D-CT] Coons [D-DE] Feinstein [D-CA] Hirono [D-HI] Merkley [D-OR] Sanders [I-VT] Warren [D-MA] Wyden [D-OR]	CR 6; CV	**Bill Text:** https://www.congress.gov/bill/117th-congress/house-bill/5314/text [House] https://www.congress.gov/117/bills/s2921/BILLS-117s2921is.pdf [Senate] **Summary:** Various provisions of this bill amend existing rules, or direct the Judicial Conference to promulgate additional rules, including: • Prohibiting any interpretation of Criminal Rule 6(e) that would prohibit disclosure to Congress of certain grand jury materials related to individuals pardoned by the President • Requiring the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 9/21/21: H.R. 5314 introduced in House; referred to numerous committees, including House Judiciary Committee • 9/30/21: S. 2921 introduced in Senate; referred to Committee on Homeland Security and Governmental Affairs • 12/9/21: H.R. 5314 debated and amended in House under provisions of H. Res. 838 • 12/9/21: H.R. 5314 passed by House • 12/13/21: House bill received in Senate

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Congressional Subpoena Compliance and Enforcement Act	**H.R. 6079** *Sponsor:* Dean (D-PA) *Co-Sponsors:* Nadler (D-NY) Schiff (D-CA)	CV	**Bill Text:** https://www.congress.gov/117/bills/hr6079/BILLS-117hr6079ih.pdf **Summary:** The bill directs the Judicial Conference to promulgate rules "to ensure the expeditious treatment of" actions to enforce Congressional subpoenas. The bill requires that the rules be transmitted within 6 months of the effective date of the bill.	• 11/26/21: Introduced in House; referred to Judiciary Committee

TAB 5

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
OCTOBER 5, 2021

1 The Civil Rules Advisory Committee met by Teams teleconference
2 on October 5, 2021. The meeting was open to the public.
3 Participants included Judge Robert Michael Dow, Jr., Committee
4 Chair, and Committee members Judge Cathy Bissoon; Judge Jennifer C.
5 Boal; Hon. Brian M. Boynton; David J. Burman, Esq.; Judge David C.
6 Godbey; Justice Thomas R. Lee; Judge Sara Lioi; Judge R. David
7 Proctor; Judge Robin L. Rosenberg; Joseph M. Sellers, Esq.; Dean A.
8 Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq.
9 Professor Edward H. Cooper participated as Reporter, and Professor
10 Richard L. Marcus participated as Associate Reporter. Judge John D.
11 Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R.
12 Coquillette, Consultant; and Peter D. Keisler, Esq., represented
13 the Standing Committee. Judge Catherine P. McEwen participated as
14 liaison from the Bankruptcy Rules Committee. Susan Soong, Esq.,
15 participated as Clerk Representative. The Department of Justice was
16 further represented by Joshua E. Gardner, Esq. Julie Wilson, Esq.,
17 S. Scott Myers, Esq., Bridget M. Healy, Esq., and Burton DeWitt,
18 Esq., represented the Administrative Office. Judge John S. Cooke,
19 Director, Dr. Emery G. Lee, Dr. Tim Reagan, and Jason Cantone,
20 Esq., represented the Federal Judicial Center.

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

23 Judge Dow opened the meeting with messages of thanks and
24 welcome. He expressed regret that it had not proved wise to meet
25 in person and the hope that the March meeting will be in person.
26 "Technology has saved us. We owe special thanks to Brittany Bunting
27 for keeping the trains running and on schedule."

28 Judge Dow welcomed two new members. Judge Cathy Bissoon sits
29 on the Western District of Pennsylvania in Pittsburgh. She is a law
30 school classmate of Judge Dow -- the class is "surely
31 overrepresented on the Committee." Judge David Proctor sits on the
32 Northern District of Alabama in Birmingham. Judge Proctor has
33 participated in many of the Committee's MDL activities, both as an
34 experienced MDL judge and as a member of the Judicial Panel on
35 Multidistrict Litigation.

36 Burton DeWitt is the new Rules Law Clerk. He has already
37 engaged in e-mail exchanges with the reporters. "The Rules Law
38 Clerks are a gift to all committees."

39 Judge Jordan is unable to attend today's meeting because he is
40 President of the American Inns of Court and must preside over their
41 meeting in London. He has been a tireless chair for the CARES Act
42 Subcommittee, and will have more work in that role as comments come

Draft

43 in on the draft emergency rule, Rule 87, that was published last
44 yAugust.

45 Judge Dow further noted the long list of observers. "Their
46 interest is appreciated." They should remember that they also can
47 participate by commenting on published proposals and by sending in
48 suggestions. The representatives from Capitol Hill were
49 particularly welcomed.

50 Judge Dow reported on the Standing Committee meeting last
51 June. All advisory committees other than the Evidence Rules
52 Committee recommended publication of emergency rules. Hard work by
53 Reporters Struve and Capra produced a high level of uniformity
54 among the proposals, with only a few departures at specific points.
55 Civil Rule 87 was approved for publication. But it should be
56 remembered that in recommending publication this Committee reserved
57 the question whether it will be best to proceed toward adoption of
58 Rule 87, instead to recommend amendments of Rules 4 and 6, or to
59 abandon the proposal. The comments on the published proposal will
60 provide helpful guidance. The Supplemental Rules for Social
61 Security cases were given final approval. If they proceed through
62 the remaining stages of the process smoothly, they will take effect
63 on December 1, 2022. Discussion of the recommendation to adopt
64 proposed Rule 12(a)(4) as published found a division of views
65 similar to the divisions expressed in this Committee at the April
66 meeting. The proposal was essentially remanded for further
67 consideration, and will be considered today.

68 The Standing Committee Report to the Judicial Conference
69 essentially mirrors the same points. It reflects the approval at
70 the January Standing Committee meeting of the recommendation to
71 publish proposed amendments to Rules 15 and 72 when a suitable
72 package of proposals can be presented. The package was formed with
73 Rule 87, and they too were published in August.

74 *Legislative Update*

75 Julie Wilson delivered the legislative update. The update
76 tracks legislation that would amend court rules outside the Rules
77 Enabling Act process. There have been no new bills to add to those
78 described in the chart in the agenda materials.

79 *April 2021 Minutes*

80 The draft minutes for the April 23, 2021 Committee meeting
81 were approved without dissent, subject to correction of
82 typographical and similar errors.

83 *Juneteenth National Independence Day*

84 Congress has made Juneteenth National Independence Day a new
85 statutory holiday. It can be added to the list of statutory

January 2 draft

Draft

86 holidays in Rule 6(a)(6)(A):

87 **Rule 6. Computing and Extending Time; Time for Motion**
88 **Papers** * * *

89 (a) COMPUTING TIME. * * *

90 (6) *"Legal Holiday" Defined.* "Legal Holiday" means:
91 (A) the day set aside by statute for observing * * *
92 Memorial Day, Juneteenth National Independence Day,
93 Independence Day, * * *.

94 The Bankruptcy Rules Committee has voted to recommend addition
95 of the new holiday to Bankruptcy Rule 9006(a) as a technical change
96 without publication. It is expected that the same addition will be
97 recommended for Appellate Rule 26(a)(6)(A) and Criminal Rule
98 45(a)(6)(A). The recommendation as to publication of Rule 6(a)(6)
99 should be the same as recommended by the other advisory committees,
100 but adoption without publication seems appropriate. It was noted
101 that even without amending Rule 6(a)(6)(A), subparagraph (B)
102 defines as a legal holiday "any day declared a holiday by the
103 President or Congress," so Juneteenth National Independence Day is
104 already covered in the rules.

105 The Committee unanimously voted to recommend addition of the
106 new holiday to Civil Rule 6(a)(6)(A) as a technical change without
107 publication.

108 *Rule 12(a)(4)*

109 Judge Dow introduced the discussion of Rule 12(a)(4) by noting
110 that this proposed amendment was requested by the Department of
111 Justice and published for comment in August, 2020:

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

116 (a) TIME TO SERVE A RESPONSIVE PLEADING.

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

120 * * * * *

121 (4) *Effect of a Motion.* Unless the court sets a
122 different time, serving a motion under this
123 rule alters these periods as follows:
124 (A) if the court denies the motion or

January 2 draft

Draft

125 postpones its disposition until trial,
126 the responsive pleading must be served
127 within 14 days after notice of the
128 court's action, or within 60 days if the
129 defendant is a United States officer or
130 employee sued in an individual capacity
131 for an act or omission occurring in
132 connection with duties performed on the
133 United States' behalf; or

134 This proposal is straight-forward. It extends the time to
135 respond from 14 days to 60 days in all of the cases it describes,
136 without attempting to distinguish between motions that raise an
137 immunity defense and other motions. There were only three public
138 comments, but two of them objected to the proposal. Discussion at
139 the April Committee meeting raised two questions: whether any
140 extended time should be less than 60 days, and whether any extended
141 time should be available only when the motion raises an immunity
142 defense. A motion to allow the extended period only when "a defense
143 of immunity has been postponed to trial or denied" failed, six
144 votes for and nine votes against. The motion to recommend the
145 proposal for adoption as published passed, ten votes for and five
146 votes against. The Standing Committee was troubled by the same
147 concerns, and after thorough discussion asked for further
148 consideration by this Committee, with a particular focus on the
149 length of any extended period to respond that might be recommended.

150 Discussion opened with a reminder that this topic has proved
151 more difficult than it initially seemed. If it continues to present
152 challenges that are not readily resolved in this meeting, it can be
153 carried forward to the March meeting without losing impetus. If it
154 were presented to the Standing Committee in January with a renewed
155 recommendation for adoption, it would be presented to the Judicial
156 Conference in October 2022, the same time as if a recommendation
157 for adoption were approved by the Standing Committee at its spring
158 meeting.

159 When it made its proposal, the Department of Justice offered
160 two reasons. The broader general reason was that, as compared to
161 other law firms and organizations, it intrinsically needs more time
162 to decide on a responsible course of action after denial of a
163 motion to dismiss claims against an individual official. That is
164 why Rule 12(a)(3) sets a 60-day period to file a responsive
165 pleading when there is no motion. The more specific reason is that
166 motions to dismiss claims against an individual official regularly
167 include an official immunity defense. Denial of an immunity motion
168 supports a collateral-order appeal. The time to appeal in these
169 actions was extended to 60 days by Appellate Rule 4(a)(1)(B)(iv) by
170 analogy to Rule 12(a)(3) and with the support of Congress through
171 an amendment of 28 U.S.C. § 2107. For like reasons, the time to
172 file a responsive pleading should be 60 days after a motion to
173 dismiss is denied.

January 2 draft

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174 The reason for setting the appeal period at 60 days, moreover,
175 reflects a concern unique to the Department of Justice. Department
176 regulations require approval of any appeal by the Office of the
177 Solicitor General. Review is essential to ensure deliberate
178 consideration of the legal positions that will be taken, and to
179 maintain national control that establishes uniform practices across
180 all United States Attorney offices. One dimension of this practice
181 is a concern described in the agenda materials: decision of what
182 may be important legal questions on the sketchy record afforded by
183 a complaint may be intrinsically unsatisfactory, and may go wasted
184 when any further proceedings that ensue show that the question
185 decided on the pleadings need not have been decided.

186 The argument for a 60-day response period was further
187 supported by describing a routine practice of seeking an extension
188 of the present 14-day period, and the routine experience of winning
189 extensions. This practice was framed in discussion at the April
190 meeting as something that can be seen as a choice between competing
191 "presumptions." The current rule presumes that a 14-day response
192 period suffices in these cases, leaving it to the government to
193 justify an extension. The published rule shifts the presumption,
194 giving the government 60 days and leaving it to the plaintiff to
195 win a shorter time by showing a need for expedition. If experience
196 indeed shows that motions are routinely made and generally granted,
197 it may be more efficient to set the presumption at 60 days. This
198 practice, further, will alleviate the uncertainty that prevails
199 between the time a motion to extend is made and the time a ruling
200 on the motion is made. Until the government knows that an extension
201 will be granted, it must do the work of preparing an answer, and
202 must file a perhaps inadequately developed answer. Once the answer
203 is filed, the government may be required to enter the routine
204 pretrial procedures of scheduling conferences, initial disclosures,
205 perhaps even discovery, while it is still deciding whether to
206 appeal. Those activities are cut off by filing a notice of appeal,
207 but the initial efforts are not undone.

208 These concerns encountered some skepticism in the April
209 Committee discussion. The 60-day period seemed too long to some
210 members, reflecting the concerns expressed in the two comments that
211 opposed the proposal. Those comments stressed that plaintiffs face
212 formidable obstacles in these actions, and should not be saddled
213 with yet another source of delay in getting into litigation on the
214 merits. These doubts prompted several questions asking for greater
215 detail about Department of Justice experiences that show the need
216 for so long an extension, and that provide more precise information
217 about both the frequency of motions to extend and the rate of
218 success on those motions. The response, framed after mid-meeting
219 consultation with the Torts Branch -- where the proposal originated

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220 -- provided anecdotal accounts of real need, "many" requests for
221 extensions, and frequent extensions. No more precise information
222 was available.

223 The need for time in cases that present an immunity defense
224 and the prospect of an immunity appeal led to similar questions.
225 What share of these cases actually involve an immunity defense?
226 What is the experience with the need to engage in pretrial
227 litigation after denial of the motion and while a decision is made
228 whether to take an appeal that will cut off further pretrial
229 litigation? These questions were wrapped up with the time
230 questions, and were met with similar answers. Immunity defenses are
231 raised in most cases, appeals are seriously considered in all of
232 them, and appeals are frequently taken.

233 Similar questions were raised in the Standing Committee. As
234 noted at the outset, much of the discussion there focused on the
235 need for a response period more than four times longer than is
236 afforded in other cases, including actions against the United
237 States, its agency, or its officer sued in an official capacity. As
238 in this Committee, questions also were raised about the reasons for
239 favoring the United States when state governments, which may have
240 similar justice department structures, are treated as all other
241 litigants.

242 These concerns suggest at least four possible outcomes. One is
243 to adhere to the proposal as published. Another is to abandon it.
244 The third is to reduce the number of extra days. The fourth, which
245 could be combined with a reduced number of days, is to limit the
246 extension to motions that raise an immunity defense.

247 Framing the questions for discussion began with a reminder
248 that the choice among these alternatives will not affect the
249 incidents of police conduct decried by the public comments, nor
250 will it modify official immunity doctrines. The question is how to
251 tailor this narrow and specific procedure rule to the realities of
252 litigating individual-liability claims against federal officials.

253 The choice among the alternatives, or perhaps some still
254 different approach, is likely to be influenced by the ability of
255 the Department of Justice to provide additional information about
256 its actual experience.

257 The Department of Justice representative responded by noting
258 that these cases are handled both in "main Justice" and by U.S.
259 Attorney offices. "There is no mechanical way to track them." But
260 the Torts Branch says that motions to dismiss are made in 90% of
261 these cases, and that an immunity defense is raised in 90% of the
262 motions. When the motion is denied, appeals are considered in every

263 case by a career attorney, and then by an appeal attorney. The
264 recommendation may be not to appeal. But the frequency of "no
265 appeal" recommendations cannot be quantified now. Nor can the
266 Department track "hard numbers" on requests for an extension of
267 time after a motion to dismiss is denied. The Torts Branch,
268 however, proposed the rule amendment because it is "weary of
269 routine motions that are often, but not always, granted."

270 A question asking how the Department defines "immunity"
271 prompted a response that the Department "could live with an
272 immunity-only rule. That would largely serve our concerns."

273 A member asked how many extra days are included in a request
274 for an extension? How many days are granted? This information would
275 help in understanding how big the problem is. The Department's
276 response was that "there is a diffuse process." It is hard to
277 canvass all of the US Attorney offices. But it can be noted that
278 the appeal period is 60 days, and an extension to 60 days affords
279 an opportunity to weigh the decision whether to appeal. If an
280 extension is denied, the effort of continuing to litigate before
281 the decision whether to appeal defeats the purpose of immunity.

282 An alternative approach to the same issue asked whether the
283 Department can find out how many people in the Torts Branch run
284 into these problems? The Department "will try to get more robust
285 information. But we are careful in making rules suggestions. This
286 is not a single, one-off problem." It may be possible to examine
287 the files of individual attorneys to get a better picture.

288 A new member observed that in coming to this issue for the
289 first time, one apparent element is that all defendants consult
290 with counsel in deciding whether to take an appeal, but only those
291 represented by the Department find their counsel has to get
292 approval. "Immunity is still the law." The defendant should be
293 entitled to get review of the defense before being required to
294 litigate. The Department added that in carrying forward with the
295 defense before knowing whether an extension will be granted, or
296 after an extension is denied, pretrial litigation is shaped by the
297 prospect that an immunity appeal may be taken.

298 Another member asked whether the purpose of the proposal is to
299 avoid the need to request an extension, or instead is to address
300 the occasions when an extension is denied -- would a rule setting
301 a period less than 60 days meet the need? The Department responded
302 that the primary concern is making the motion and the need to
303 continue pretrial activity until learning whether an extension has
304 been granted. A period shorter than 60 days would be
305 counterproductive. As the recent letter from Acting Assistant
306 Attorney General Boynton points out, "you still have to keep

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307 preparing until you know."

308 A judge framed the issues of delay and uncertainty by
309 observing that a rule allowing 60 days to respond will not much
310 increase delays, and will alleviate uncertainty, if 90% of the
311 motions raise immunity, and if appeal is always considered after an
312 immunity motion is denied, and if a request for an extension is
313 almost always made. Another judge recalled that this observation
314 reflected the discussion in April. A presumption that the period is
315 60 days, with the opportunity for a plaintiff to request a shorter
316 period when there are real problems with delay, "may be the Rule 1
317 answer." This answer, however may be found more comfortable if it
318 is given only for cases with an immunity motion.

319 Another member asked why, indeed, the rule should not be
320 limited to immunity cases. The Department position was repeated --
321 "we can live with that." But the proposal as published is clean.

322 A judge asked what prompted the Torts Branch to suggest this
323 proposal? They have been living with the 14-day period; did
324 something change? The Department's sense is that the issue "has
325 been around for a while."

326 The question recurred: if the extra time is to be available
327 only in cases with an immunity motion, how is immunity to be
328 defined? Apparently the underlying concept focuses on immunities
329 that confer a "right not to be tried," thus supporting a
330 collateral-order appeal. That may not be appropriate rule language.
331 Discussions that eventually led to the 2010 amendments of Rule 56
332 considered and abandoned various ways to draft a rule that would
333 require the court to identify disputed material facts when denying
334 summary judgment in a case with an opportunity to appeal. It might
335 be worked out in this way, however, given the lack of any clearly
336 limiting concepts of the "qualified" and "absolute" official
337 immunities that support collateral-order appeals. Or the rule might
338 simply refer to "official immunity," with an explanation in the
339 Committee Note. Or, if it proves possible to identify and define
340 one or two types of immunity that are involved in 90% of the cases,
341 that might suffice.

342 Another member, who in April voted to recommend adoption of
343 the published proposal for the reasons discussed by some other
344 members today, renewed the question whether this is a problem that
345 has built up over time. Would it be possible to survey US Attorneys
346 to find out more?

347 Support for the proposal as published was summarized by
348 another member. If 90% of these motions raise an immunity defense,
349 and 100% of the denials are considered for appeal, a clean rule

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350 that covers all cases is better. It would clearly address all the
351 cases that present a need for added time -- that is the vast
352 majority of all cases -- and it avoids the risk that an attempt to
353 define the forms of immunity that afford the extra time to respond
354 will miss some cases that should be included.

355 The discussion at the June Standing Committee meeting was
356 brought back, beginning with the reminder that the published
357 proposal might be modified by limiting it to immunity cases, by
358 reducing the allowance of extra time, or both. The focus in the
359 Standing Committee was on the number of extra days, reflecting
360 concern that there is too much delay in litigation as it is. That
361 concern needs to be addressed. The prospect that the full 60-day
362 period would not have much effect on delay, given the frequency of
363 successful requests for extensions, should be developed as fully as
364 possible. Another concern was the appearance of favoritism --
365 affording more than four times the number of days to respond seems
366 much. The comparison to the 60-day appeal period may weaken this
367 perspective, since that is only double the 30 days allowed other
368 litigants. The 60-day appeal period, however, provides a functional
369 justification that can be offered. And it can be noted that
370 excluding non-immunity cases may generate more work than it's
371 worth.

372 The Standing Committee's concern with "equity" was noted
373 again. The 60-day appeal period applies to all parties, not only
374 the United States. The proposed extended response time does not.
375 One possibility would be to cut the response time back to 40 days.
376 That is 2/3 of the 60-day appeal period, the same ratio as holds
377 between the 14-day response period for all litigants in Rule
378 12(a)(4) and the 21-day initial response period afforded by Rule
379 12(a)(1) to all litigants other than the United States.

380 The importance of addressing the Standing Committee's concern
381 was echoed. The Department responded that it understands the
382 questions and will get as much information as can be gathered for
383 consideration at the March meeting.

384 Discussion concluded with the observation that the consensus
385 is to give the Department the opportunity to respond to the
386 concerns expressed today and in the Standing Committee. The
387 Department's work is much appreciated. This will be an action item
388 on the March agenda.

389 *Rule 12(a)(2), (3)*

390 Judge Dow opened discussion by noting that a proposal to
391 recommend publication of an amendment that would conform Rule
392 12(a)(2) and (3) to statutory requirements has been considered

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393 twice, first at the October 2020 meeting and then again at the
394 April 2021 meeting. The Committee divided by a rare tie vote at the
395 October meeting and did not have time for full consideration at the
396 April meeting. The time has come to decide whether to recommend
397 publication.

398 The reasons supporting amendment are simple. As it stands, the
399 rule is inconsistent with statutes that set a shorter time to
400 respond than the 60 days allowed by paragraphs (2) and (3). There
401 has never been any intention to supersede such statutes, but the
402 failure to provide for them may be aggravated by the prospect that
403 a close reading might even support an inference from the exception
404 for other statutory periods in (a)(1) that (2) and (3) were
405 intended to supersede inconsistent statutes. The problem with the
406 present rule text can be readily amended to subject all three
407 paragraphs to inconsistent statutes, as shown by the present rule
408 text and the proposed amendment.

409 Rule 12(a) begins like this:

410 (a) TIME TO SERVE A RESPONSIVE PLEADING.
411 (1) *In General.* Unless another time is specified by this rule
412 or a federal statute, the time for serving a responsive
413 pleading is as follows:
414 (A) A defendant must serve an answer:
415 (i) within 21 days after being served with the
416 summons and complaint; or * * *
417 (2) *United States and its Agencies, Officers, or Employees*
418 *Sued in an Official Capacity.* The United States, a United
419 States agency, or a United States officer or employee
420 sued only in an official capacity must serve an answer to
421 a complaint, counterclaim, or crossclaim within 60 days
422 after service on the United States attorney.
423 (3) *United States Officers of Employees Sued in an Individual*
424 *Capacity.* A United States officer or employee sued in an
425 individual capacity for an act or omission occurring in
426 connection with duties performed on the United States'
427 behalf must serve an answer to a complaint, counterclaim,
428 or crossclaim within 60 days after service on the officer
429 or employee or service on the United States attorney,
430 whichever is later. * * *

431 The amendment would recast the beginning of Rule 12(a) to read
432 like this:

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

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437 <u>(1) *In General.*</u>
438 (A) a defendant must serve an answer * * *.

439 There are in fact statutes that set a shorter time than 60
440 days to respond in actions within Rule 12(a)(2). The submission
441 that prompted consideration of this topic was made by a lawyer who
442 had to argue vigorously to persuade a clerk to issue a summons with
443 the 30-day response period set by the Freedom of Information Act.
444 It is not the only such statute. The potential for confusion is
445 more than abstract speculation. Independent research on PACER by a
446 journalist and research law librarian shows that mean and median
447 response times in Freedom of Information Act actions exceed 30
448 days. Breaking it down further, in the cases with responses within
449 30 days -- one-third of the total -- the mean was 22.4 days and the
450 median was 24 days. In the remaining two-thirds, the mean was 62.1
451 days and the median was 48 days. The District for the District of
452 Columbia accounts for approximately 2/3 of all these cases, and has
453 a "practical mechanism" for obtaining 30-day summonses. In other
454 districts, 60-day summonses are commonly issued.

455 The proposed amendment is supported by the desire to have rule
456 text that accurately reflects the intended purpose. That may
457 suffice in itself to overcome the general reluctance to avoid
458 burdening bench and bar with what may seem a steady profusion of
459 minor adjustments. There is a more important concern as well. As it
460 stands, Rule 12(a)(1) expressly defers to inconsistent statutes.
461 (2) and (3) do not. The apparent distinction may imply an intent to
462 supersede inconsistent statutes. That has never been intended, and
463 should be clearly rejected now. The very implementation of
464 supersession, moreover, can impose significant burdens. An Enabling
465 Act rule supersedes inconsistent statutes in effect at the time the
466 rule is adopted, but is in turn superseded by later enactment of an
467 inconsistent statute. What counts as the relevant time of adoption
468 or enactment may be further confused by changes in rule text or
469 statutory provisions that are associated with the inconsistent
470 texts but do not directly change the relevant texts. Research has
471 not yet uncovered a statute inconsistent with the 60-day period in
472 Rule 12(a)(3), but such statutes may exist now, and might be
473 enacted in the future.

474 The only contrary concern has been suggested by the Department
475 of Justice. The Department reports it knows and honors the 30-day
476 statutory periods. But some cases combine claims subject to a 30-
477 day statute and other claims that are not. Often they move for an
478 extension of the 30-day period so they have adequate time to
479 prepare a response to all claims. They are concerned that adding
480 express deference to statutes to rule text might make it more
481 difficult to persuade some judges to grant extensions in the mixed-
482 claim cases.

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483 The view that supersession concerns provide a strong reason to
484 go forward with the proposal was expressed forcefully. Although the
485 problem does not seem to have yet emerged in the cases, treatises
486 have noted it as a concern.

487 Further discussion suggested that it is a good idea to clean
488 up this problem. "The rules maven in me wants to fix it." There is
489 no reason to expect any interference with practice in the District
490 Court for the District of Columbia, where the majority of FOIA
491 actions are brought.

492 Another member supported the amendment. The rule "is
493 inaccurate now." It is important that the rule reflect the
494 statutes. Discussion with some judges who are not committee members
495 suggests that if the amendment affects practice in granting
496 extensions, the effect will not be adverse to the Department of
497 Justice.

498 The committee voted without dissent to recommend publication
499 of this proposal.

500 *MDL Subcommittee*

501 Judge Rosenberg began the report of the MDL Subcommittee with
502 thanks to the Subcommittee for much hard work, including several
503 meetings and the Emory conference. She also thanked Professor
504 Marcus for drafting illustrations of ways in which Rule 16 could be
505 revised to embody some of the approaches to managing MDL
506 proceedings that the Subcommittee has been discussing.

507 The Subcommittee retains the question of interlocutory appeal
508 opportunities on its agenda, but holds it in reserve without plans
509 for further consideration now. Third party litigation funding
510 remains an important topic to be discussed later in this meeting,
511 but it does not seem to be peculiarly involved in MDL proceedings
512 and has been relinquished by the Subcommittee to a watching agenda
513 of the full committee.

514 Attention now focuses on early "vetting" of claims and
515 judicial involvement in the settlement process. Most Subcommittee
516 members attended the Emory conference arranged by Professor Dodge.
517 The conference focused on management of MDL proceedings and
518 settlement. Academics frequently invoke an analogy to Rule 23
519 provisions for appointing counsel in class actions and for
520 reviewing proposed settlements. The conference showed that MDL
521 settlements often are not "global." Rather than settling all the
522 claims swept into the proceeding, settlements commonly involve a
523 greater or smaller subset. One common event is an "inventory"
524 settlement that resolves all claims represented by a single lawyer.

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525 And it often happens that different inventories settle for
526 different values. Participants accounted for the differences by
527 suggesting that higher prices are paid for claims represented by a
528 lawyer who has carefully developed each case in the inventory,
529 making it clear that the claims are strong. As compared to class
530 actions, further, there is no authority for an MDL court to reject
531 proposed settlement reached between a plaintiff and a defendant.
532 The Subcommittee is not looking toward a rule that would require
533 court approval, but instead is considering the possibility of
534 providing for judicial monitoring or perhaps supervision of the
535 settlement process.

536 The Subcommittee also is considering the questions raised by
537 common benefit fund practices. Common benefit funds are regularly
538 established as the vehicle for compensating court-appointed lead
539 counsel for pretrial work undertaken on behalf of all claimants in
540 the proceeding. Judge Chhabria's thoughtful opinion in the Roundup
541 MDL proceeding says that courts and attorneys need clear guidance.
542 The practice seems to have got out of control, at least in some of
543 the largest MDL proceedings. The opinion invites consideration of
544 new rules.

545 The Subcommittee met in August. It considered the choice
546 between looking for a "high impact" rule or looking for a "low
547 impact" rule. A high impact rule would be something of the sort
548 illustrated by the sketch Rule 23.3 that has been in agenda
549 materials for some time but has never been much discussed. A low
550 impact rule would offer less guidance, at least in rule text.
551 Professor Marcus was asked to draft an illustrative rule, and
552 quickly produced the sketch of a new Rule 16(b)(5) included in the
553 agenda materials. This is what many MDL courts are doing now. The
554 Subcommittee plans to develop this low impact approach, without
555 looking for present discussion of the "Rule 23.3" high impact
556 alternative.

557 The familiar proposition that MDL proceedings now include
558 nearly half of all civil actions on the dockets of federal courts
559 may of itself provide good reason to continue looking for possible
560 new rules. Additional reasons may be found in the reports that the
561 Judicial Panel on Multidistrict Litigation is expanding the number
562 of judges selected to entertain MDL proceedings, and that MDL
563 judges are seeking to expand and diversify the pool of lead
564 counsel. Explicit MDL rules could help guide judges and lawyers new
565 to these proceedings. The Manual for Complex Litigation remains
566 relevant, but parts of it are outdated. The parts for early vetting
567 of claims and early exchange of information are increasingly behind
568 evolving practice.

569 Professor Marcus added that the agenda includes the first

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570 sketch of a new Rule 16(b)(5), and a companion addition to Rule
571 26(f)(3) that would add a new subparagraph (F) calling for party
572 discussion about an early exchange of information about claims and
573 defenses. The sketch includes many footnotes that call attention to
574 issues that need to be addressed. Discussion today will help the
575 Subcommittee as it advances its work. Judge Dow agreed that
576 feedback will be welcome and helpful.

577 A Subcommittee member found the Rule 16(b)(5) sketch helpful,
578 but expressed concerns. It is true that MDL proceedings occupy a
579 large share of the federal court case inventory. The draft
580 provisions are "hefty." It is regrettable that the Manual has not
581 been updated. But these provisions "do not reflect how MDLs
582 actually work." They might give leadership counsel still greater
583 leverage than they now have over cases not in the MDL. And it must
584 be remembered that mass-tort cases are not the only kind that find
585 their way into MDL proceedings. "We may be further muddying waters
586 that are already muddy," and "add to present conflicts."

587 A judge agreed with these concerns "to some extent," asking
588 how much have these issues been discussed with the bar? The focus
589 seems to have whittled down to settlement. How much discussion has
590 there been with members of the MDL bar about rules for appointing
591 lead counsel, the responsibilities of lead counsel, reports of lead
592 counsel to the court?

593 Judge Rosenberg explained that the draft was prepared at the
594 Subcommittee's request. The Subcommittee saw it for the first time
595 at its August 23 meeting. Early vetting has been discussed in
596 conferences with lawyers -- plaintiff and defense lawyers agree
597 that it is important, but have not discussed how it should be done.
598 Rule 16(b)(5)(A) addresses this. The Subcommittee has discussed
599 that topic repeatedly, but has not addressed this draft.

600 The question was reframed to ask whether the Subcommittee will
601 go back to the bar to discuss the issues raised by provisions
602 regarding leadership counsel.

603 A partial response was made by recalling discussions early in
604 the MDL Subcommittee's work with former committee member Parker
605 Folse, who focused on widespread use of TPLF in patent litigation.
606 The Subcommittee has "intensely focused on ideas that have fallen
607 by the way. Ideas have come from various sources. They have not
608 been fully explored. There is a good deal of work yet to be done."
609 There are academic papers that focus on the importance of including
610 detailed provisions in the orders that appoint leadership counsel.
611 These orders limit what other lawyers can do. The order needs to
612 look four or five years ahead. The subcommittee needs to raise
613 these issues in conferences with the bar, giving them the attention

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614 that has been lavished on ideas that have fallen by the way.

615 The work to continue to develop possible rules is justified in
616 part because there is a lot that new MDL judges do not know.
617 Guidance in formal court rules might help. But in the end, the
618 Committee may decide not to attempt to frame a formal rule of
619 procedure.

620 A Subcommittee member noted that the Subcommittee has wrestled
621 with these issues. Many questions remain open. The "low impact"
622 approach represents the Subcommittee's best thinking for right now,
623 but without consensus on the issues flagged in the footnotes.

624 Professor Marcus added that indeed this draft has not been
625 reviewed with the bar. Resistance is likely, but it may be
626 different from what a high impact approach would encounter. It is
627 useful to pursue these issues with the bar to see whether a low
628 impact approach can win support.

629 A new committee member noted that while a member of the
630 Judicial Panel on Multidistrict Litigation he had engaged in many
631 conferences with the Subcommittee and had been impressed with its
632 work. Some of the issues may prove to be suitable for addressing in
633 the annual conference for MDL judges, but determining what may be
634 better addressed by court rules is the question to be addressed
635 now. That is the work going forward.

636 Judge Dow noted that there has been a lot of resistance to the
637 idea that judges might be called on to approve settlements. Many
638 lawyers emphasize the right to settle, and lawyers and judges agree
639 that there is nothing an MDL judge can do when parties file a
640 stipulated dismissal. The low impact approach focuses on the
641 process of settlement, and on the disconnect between leadership and
642 other counsel. There is reason to be nervous about the prospect
643 that a judge might upset a settlement reached between two parties,
644 but perhaps a procedure can be devised to improve the flow of
645 information in ways that will advance the fairness of individual
646 inventory settlements, or other forms of settlement.

647 A judge asked whether it would be wise to test a new rule
648 through a pilot project. "I'm not sure this feels right for a rule
649 right now." The response observed that many of these ideas are
650 being tried in practice now. Early vetting of claims is an example
651 of practices that have evolved dramatically during the time the
652 Subcommittee and Committee have been studying MDL practice. The
653 concept is not controversial. Plaintiffs and defendants agree that
654 it is desirable. The means of implementation depend in part on the
655 particular characteristics of each mass tort. Settlement review
656 practices vary, but the Subcommittee can find orders that

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657 illustrate a variety of approaches, and may be able to learn about
658 implementation. The Subcommittee continues to gather information
659 about many aspects of ongoing MDL practice. Its work remains in
660 mid-stream.

661 Professor Marcus noted that the mandatory initial discovery
662 pilot project fixed on two districts, and asked how would a pilot
663 project for MDL procedures be structured. The Judicial Panel
664 selects the transferee judge for each MDL. Would that element of
665 itself interfere with the ability to compare pilot courts to other
666 courts in a neutral, random way?

667 A judge said that it is worth pursuing the low impact model
668 now to see how lawyers and judges react to it. "The concepts seem
669 attractive. It's worth pursuing."

670 Judge Cooke said that the Federal Judicial Center is in the
671 early stages of developing a new edition of the Manual for Complex
672 Litigation. A steering committee is being formed. But the new
673 edition is not likely to be ready soon. Professor Marcus added that
674 the Fourth Edition was drafted shortly after Rule 23 amendments.
675 The prospect of a Fifth Edition is not a reason to defer work on a
676 possible MDL rule.

677 Judge Rosenberg noted again that the Subcommittee has not
678 reached uniform views on the concepts in the Rule 16(b)(5) sketch.
679 "We will work more to crystallize thinking about general concepts."
680 The Subcommittee will meet as often as needed to work out a draft
681 that is ready for review at another conference, either arranged by
682 Professor Dodge at Emory or in some other forum. A conference is
683 being held later this week at George Washington Law School to
684 discuss all these issues as part of a project to develop best
685 practices. Others as well are working for best practices
686 guidelines. The concepts in the Rule 16(b)(5) sketch subparagraphs
687 (A), (B), and (D) are being done now -- early exchanges of
688 information about claims and defenses, detailed orders appointing
689 leadership lawyers, and regular reporting by leadership to the
690 court. The footnotes to subparagraph (C) on identifying methods for
691 compensating leadership counsel for efforts that produce common
692 benefits reflects the uncertainties that surround current practice.
693 Subparagraphs (E) and (F) address settlement issues that remain
694 "hot button" subjects of controversy. And there is one optimistic
695 note. The pandemic has led to many Zoom conferences in MDL
696 proceedings, engaging attendance by hundreds of lawyers. As
697 compared to travel from distant places to attend a hearing in
698 person, this practice should be encouraged as a regular feature of
699 MDL management.

700 *Discovery Subcommittee*

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701 Judge Dow prefaced the Discovery Subcommittee report by noting
702 that Discovery Subcommittee members participated in remote
703 conferences on privilege logs on September 20, and 22 to 23.

704 Judge Godbey began the report by thanking Subcommittee members
705 for their hard work. Special thanks are due to the lawyers from
706 private practice, who have devoted much valuable time to this
707 Subcommittee and all of whom have also devoted much valuable time
708 to the MDL Subcommittee. Two main subjects have occupied the
709 discovery work -- sealing court records and privilege logs.

710 The sealing topic began with a proposal for a new Rule 5.3
711 submitted by Professor Volokh, the Reporters' Committee for Freedom
712 of the Press, and the Electronic Frontier Foundation. The proposed
713 rule draft is complex, but is designed to make it harder to seal
714 and easier for the press to oppose sealing. The Subcommittee has
715 not voted on this specific proposal, but it seems to have little
716 support.

717 Sealing "is complicated." A sample of local rules, without yet
718 undertaking a comprehensive survey, shows clearly that practices
719 are different in different districts. The circuits seem to have
720 pretty similar standards for sealing, although it might be useful
721 to confirm in rule text that the standard for sealing court records
722 is different from the standard for discovery confidentiality
723 orders.

724 The Administrative Office has launched a sealing project.
725 Julie Wilson noted that the effort aims to address the management
726 of sealed documents through operational tools such as model rules,
727 best practices, and the like. The newly formed Court Administration
728 and Operations Advisory Council will be asked for advice on
729 operational issues with unsealing, and will be asked for advice on
730 the need for a civil rule on sealing. "It's very early in the
731 process. They will be gathering information on what the operational
732 issues are." That may extend to offering views on the desirability
733 or framing of a new civil rule.

734 The agenda materials include a sketch of a new Rule 5(d)(5) to
735 govern sealing, along with a companion cross-reference provision to
736 be added as Rule 26(c)(4). Professor Marcus observed that it would
737 be premature to decide now to do nothing, or to adopt some version
738 of this draft, or even to look at the procedures for sealing. These
739 issues affect other advisory committees, particularly the Criminal
740 Rules Committee. It may make sense to pause work for now.

741 The Committee agreed that present work on sealing court files
742 should be deferred to avoid competition with the parallel work in
743 the Administrative Office.

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744 Judge Godbey described the Subcommittee's work on privilege
745 logs. Suggestions for rule amendments have relied on the view that
746 privilege logs can be vastly expensive and at the same time provide
747 little or no benefit. The Subcommittee responded by issuing an
748 invitation for public comments that produced more than 100
749 responses and a considerably revised and elaborated version of the
750 suggestion that prompted the inquiry. Professor Marcus summarized
751 the comments as shown in the agenda materials. The Subcommittee met
752 with representatives of the National Employment Lawyers Association
753 and of Lawyers for Civil Justice, a proponent of a new rule. They
754 also attended a day and a half long symposium produced by Jonathan
755 Redgrave and retired Magistrate Judge Facciola with participation
756 by dozens of practicing lawyers. The American Association for
757 Justice will be asked whether it is interested in arranging a
758 discussion group for the Subcommittee.

759 These events have demonstrated a drastic divide between
760 plaintiffs and defendants. Defendants think that the predominant
761 practice that requires a document-by-document log is expensive,
762 often prohibitively expensive, and leads to nearly useless logs
763 that no one uses. Plaintiffs think that defendants over-designate
764 documents that are not privileged. Their theory is in part that the
765 actual designations are made by junior associates or contract
766 lawyers that are terrified that failure to designate a privileged
767 document will be a career disaster. And plaintiffs also believe
768 that switching the proposed rule to allow designation by
769 "categories" will lead to less informative logs that make it
770 difficult or even impossible to ferret out which designations to
771 challenge. Defendants, of course, will be equally unhappy if we do
772 nothing. It is likely to be impossible to find a mid-point that is
773 acceptable on all sides.

774 There may, however, be agreement on one issue. Most observers
775 agree that many of the problems with current log practice arise
776 from producing logs late in the discovery period. Making challenges
777 and getting them resolved before the close of discovery, and then
778 getting discovery of documents successfully challenged, is a
779 regular problem. Some means to encourage early attention to the log
780 process, including "rolling" logs to keep pace with rolling
781 discovery responses, may be acceptable on all sides.

782 Professor Marcus pointed to pages 187-190 of the agenda
783 materials to illustrate possible ways to call attention to these
784 issues early in the litigation through Rules 26(f) and 16(b). "It
785 is an open question whether this would be useful. Good lawyers tell
786 us they do this now." But some plaintiffs say they try to do it and
787 meet a blank wall of refusal even to discuss the issues.

788 Professor Marcus further observed that the proposal to

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789 enshrine in rule text recognition of logs that describe only
790 categories of withheld documents would appear to "tilt the playing
791 field" away from the current presumption in most courts that
792 document-by-document designations are required. And trying to
793 define the contours of appropriate categories in rule text will be
794 tricky, perhaps even in approaching such suggestions as one that
795 would specifically describe in rule text a category of documents
796 involving communication with outside counsel after the first
797 complaint is filed. The Subcommittee has not had an opportunity to
798 meet and discuss the many surrounding issues that were described in
799 the recent conferences.

800 A Committee member noted that "people feel very strongly on
801 both sides of the v." We have heard complaints from people involved
802 in very big cases. The rule seems to be working in ordinary cases.
803 But the time at which logs are produced does seem to be a problem
804 in cases both large and small.

805 Another judge member observed that "not all cases are created
806 equal." A run-of-the-mill employment case may have few documents
807 in the privilege log. It might be useful to add discussion of log
808 issues to the matters for discussion in the Rule 26(f) conference,
809 and include the possibility of a categorical approach and timing in
810 the report.

811 Judge Dow concluded the discussion by repeating thanks to the
812 lawyer members for all the time they contribute to the
813 Subcommittee. "It makes a tremendous difference in the quality of
814 our work."

815 *Appeal Finality After Consolidation Subcommittee*

816 Judge Rosenberg delivered the report of the joint
817 Subcommittee, informally dubbed the "Hall v. Hall" Subcommittee.
818 The Subcommittee is studying the Supreme Court's suggestion that
819 new rules may be appropriate if problems arise from the ruling that
820 a case initially filed as an independent action retains its
821 identity for purposes of appeal finality after consolidation with
822 another action. Final disposition of all claims among all parties
823 to what began as a separate action is appealable, and appeal time
824 starts to run.

825 The Subcommittee has reported on an exhaustive Federal
826 Judicial Center study of appeals in all consolidations in the
827 district courts over a period of three years. These years were
828 evenly divided between cases filed before, and cases filed after,
829 Hall v. Hall. The study revealed no problems. Replicating the study
830 for a later year or two would be a great effort that does not seem
831 worthwhile. The Subcommittee had come close to deciding that it had

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832 little left to do apart from considering the question whether a new
833 rule might be justified as a way to enhance trial court control of
834 the consolidation from start to finish. But Dr. Lee has devised a
835 different study method that begins with cases on appeal rather than
836 beginning with all original filings in the district courts. That
837 study is continuing. The Subcommittee will study the results when
838 the study is completed, and decide then whether further
839 consideration of Hall v. Hall is appropriate.

840 *End of Day for e-Filing*

841 Judge Dow reported that the Federal Judicial Center continues
842 to gather information that will inform the work of the joint
843 subcommittee formed to study the question whether the several sets
844 of rules should continue to define the end of the last day for
845 electronic filing as midnight in the court's time zone. The
846 pandemic has slowed progress. A new Civil Rules member will be
847 appointed to this Subcommittee.

848 *Rule 9(b)*

849 Dean Spencer, a Committee member, has submitted a proposal to
850 revise Rule 9(b) to allow malice, intent, knowledge, and other
851 conditions of a person's mind to be pleaded as a fact without
852 requiring pleading of facts that support inference of the fact. The
853 proposal has been on the agenda for two meetings, but the press of
854 other work has prevented full consideration. The proposal is
855 important enough to justify appointment of a subcommittee. Judge
856 Lioi has agreed to chair the subcommittee. Other members will be
857 appointed soon. A report is expected for the March meeting, and
858 will generate robust discussion.

859 *In Forma Pauperis Standards and Procedures*

860 The Committee, prompted by submissions by a frequent litigant
861 and by Professors Clopton and Hammond, has considered forma
862 pauperis questions at three earlier meetings. The topic was carried
863 forward to await the outcome of work by the Appellate Rules
864 Committee on the i.f.p. Form 4 appended to the Appellate Rules.
865 That work is nearing completion, but not in time for consideration
866 at this meeting.

867 The Committee has concluded that there are serious problems
868 with administration of forma pauperis practice. There are no
869 uniform standards to govern determinations whether a litigant
870 qualifies under 28 U.S.C. § 1915(a) as unable to pay fees. In
871 practice, standards vary widely from one court to another, and
872 often among different judges on the same court. Nor are there
873 uniform practices in gathering information to consider in applying

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874 whatever standard is adopted. Many courts use forms created by the
875 Administrative Office, but many others do not. The forms, moreover,
876 are criticized as ambiguous or opaque, leaving the party uncertain
877 what is being asked. As a simple example, should "income" be
878 defined as for the Internal Revenue Code, or by some more natural
879 test? The breadth and depth of the information requested by many
880 forms is also challenged as an unwarranted invasion of nonparty
881 privacy, perhaps even unconstitutional. Appellate Form 4 is offered
882 as an example by pointing to the required wealth of information
883 about resources available to the party's spouse.

884 These issues call out for a better approach. But it remains
885 unclear whether the appropriate response is an Enabling Act rule.
886 As a simple illustration, Appellate Form 4 assumes that a spouse's
887 resources are relevant to the § 1915(a) determination, but that is
888 a substantive interpretation of the statute that at best tests the
889 limits of Enabling Act authority. Many of the questions that may be
890 appropriate to determining pauper status also may be better
891 addressed by setting different standards for different areas of the
892 country. The resources required to support minimal standards of
893 living in a major and congested metropolitan area, for example, may
894 be considerably greater than what is required in a rural area. And
895 even if not appropriately substantive, individual circumstances
896 vary across countless important variations in other obligations.
897 What account should be taken of health expenditures? Health
898 expenditures for dependents? Education expenses incurred to qualify
899 for better compensated employment? Enabling Act processes are not
900 designed to address such questions. And even if appropriate answers
901 could be worked out for the moment, the standards will surely
902 require regular adjustments.

903 Judge Dow invited comments on this presentation. He observed
904 that experience in the Northern District of Illinois reflects many
905 of the problems. They have repeatedly revised their forms. Even
906 with that, prisoners often fail to understand what they are being
907 asked.

908 Judge McEwen said that if a joint subcommittee is formed to
909 study forma pauperis issues, the Bankruptcy Rules Committee should
910 be involved. They frequently encounter these problems. Judge Dow
911 agreed that the advisory committees should think together about
912 these issues.

913 Despite the obvious difficulties, the topic will remain on the
914 agenda. Judge Dow will reach out to Professors Clopton and Hammond.

915 *Rule 41(a)*

916 Judge Furman, a member of the Standing Committee, submitted a

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917 suggestion that it might be useful to study a well-settled division
918 of interpretations of Rule 41(a)(1)(A). The rule says that "the
919 plaintiff may dismiss an action without a court order by filing a
920 notice of dismissal or a stipulation signed by all parties who have
921 been served. Unless the notice or stipulation states otherwise, the
922 dismissal is without prejudice. Dismissal without prejudice is not
923 a judgment on the merits and does not establish res judicata.

924 The initial question is whether power to dismiss "the action"
925 requires dismissal of the entire action as to all claims. Most
926 courts, commonly relying on the plain meaning of "the action,"
927 conclude that the rule does not authorize a unilateral dismissal
928 without prejudice as to some claims but not others. Other courts,
929 however, allow dismissal of some claims while the action proceeds
930 as to others. The suggestion is that it may be desirable to
931 establish a uniform meaning. That leaves the question which meaning
932 is better.

933 The reasons that move a plaintiff to wish to dismiss only part
934 of an action are likely to be similar to the reasons that counsel
935 dismissal of an entire action, but with the complication that part
936 remains to be litigated here and now. Further preparation may show
937 that one claim is simply not ready for litigation, while another is
938 ready and may present a compelling need for prompt relief. Or
939 joinder of the claims may come to be poor litigation tactics. Or
940 the decisions of which plaintiffs to join together, which
941 defendants to join, and what court to seek, may be rethought.

942 The impact on the defendant is more obviously different when
943 only some claims are dismissed. The defendant is faced with the
944 need to continue litigating the claims that remain, often incurring
945 most of the costs that would be incurred to litigate them all. At
946 the same time, the defendant is left at risk of future litigation,
947 with continuing uncertainty as to total liability. Evidence must be
948 preserved both for defense and to avoid spoliation, and further
949 investigation may seem necessary.

950 Partial dismissal, in short, is markedly different from
951 dismissal of an entire action. If the proposal is taken up,
952 practical wisdom about the likely consequences of either choice may
953 be the most important guide. The inquiry may prove reasonably
954 manageable, or more difficult.

955 If the proposal is taken up, it will be appropriate to
956 consider the possibility that related issues should be considered.

957 One potential set of issues relates both to the value of
958 amending Rule 41(a)(1)(A) and consistency with other rules. Claims
959 may be dropped by amending the complaint, subject to the rather

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permissive provisions of Rule 15. Parties may be dropped under Rule 21. How far do those rules afford an opportunity to dismiss without prejudice? If Rule 41 is amended, should there be some explicit provisions that address the role of each rule?

Judge Furman's submission notes that most courts seem to agree that Rule 41(a)(1)(A) authorizes dismissal without prejudice as to one defendant. That may be seen as dismissal of "the action," treating a single suit as including as many actions as there are defendants. As compared to dismissing a claim against a defendant who must continue to litigate other claims, this result may be appropriate because the dismissed defendant is in a position closer to the position of a defendant who was the only one joined to begin with. But this is not the only way the rule might be read.

Nothing in the submission asks whether "plaintiff" should be interpreted to reach any claimant by way of counterclaim, crossclaim, third-party claim, or conceivably interpleader. That question might, if considered, prove truly complicated.

Apart from those questions, a distinct question is presented by Rule 41(a)(1)(A)(i), which cuts off the right to dismiss without court order and without prejudice when the opposing party files an answer or a motion for summary judgment. There are good reasons to wonder whether, if Rule 41(a)(1)(A) is taken up for consideration, the work should also consider adding a motion to dismiss to this list. Rule 15(a)(1)(B) was amended not long ago to add motions under Rule 12(b), (e), and (f) to the events that trigger the time limit on amendment once as a matter of course. The reason was that a motion to dismiss often involves more work than an answer, and often does a better job of educating the plaintiff about the things that need be pleaded and proved. The same reasons may well apply here, perhaps adding a Rule 12(c) motion for judgment on the pleadings to the list.

Discussion began with the suggestion that there are enough questions to deserve additional attention. What is the intent of the rule? Should it be broadened?

Another observation was that a recent Fifth Circuit en banc decision has made dismissal without prejudice a trap for finality. This is a question distinct from frequent, and commonly unsuccessful, efforts to establish appeal finality after an adverse ruling on part of an action by dismissing what remains without prejudice.

The next observation was that "action" and "claim" are used to express different concepts in different settings. So Rule 41(d) refers to the consequences when a plaintiff has previously

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1003 dismissed "an action, based on or including the same claim * * *."
1004 These words may have a different meaning than "action" has in Rule
1005 41(a), or than "claim" would mean if it comes to be included there.

1006 A judge agreed that these issues are worthy of attention.
1007 Judge Furman's opinion exploring partial dismissal is useful.

1008 The discussion concluded with the observation that judges are
1009 not uniform in applying the present rule. "On its face, we may be
1010 able to do better." Work will proceed to see what projects may be
1011 carved out.

1012 *Rule 55*

1013 The role of the provisions directing that the clerk "must"
1014 enter a default, and "must" enter a default judgment in narrowly
1015 defined circumstances, was brought to the Committee by the
1016 curiosity of judges on courts that regularly have a judge enter
1017 both the initial default and any eventual default judgment. How
1018 many courts, they wondered, engage in similar departures from the
1019 apparent mandate of the rule text? And why was the rule written as
1020 it is?

1021 The role of "must" begins with the Style Project that amended
1022 all of the rules in 2007. Rule 55(a) and (b) had provided that the
1023 clerk "shall" enter the default, and, in the circumstances defined
1024 by the rule, the default judgment. Having banished "shall" from
1025 rules style conventions, the choice among "may," "should," and
1026 "must" was made for must and explained in the Committee Note as
1027 "intended to be stylistic only." That choice may have been unwise.
1028 At any event, it is confused by the parallel style revisions of
1029 Rule 77(c)(2), which now provides that "subject to the court's
1030 power to suspend, alter, or rescind the clerk's actions for good
1031 cause, the clerk may: * * * (B) enter a default; (C) enter a
1032 default judgment under Rule 55(b)(1)." "May" here seems
1033 inconsistent with "must" in Rule 55 itself. The court's role may be
1034 further confused by the apparent direction that the court may set
1035 aside the clerk's action only for good cause.

1036 Whatever might be divined from these rule texts, the important
1037 question is what role clerks should play in the distinct processes
1038 of entering a default and entering a default judgment.

1039 Entering a default is a less ominous step. Although it sets
1040 the stage for a default judgment, courts are willing to set aside
1041 a default on rather modest showings so that a case can be resolved
1042 on the merits. But it is not a purely ministerial act. It must be
1043 shown, "by affidavit or otherwise," that a party "has failed to
1044 plead or otherwise defend." A failure to plead is apparent from the

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1045 court's records, but a proof of service may not be fully
1046 satisfactory. The problem of "sewer service" has not entirely
1047 disappeared. However that may be, "otherwise defend" may involve
1048 events that do not come to the court's attention. Nonetheless, the
1049 potential complications may be rare in comparison to
1050 straightforward defaults. Authorizing the clerk to enter the
1051 default is different from mandating, but a clerk that finds reasons
1052 for concern can submit the question to the court despite the
1053 mandate.

1054 Entering a default judgment is intended to be just that, a
1055 judgment. Under Rule 54(b) it can be revised at any time before all
1056 claims are resolved as to all parties, but after that it becomes
1057 final and can be set aside only by vacating it under Rule 60(b).
1058 The determination that the claim is "for a sum certain or a sum
1059 that can be made certain by computation" may not be easy, and
1060 consideration by a judge may show reasons to doubt whether anything
1061 is due at all. The clerk's authority and duty are limited to cases
1062 in which the defendant has been defaulted for not appearing and is
1063 not a minor nor an incompetent person. "[N]ot appearing" may not be
1064 free from all ambiguity. And the complaint may not show whether the
1065 defendant is a minor or an incompetent person, adding to the
1066 clerk's responsibilities to inquire.

1067 These observations concluded with the suggestion that the
1068 first step in any inquiry into these parts of Rule 55 might begin
1069 with a quest for more information about actual practices. If the
1070 questions that prompted the inquiry bear out, much can be learned
1071 about the wisdom of the present rule by considering actual
1072 practices.

1073 Judge Dow asked how many committee members have clerks enter
1074 a default. Some initial responses that this happens were followed
1075 by a more detailed accounting. The clerk representative reported
1076 that in the last two years, her office had 600 requests for a
1077 default and the clerk entered defaults in 480 cases; the reasons
1078 for not entering defaults in the other 120 cases are not yet clear.
1079 Her office does not enter default judgments. Six judges then
1080 reported that in their courts, the same practices prevail: the
1081 clerk enters defaults, but only a judge enters a default judgment.
1082 A practicing lawyer reported the same practices in another court.

1083 Judge Dow noted that in his court a judge enters the default
1084 as well as a default judgment. "We may be in the minority." In any
1085 event, this topic merits a place on the agenda. "The rule should
1086 reflect the state of the world."

1087 The Federal Judicial Center will be asked to help with this
1088 research. In addition to the general questions described in the

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1089 earlier discussion, an added question was suggested -- to find out
1090 whether there are courts in which the clerk actively audits the
1091 files for cases that seem to be in default, as compared to waiting
1092 for a request from a party.

1093 *Rule "9(i)"*

1094 A letter dated June 7, 2021, from Senators Tillis, Grassley,
1095 and Cornyn to Chief Justice Roberts suggests that the Chief Justice
1096 "should coordinate with the Judicial Conference to create a
1097 pleading standard for Title III ADA cases that employs the
1098 'particularity' requirement currently contained in Rule 9(b) of the
1099 Federal Rules of Civil Procedure." Enhanced pleading would enable
1100 property owners to more easily remove barriers to access, prompt
1101 removal would benefit disabled plaintiffs, and courts could more
1102 readily determine whether Title III has been violated.

1103 Professor Marcus introduced this topic by noting that ADA
1104 litigation has drawn a lot attention in recent years. There has
1105 been a great increase in the number of actions, as detailed in the
1106 agenda materials. Much of the attention seems to focus on
1107 California, perhaps because a parallel state statute provides for
1108 damages, a remedy not available under Title III; Florida, perhaps
1109 because there are a number of active "tester" plaintiffs there; and
1110 New York, perhaps because there are many outdated business
1111 structures that have not been brought into compliance with
1112 accessibility requirements.

1113 Although there may be many reasons to worry about the
1114 blossoming of Title III litigation, "particularity in pleading may
1115 not be the answer." The Committee has always been reluctant to
1116 recommend substance-specific rules. The recent Supplemental Rules
1117 for Social Security cases were recommended only after searching and
1118 repeated demands for compelling reasons to justify substance-
1119 specific rules. The Social Security Rules are intended to establish
1120 a procedure for actions that involve appellate review on a closed
1121 administrative record, while Title III cases fall into the
1122 mainstream of civil litigation. Adoption of a particularized
1123 pleading standard, further, might simply lead California lawyers to
1124 file their actions only under state law in state courts. On
1125 balance, the initial conclusion may be that a particularized
1126 pleading standard is not the answer for whatever problems exist.

1127 A committee member suggested that such problems of vague
1128 pleading as may exist can be addressed by a motion for a more
1129 definite statement. In addition, current general pleading standards
1130 may well be up to the task. It was pointed out that recent Ninth
1131 Circuit decisions uphold district court demands for specific
1132 pleading of barriers to accessibility.

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1133 A judge member observed that a wide variety of barriers exist.
1134 Such things as curb cuts, the height of towel rods, the placement
1135 of shower controls, floor plans themselves, are commonplace. And a
1136 lot is happening with claims based on access barriers to websites
1137 facing visually or hearing impaired persons. A better solution to
1138 the problems of litigation should be sought in legislation that
1139 requires pre-suit notification of barriers, affording an
1140 opportunity for correction, spending needed funds on improving
1141 access rather than wasting them on litigation.

1142 Another participant agreed, and underscored the proposition
1143 that principles of transsubstantivity preclude making a rule for a
1144 specific problem in a particular area of the law.

1145 A judge observed that the same problems arise in state courts,
1146 which may likewise resist pressures for substance-specific rules.

1147 The discussion concluded by removing this topic from the
1148 agenda. Courts can implement appropriate pleading standards under
1149 the current rules. Congress can consider solutions outside the
1150 pleading rules. It is better not to infringe the transsubstantivity
1151 presumption in this setting.

1152 *Rule 23 Opt-In*

1153 Professor Marcus introduced this submission by a nonlawyer
1154 who, after his wife got a notice of an opt-out class action,
1155 believes that class actions should be limited to members who
1156 affirmatively choose to opt in. "The rest of the world doesn't
1157 believe in our opt-out class." But the opt-out feature was baked
1158 into Rule 23 in the 1966 amendments. It is an interesting argument,
1159 but it would be a dramatic change in class-action practice as it
1160 has matured in our system. An opt-in structure likely would defeat
1161 the utility of class actions for small claims.

1162 This item was removed from the agenda without dissent.

1163 *Rule 25(a)(1)*

1164 This proposal by a federal judge's law clerk is to amend Rule
1165 25(a)(1) to authorize the judge to enter a statement of death on
1166 the record. The purpose is to avoid the risk that a "zombie" action
1167 may continue indefinitely after a party has died but no party makes
1168 a suggestion of death. A statement made by the judge, just as a
1169 statement entered by a party, would trigger the 90-day limit for a
1170 motion to substitute.

1171 Professor Marcus noted that an amendment framed as entry of a
1172 statement noting the death would have to resolve a complication

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1173 framed by Rule 25(a)(3), which directs that a statement noting
1174 death must be served on the parties as provided in Rule 5 -- no
1175 problem there -- and served on nonparties as provided in Rule 4. It
1176 might become important to clarify the practice for Rule 4 service
1177 by the court, including the means of identifying the nonparties
1178 that must be served.

1179 The proposal identifies four cases that appear to involve the
1180 "zombie" problem. One of them, from the Northern District of
1181 Illinois, appears to treat a judge's identification of a party's
1182 death as like a suggestion of death that must be served on a
1183 nonparty. The nonparty that must be served has an obvious interest
1184 in learning of the litigation and deciding whether to seek to
1185 substitute in.

1186 This proposal does not seem a promising occasion for amending
1187 Rule 25. The first sentence of Rule 25(a)(1) confers authority to
1188 order substitution of the proper party when a party dies and the
1189 claim is not extinguished. The court, on learning of the death, can
1190 order substitution on terms that are suitable to the circumstances,
1191 just if there had been a formal statement of the death. Indeed once
1192 the court learns of the death it is required to dismiss the action
1193 as moot as to the deceased party unless a new party with authority
1194 to pursue or defend against the claim is brought in.

1195 Judge Dow described the circumstances surrounding the Northern
1196 District of Illinois action described in the proposal. The deceased
1197 defendant was the medical director at a large prison. He had been
1198 sued more than 400 times. In most of the related actions the state
1199 attorney general's office filed a statement noting the death. For
1200 some reason that did not happen in this action, but the judge was
1201 well aware from other cases that this defendant had died. It was a
1202 strange case with special circumstances, the sort of circumstances
1203 and judicial response that prove the worth of the current rule.

1204 This item was removed from the agenda by consent.

1205 *Rule 37(c)(1)*

1206 Professor Marcus introduced this topic. Rule 37(c)(1) was
1207 added in 1993 to implement the disclosure requirements of new Rule
1208 26(a) and the Rule 26(e) duty to supplement Rule 26(a) disclosures.
1209 The first sentence directs that a party who fails to disclose
1210 information or the identity of a witness as required by Rule 26(a)
1211 and (e) is not allowed to use the information or witness to supply
1212 evidence on a motion, at a hearing, or at trial, unless the failure
1213 was substantially justified or is harmless. The second sentence
1214 then begins: "In addition to or instead of this sanction, the
1215 court, on motion and after giving an opportunity to be heard" may

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1216 order other sanctions. The first in the list, (A), is an award of
1217 reasonable expenses, including attorney fees.

1218 The rule text is unambiguous. Even though a failure to make a
1219 required disclosure is not substantially justified and is not
1220 harmless, the court may order an alternative sanction "instead of
1221 this [exclusion] sanction."

1222 This question was raised by a submission that pointed to a
1223 pair of dissenting opinions in the Eleventh Circuit that argue that
1224 a court may not choose to award attorney fees and permit a party to
1225 use as evidence information or a witness that was not disclosed
1226 when the failure to disclose was not substantially justified and is
1227 not harmless. The argument rests on the 1993 Committee Note. The
1228 Note characterizes exclusion as a "self-executing sanction," and as
1229 an "automatic sanction," because it can be implemented without a
1230 motion. The Note then observes that exclusion is not an effective
1231 sanction when a party fails to disclose information that it does
1232 not want to have admitted in evidence. The alternative sanctions
1233 address that circumstance. The argument juxtaposes these Note
1234 observations to conclude that the alternative sanctions cannot be
1235 imposed as a substitute for excluding evidence offered by the party
1236 who failed to disclose it.

1237 Research by the Rules Law Clerk discloses that other courts
1238 have been bemused by this argument from the Committee Note, as if
1239 the Note could somehow impair the explicit and unambiguous language
1240 of the rule text. The research further reveals, however, that the
1241 district judge's hands are not tied. The rule has functioned as
1242 intended for almost thirty years.

1243 This topic was removed from the agenda by consensus, without
1244 further discussion.

1245 *Rule 63*

1246 Rule 63 addresses situations in which a judge conducting a
1247 hearing or trial is unable to proceed. The first sentence
1248 authorizes another judge to proceed on "determining that the case
1249 may be completed without prejudice to the parties." The second
1250 sentence applies only to a hearing or a nonjury trial, and
1251 provides:

1252 [T]he successor judge must, at a party's request, recall
1253 any witness whose testimony is material and disputed and
1254 who is available to testify again without undue burden.

1255 The suggestion that brought this topic to the agenda responded
1256 to a nonprecedential Federal Circuit decision by asking whether the

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1257 direction to recall a witness should be relaxed when the witness's
1258 original testimony was recorded by video.

1259 Many features of Rule 63 suggest that it provides ample
1260 authority to account for the availability of a video transcript in
1261 determining whether a witness must be recalled. The question might
1262 be considered initially in determining whether the case can be
1263 completed without prejudice to the parties if the witness is not
1264 available to be recalled. If the witness can be recalled, the three
1265 factors listed in the rule come to bear. The testimony must be
1266 "material." Materiality is a concept that appears in many settings,
1267 often with uncertain meaning. At a minimum, it means that the
1268 testimony could make a difference in the outcome. It may also allow
1269 some room to determine, with the aid of a video transcript if there
1270 is one, that possible changes in the testimony are unlikely, in the
1271 context of the whole record, to affect the outcome. The testimony
1272 must be disputed. It may be fair to ask whether the dispute needs
1273 to be further illuminated, and credibility measured, by recalling
1274 the witness, a determination that again may be advanced by
1275 consulting a video transcript. The witness, finally, must be
1276 available for recall "without undue burden." Whether the rule means
1277 to consider only burdens on the witness, or also allows
1278 consideration of burdens on the parties and the court, whether a
1279 burden is "undue" can be measured in light of the confidence
1280 engendered by reviewing a video transcript.

1281 A further consideration is that Rule 63 applies to hearings as
1282 well as trials. Hearings address a great many things. Witness
1283 testimony may be adduced for many different purposes, implicating
1284 quite different fact-finding responsibilities and issues. Recalling
1285 a witness on an issue of personal or subject-matter jurisdiction,
1286 for example, may be less sensitive than recalling a trial witness.

1287 One perspective on the rule text is that although "must" is
1288 used in the rules drafting convention to express a clear command,
1289 it is frequently accompanied, as in Rule 63, by provisions that
1290 qualify the command. The witness "must" be recalled only if
1291 available without "undue" burden, and so on. Any command is clearly
1292 qualified by some measure of discretion.

1293 These considerations suggest that there is little reason to
1294 take up Rule 63 for the specific purpose of asking whether the rule
1295 text should be revised to refer to the availability of a video
1296 transcript.

1297 Discussion began with a suggestion that it might be
1298 interesting to take a deeper look at Rule 63. "I'm not convinced
1299 there is as much flexibility as should be." The cases seem to close
1300 it down. To be sure, video trials today are far better than the

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1301 video depositions that were known in 1991, when the Committee Note
1302 to the revised Rule 63 suggested that the availability of a video
1303 recording might be considered. But "must" seems to be specific, to
1304 be controlled by the parties more than the court. How often is the
1305 rule used? To what effect?

1306 Another member suggested that, without greater familiarity
1307 with the cases, the plain rule language "seems fairly mandatory."
1308 It may not have as much "wiggle room" as the initial presentation
1309 suggests. That is not to say that the Department of Justice has
1310 encountered problems with Rule 63, only to suggest that it may
1311 deserve further inquiry.

1312 A specific question looked to the sketch provided in the
1313 agenda materials to illustrate a possible amendment to incorporate
1314 reference to the forms of available transcripts. This version would
1315 add this at the end of the second sentence: "considering whether
1316 the testimony is preserved in written, audio, or video transcript."
1317 The question asked whether "considering" is consistent with "must."

1318 The Committee concluded that Rule 63 should be carried on the
1319 agenda to determine how frequently it is used in practice, and
1320 whether it is sufficiently flexible to enable proceedings before a
1321 successor judge in ways that are both fair to all parties and
1322 efficient.

1323 *Briefs Amicus Curiae*

1324 This proposal was advanced by three lawyers who have an
1325 extensive practice of submitting briefs amicus curiae in district
1326 courts around the country. They suggest it would be desirable to
1327 establish uniform national standards and procedures to govern
1328 amicus briefs.

1329 The proposal is accompanied by a draft rule adapted from a
1330 local rule in the District Court for the District of Columbia, and
1331 informed by Appellate Rule 29 and the Supreme Court Rules. If the
1332 subject is to be taken up, it will provide a good starting point.

1333 The reasons for adopting a new rule on amicus briefs begin, in
1334 a perhaps surprising way, with the estimate that an amicus brief is
1335 filed in only one case out of every thousand filed in the district
1336 courts, some 300 cases a year. The relative rarity of amicus
1337 filings may in part account for the observed reasons for a rule.
1338 Many district courts do not really know what to make of amicus
1339 brief practice. They have no standards, or only vague standards,
1340 governing permission to file. And the procedures for seeking
1341 permission may be equally indistinct or ad hoc. Amicus briefs can
1342 improve the quality of decisions. As the submission puts it:

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1343 At a high level, amicus parties should bring a unique
1344 perspective that leverages the expertise of the party
1345 submitting the brief and adds value by drawing on
1346 materials or focusing on issues not addressed in detail
1347 in the parties' submissions * * *.

1348 The analogy to amicus practice in appellate courts is
1349 interesting, but may be complicated. The central task of appellate
1350 courts is to develop the law. Trial courts also are responsible for
1351 resolving what may be new, important, complex, and vigorously
1352 disputed questions of law. In addition, however, trial courts also
1353 are responsible for generating a trial record that provides as
1354 strong a foundation as possible for resolving the facts. The facts
1355 are critical in deciding the case, and also may be an indispensable
1356 part of the framework for identifying and deciding the relevant
1357 questions of law. The parties may welcome participation by an
1358 amicus. But a party also may prefer to maintain control of the
1359 information, issues, and arguments presented to the trial court to
1360 protect its own interests in shaping the record. On appeal, the
1361 trial court record is taken as given, significantly limiting the
1362 range of arguments open to an amicus brief.

1363 The question, then, is whether a rule should be adopted to
1364 establish good and nationally uniform standards and procedures for
1365 authorizing amicus briefs.

1366 Discussion began with an expression of uncertainty. "I'm not
1367 a strong advocate for doing anything." But the local rule in the
1368 District of Columbia is a fine rule. The District may be atypical,
1369 because it encounters a number of cases that raise issues of law.
1370 "I've had a number of cases that involve issues of law." A
1371 minimalist rule like the D.D.C. rule may be worth considering.

1372 A judge noted that in 14 years on the bench he has had fewer
1373 than half a dozen amicus briefs. "I've never denied a motion. I'm
1374 not sure we need a rule." One concern is that the Civil Rules do
1375 not have a rule on briefs. Format, length, timing, and like issues
1376 are left to local practice. The District of Columbia may be
1377 uniquely situated to draw amicus briefs. But it might be useful to
1378 survey local rules. And the proposal is well executed. It would be
1379 a helpful starting point if a rule is to be drafted.

1380 The Committee concluded that these questions should be carried
1381 forward. The first task will be to determine how frequently amicus
1382 briefs are tendered in courts outside the District of Columbia.

1383 *Rule 4*

1384 The service of summons and complaint provisions of Rule 4 have

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1385 drawn a number of suggestions over the last few years. Suggestions
1386 continue to arrive. The broader recent suggestions are to reduce
1387 the burden of multiple service in many of the actions involving the
1388 United States and governed by Rule 4(i); to authorize service on
1389 the United states by electronic means, greatly expanding the
1390 limited provision in Rule 3 of the pending Supplemental Rules for
1391 Social Security cases; and to dispense with service on a party who
1392 has actual knowledge of the suit.

1393 Rule 4 was considered carefully by the CARES Act Subcommittee.
1394 The proposed new Rule 87 published last August includes several
1395 Emergency Rule 4 provisions for service by a means reasonably
1396 calculated to give notice when a court order authorizes a specific
1397 proposal. In recommending publication, the Committee explicitly
1398 reserved Rule 87 for further consideration in light of the public
1399 comments. One of the reserved alternatives would be to amend Rule
1400 4 for general purposes, not only for a civil rules emergency,
1401 discarding the Rule 4 part of Rule 87. The Subcommittee also
1402 recognized that however that question is resolved, it may be wise
1403 to consider Rule 4 in depth. The obvious question is whether it is
1404 time to contemplate the use of electronic service in at least some
1405 cases. One limited possibility would be to authorize electronic
1406 service on any defendant that consents and establishes an address
1407 for electronic service. Firms that are frequently sued might find
1408 that electronic service works to their advantage by enabling a
1409 structure that promptly brings new litigation to the attention of
1410 the relevant people within the firm. That and other possibilities,
1411 however, remain in the realm of speculation.

1412 Rule 4 questions will be considered by the CARES Act
1413 Subcommittee while it studies comments on Rule 87.

1414 *Rule 5(d)(3)(B)*

1415 Rule 5(d)(3)(B) directs that a person not represented by an
1416 attorney may file electronically only if allowed by court order or
1417 by local rule. It was drafted as a joint project by the Appellate,
1418 Bankruptcy, Civil, and Criminal Rules Committees. Alternatives that
1419 would allow readier access to electronic filing were discussed
1420 extensively during the drafting process. Proponents of a general
1421 right to file electronically noted that many pro se litigants are
1422 adept with computer systems, and that their numbers grow every day.
1423 They emphasized the advantages of electronic filing for a pro se
1424 party, producing savings in time and expense that increase with the
1425 distance to the courthouse. These advantages were recognized, but
1426 the more limited approach was adopted from fear that inept
1427 litigants would impose undue burdens on the court and other
1428 parties.

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1429 The question has been renewed in light of experience during
1430 the pandemic. Several courts expanded the opportunities for pro se
1431 parties to use electronic filing. Susan Soong conducted an informal
1432 survey of clerks offices in the districts within the Ninth Circuit.
1433 Several of them allowed general access to e-filing by unrepresented
1434 parties. Many of those courts reported that it worked. It "worked
1435 fine" in the Northern District of California. For the most part,
1436 electronic filing was accomplished by e-mail messages to the clerk,
1437 who then entered the filings in the court's system. Other courts,
1438 however, were not enthusiastic about this process.

1439 Judge Bates noted that there may be a risk that each of the
1440 advisory committees may hang back from this topic, waiting to see
1441 whether some other committee will take the lead. The Appellate
1442 Rules Committee, for example, has tabled the question pending
1443 consideration by the Civil Rules Committee. Deferring consideration
1444 by all committees may be the right course. Perhaps the reporters
1445 should take the question up among themselves, to make sure that it
1446 does not fall through the cracks. Professor Struve agreed that the
1447 reporters will confer.

1448 Judge Dow noted that in addition to coordination among the
1449 advisory committees, it will be important to coordinate with the
1450 Court Administration and Case Management Committee to integrate
1451 with the next generation CM/ECF project. He also noted that some
1452 courts are experimenting with e-filing by supporting facilities in
1453 prisons.

1454 Judge McEwen noted that there has been little progress on this
1455 subject in the Bankruptcy Rules Committee. "We're heading into the
1456 next generation CM/ECF. We need to find out how it works." In
1457 bankruptcy there often are hundreds of docket events in a single
1458 case, in a system that cannot work for untrained persons. Claims
1459 can be filed electronically, and frequent filers must do so. But
1460 any system for e-filing by unrepresented debtors or other parties
1461 would need "a lot of safeguards."

1462 Another comment suggested that a distinction might be drawn
1463 between the events that initiate a case and later filings.
1464 Electronic filing of initiating papers could be troublesome. This
1465 concern was seconded by another participant who suggested that
1466 clerks' offices may well resist electronic filing of case-
1467 initiating filings by pro se litigants.

1468 A practical note was sounded by asking how electronic filing
1469 would relate to getting permission to file without paying fees
1470 under 28 U.S.C. § 1915. This question was expanded by an
1471 observation that § 1915 provides a screen for initiating frivolous
1472 filings without service of process. But if a fee is paid, not all

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1473 judges do the initial screening.

1474 This question will be retained. The next step may be
1475 collaboration of the reporters.

1476 *Third Party Litigation Funding*

1477 Professor Marcus introduced the report on Third Party
1478 Litigation Funding as a timely reminder that this growing and
1479 changing phenomenon continues to hold a place on the agenda. The
1480 report is further made timely by an inquiry last May from Senator
1481 Grassley and Representative Issa.

1482 This topic first came to the agenda in 2014 with a proposal to
1483 add a rule requiring initial disclosures about TPLF arrangements.
1484 That proposal was studied carefully and put aside to await further
1485 developments and better knowledge of TPLF practices. It came back
1486 in 2019, and was then confided to the Multidistrict Litigation
1487 Subcommittee. The Subcommittee concluded that TPLF is not
1488 distinctively allied to MDL proceedings, and remitted the subject
1489 to the Committee's general agenda.

1490 TPLF presents an important set of issues. The Committee will
1491 continue to monitor them. The Rules Law Clerks continue to gather
1492 a catalogue of relevant materials that has grown to impressive
1493 length.

1494 Legislation has been introduced in Congress, S. 840, that
1495 would adopt disclosure requirements for TPLF in class actions and
1496 MDL proceedings.

1497 TPLF continues to present many "uncertainties, unknowns, and
1498 difficulties."

1499 Last week the Committee received a proposal that TPLF
1500 disclosure be tested by a pilot project. There are some local rules
1501 that might be seen as informal pilot projects. A Northern District
1502 of California local order providing for disclosure in class actions
1503 has been invoked once in four years. The District of New Jersey has
1504 recently adopted a local rule; there is no information yet on how
1505 it works. Wisconsin has adopted a disclosure requirement for TPLF
1506 arrangements in civil cases in its state courts, but informal
1507 inquiries have failed to garner much information about how it is
1508 working.

1509 The agenda materials describe several of the many problems
1510 that must be confronted by any attempt to create a rule for TPLF
1511 arrangements. What should be its scope -- what sorts of financing,
1512 and perhaps what sorts of litigation should be included? What about

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1513 work-product protections? Many of the concerns, such as
1514 professional responsibility and usury, "are not the normal stuff of
1515 the Civil Rules."

1516 Judge Dow said that the topic has been presented to take
1517 stock. What experiences have Committee members had? Some judges do
1518 ask about TPLF. A party can ask the judge to inquire.

1519 A judge reported requiring disclosure of any TPLF arrangements
1520 by those applying for leadership positions in an MDL. The
1521 disclosures were to be made to the judge ex parte. No arrangements
1522 were reported.

1523 This MDL experience was consistent with findings by the
1524 Judicial Panel on Multidistrict Litigation, which found that TPLF
1525 seems not to be used in big MDLs, likely because lawyers self-
1526 finance. Another judge, however, reported being aware of massive
1527 TPLF positions in some MDLs. The court has to keep in touch with
1528 this. Possibilities could include adding the subject to Rule 16(b)
1529 and Rule 26, or encouraging courts to discuss TPLF with the
1530 parties. The court might decide that there is nothing to do about
1531 the arrangements. And there is no need to make the arrangements
1532 public. He did have one case in which he admonished the lender that
1533 it could not affect settlement decisions.

1534 A judge agreed that courts have authority to require
1535 disclosure. "A Rule 16 prompt could be useful." Not all judges are
1536 aware of the authority they have.

1537 A judge who reported no personal experience with TPLF
1538 suggested that it would be good to learn more about the California,
1539 New Jersey, and Wisconsin arrangements. We heard years ago that
1540 TPLF is common in patent litigation, but the California order does
1541 not seem to touch that. A related issue is before the Appellate
1542 Rules Committee, concerning disclosure of who is actually funding
1543 an amicus brief. These are big issues. Holding them open may be the
1544 right course to pursue.

1545 Another judge agreed that it would be useful to learn more
1546 about such local rules and practices as may be identified. And the
1547 reports about patent litigation indicated that TPLF is used by
1548 defendants as well as plaintiffs. It would be good to learn more
1549 about defendant financing practices.

1550 A magistrate judge noted that magistrate judges frequently
1551 engage in mediations. They have discussed among themselves the
1552 effect that ex parte disclosures of TPLF might have in mediating a
1553 resolution.

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1554 Another participant noted that "there is a whole state
1555 regulatory mechanism." "This is a huge research burden," perhaps
1556 too heavy to impose on the rules law clerks. A judge agreed that
1557 state courts confront TPLF practices, and volunteered to approach
1558 the Conference of Chief Justices and the National Center for State
1559 courts if that seems likely to be helpful.

1560 A lawyer member provided a reminder that it is critical to be
1561 clear about defining terms in approaching TPLF. It can mean many
1562 different things. What of a traditional bank line of credit? All
1563 agree that's not "TPLF." TPLF goes on around the world, though it
1564 is more common in some places than others.

1565 This observation included a reminder that it is important to
1566 encourage diversity, equity, and inclusion in the ranks of class
1567 action lawyers and MDL leadership. There are lawyers who need to
1568 borrow to represent clients they are perfectly able to represent.
1569 They should not be left at a disadvantage.

1570 Another participant observed that lawyers frequently have
1571 financing in bankruptcy proceedings. In state courts, financing may
1572 provide living expenses for plaintiffs. "There are lots of things
1573 we're not talking about." Champerty is one of the things others are
1574 talking about.

1575 Two participants agreed there is a distinction between
1576 "consumer" and "commercial" TPLF. There are so many permutations
1577 that it would be difficult to define what sorts of arrangements
1578 should be brought into a "TPLF" rule. "This is a challenge. There
1579 is much to be learned. But filling in the blanks will not make the
1580 rules choices go away."

1581 The Committee agreed that TPLF is a big topic. It cannot be
1582 allowed to get away. Continued study will be important. But the
1583 time has not come to start drafting. The game for now is to stay
1584 the course.

1585 *Mandatory Initial Discovery Pilot Projects*

1586 Dr. Lee provided an interim report on the mandatory initial
1587 discovery projects in the District of Arizona and the Northern
1588 District of Illinois. The projects ran for three years in each
1589 court, beginning and concluding a month apart. All judges
1590 participated in the Arizona project. Most judges participated in
1591 the Northern District of Illinois.

1592 The "pilot order" was docketed in more than 5,000 cases in
1593 Arizona. Discovery was filed in about half of them. Ninety-three
1594 percent of these cases have closed. In both Arizona and Illinois

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1595 there is a backlog of cases awaiting trial because of the pandemic.
1596 Jury trials are on the lists. The pilot order was entered in more
1597 than 12,000 cases in Illinois. Ninety percent of these cases have
1598 closed, leaving some 1,200 open.

1599 There are positive things to report about the study. The
1600 pandemic affected both districts, so it remains possible to compare
1601 their experiences. Case events have been loaded into the study
1602 program with the cooperation of the clerks' offices. The FJC has
1603 interviewed judges and court staff. In-depth docket data is being
1604 collected.

1605 Surveys are sent to the lawyers in closed cases at six-month
1606 intervals. More than 10,000 surveys have been sent. There are more
1607 than 3,000 responses. That is a great response rate.

1608 The FJC has been working on the study for five years. "It's
1609 become part of my mental furniture." It will yield "lots and lots
1610 of information."

1611 Judge Dow noted that circumstances in Arizona are different
1612 from circumstances in Illinois. Arizona lawyers have worked with
1613 expanded disclosures in Arizona state courts for more than twenty
1614 years. Greater resistance was faced in Illinois.

1615 The meeting concluded with the hope that the next meeting,
1616 scheduled for March 29, 2022, will be in person.

1617 Respectfully submitted,

1618 Edward H. Cooper
Reporter

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January 2 draft

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TAB 6

1 **6. For Final Approval: Proposed Rule 87 -- Emergency Rules**

2 Rule 87 establishes Judicial Conference authority to declare a civil rules emergency. A
3 declaration automatically adopts all of the Emergency Civil Rules included in Rule 87(c) unless
4 the Judicial Conference excepts one or more of them. The emergency rules are narrowly limited.
5 Five of them supplement specific provisions in Rule 4 by authorizing the court to order service by
6 a method that is reasonably calculated to give notice. Other parts of Rule 4 are not included, most
7 notably those that involve foreign parties or service in foreign countries, as to whom special
8 provisions are made in Rule 4(f), (g), and (j)(1). The only other emergency rule, Emergency Rule
9 6(b)(2)(A), relaxes the absolute prohibition in Rule 6(b)(2) that forbids any extension of the time
10 to act specified for post-judgment motions under Rules 50(b) and (d); 52(b); 59(b),(d), and (e);
11 and 60(b). The regular rule is reasonably clear. The provisions of Emergency Rule 6(b)(2)(B) are
12 more complex, growing from the need to integrate extensions of time with the provisions of
13 Appellate Rule 4 that govern the effect of timely post-judgment motions on appeal time. The
14 importance of precise time calculations is reflected in the supporting amendment of Appellate Rule
15 4 that was published for comment alongside Rule 87.

16 Rule 87 was developed through extensive meetings of the CARES Act Subcommittee and
17 this Committee. The process depended on intense collaboration with the Appellate, Bankruptcy,
18 and Criminal Rules Committees. Professors Capra and Struve guided the four committees through
19 the task of shaping rules as nearly uniform as could be. The rules published for comment show a
20 high level of uniformity.

21 Some disuniformities remain. Some of them are inevitable. Rule 87(c)(1) and (2) sets out
22 provisions for completing service or processing post-judgment motions after a declaration of a
23 Civil Rules Emergency ends. These provisions are carefully adapted to the specific contexts, and
24 are no more suitable for the other sets of rules than the provisions in the other sets are for civil
25 procedure.

26 Another disuniformity was discussed in the Standing Committee and accepted. Appellate
27 Rule 2(b), Bankruptcy Rule 9038(a), Civil Rule 87(a), and Criminal Rule 62(a)(1) include a
28 common definition that authorizes the Judicial Conference to declare an emergency "if it
29 determines that extraordinary circumstances relating to public health or safety, or affecting
30 physical or electronic access to a court, substantially impair the court's ability to perform its
31 functions in compliance with these rules." Criminal Rule 62(a)(2), however, adds an additional
32 requirement: "and (2) no feasible alternative measures would sufficiently address the impairment
33 within a reasonable time." This Committee rejected this additional requirement, believing that it
34 is at best redundant. If feasible alternative measures can be found that enable the court to perform
35 its functions in compliance with the applicable rules, there is no emergency. The Criminal Rules
36 Committee, however, believes that the distinctive history, tradition, needs, and special sensitivity
37 of many matters of criminal procedure require double assurance. There is no apparent reason to
38 consider this disuniformity further.

39 In January the reporters for the advisory committees, again guided by Professors Capra and
40 Struve, thought once more about the differences between Emergency Rule 87(b)(1)(B) and the
41 parallel Bankruptcy and Criminal rules. As noted above, Rule 87(b)(1)(B) provides that a

42 declaration of a civil rules emergency automatically adopts all of the emergency rules provisions
43 in Rule 87(c) "unless it excepts one or more of them." The Bankruptcy and Criminal Rules
44 provisions, on the other hand, direct that the declaration must "state any restrictions on the
45 authority granted in" their emergency provisions. The Standing Committee thought it worthwhile
46 to explore this difference one more time after publication. The problem is that "restrictions on the
47 authority" granted by the emergency civil rules do not make sense. Each of the Emergency Rule 4
48 provisions requires a court order and requires that it allow only a method of service reasonably
49 calculated to give notice. "Restrictions" that attempt to limit the authority to more specific means
50 of service would be extraordinarily difficult to provide in the Judicial Conference process for
51 declaring an emergency, and could impair the flexibility required to tailor the method of service
52 to the case-specific issues of parties, subject, and the impact of the emergency in different
53 circumstances. There may be good reasons to except one or more of the Emergency Rules 4 -- for
54 example, to adopt Emergency Rules 4(h)(1) for serving corporations and other entities and 4(i) for
55 serving the United States and its officers and agencies, but to except Rule 4(e) for serving
56 individuals. Emergency Rule 6(b)(2) is even more clearly an "on or off" provision. Any attempt
57 to complicate its provisions for the time to seek more time for a post-judgment motion, for acting
58 on the motion, and for integration with appeal time could prove disastrous. It came to be accepted
59 that "exceptions" works with the civil rules, and "restrictions" would not. The Bankruptcy and
60 Criminal Rules Committees, on the other hand, remain firm in the belief that "exceptions" could
61 open the way for untoward modification of their emergency provisions. That may be particularly
62 true for the complex and often highly sensitive emergency provisions in the criminal rules,
63 addressing such matters as a defendant's appearance in court. This disuniformity can remain.

64 When Rule 87 was recommended for publication last year, the Committee expected that
65 public comments would provide a powerful test of its narrowly limited provisions. Problems might
66 be found in the overall structure or in the details of the emergency civil rules. Or experience with
67 ongoing adjustments to successive surges of the Covid-19 pandemic might show a need for
68 additional emergency provisions. Or experience with the ordinary provisions of Rules 4 and
69 6(b)(2) might show that courts have adjusted in ways that diminish any need for Rule 87.

70 The anticipated flow of public comment has not happened. The small number of comments
71 are summarized below. They do not provide any persuasive reasons for reconsidering the
72 published proposal. The extensive comment submitted by the American Association for Justice
73 offers strong support for Rule 87 as published, but adds several suggestions for adding to Rule 87
74 and for further rules changes. The summary of the AAJ comment goes beyond description to
75 describe the tight ties between the AAJ suggestions and earlier work by the Subcommittee and, for
76 one of them, in the Standing Committee. Each of these potential problems was considered, and for
77 each the conclusion was that the flexibility of each of the Civil Rules identified by the AAJ suffices
78 to meet the needs that concern AAJ.

79 Subcommittee discussion focused on some familiar points.

80 Great progress was made toward making Rule 87 uniform with the Appellate, Bankruptcy,
81 and Criminal emergency rules provisions. The definition of a rules emergency is uniform among
82 Appellate, Bankruptcy, and Civil Rules. Criminal Rule 62(a) adds a further a "no feasible
83 alternative" qualification. The Standing Committee has accepted the difference as something that

responds to the unique pressures generated by the Criminal Rules. As noted above, Rule 87(b)(1)(B) departs from the Bankruptcy and Criminal Rules in providing that a Judicial Conference declaration of a Civil Rules emergency adopts all of the emergency rules in Rule 87(c) "unless it excepts one or more of them." The Subcommittee accepted the conclusion that no changes should be made to approach greater uniformity.

Another observation, familiar from discussions in other committees, noted that an emergency may well exist in parts of a large district but not other parts. Although circumstances that arise within a narrow geographic area often may be addressed by relying on judges in other parts of the district, it may be that some future emergency of an unpredictable character may cause problems that establish a rules emergency in a particular court within the district. Rule 87(b)(1)(A) directs that the Judicial Conference declaration "designate the court or courts affected." The Committee Note observes that "[a]n emergency may be so local that only a single court is designated." The Subcommittee noted that "court" is often used in the rules to describe action by a single judge. "Court" should not be confused with "district" in this setting.

The comment by the American Association for Justice suggested that Rule 87 should include a "fallback" provision designating some alternative authority to declare a rules emergency in circumstances that disable the Judicial Conference from acting. This possibility was thoroughly explored in joint discussions of the several advisory committees and, on their recommendation, rejected by the Standing Committee.

The Lawyers for Civil Justice comment on Rule 87 suggests that service by a nontraditional method under an Emergency Rule 4 should be authorized only if traditional methods do not work. It seems likely that judges are fully aware of the importance of giving notice that an action has been commenced. But a new sentence in the Committee Note may provide useful reassurance:

> Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties.~~;~~ The court should explore the opportunities to make effective service under the traditional methods provided by Rule 4, along with the difficulties that may impede effective service under Rule 4. ~~and take account of,~~ Any means of service authorized by the court must be calculated to fulfill the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

Another pair of questions about the Committee Note arise from provisions that were enclosed by brackets in the published materials. The first appears at the end of the second paragraph on Emergency Rule 6(b)(2). This paragraph addresses the time limits imposed for making post-judgment motions, and notes that the limit for motions under Rules 60(b)(1), (2), and

125 (3) is a reasonable time but no more than a year after the entry of judgment. The bracketed language
126 notes that an extension of time for these Rule 60(b) motions is relevant only in emergency
127 circumstances that make it reasonable to move more than a year after judgment is entered. That is
128 a fine point in the complicated process that integrates Emergency Rule 6(b)(2) with Appellate Rule
129 4. It seems better to delete it as a form of attempted advice that is not needed by those who fully
130 appreciate the intricacies of Appellate Rule 4, and may confuse those who do not.

131 The second bracketed sentence addresses Emergency Rule 6(b)(2)(B)(i) that resets appeal
132 time to run from entry of an order denying a motion to extend the time for a post-judgment motion.
133 This sentence offers advice to courts considering motions to extend, urging that they decide as
134 promptly as the emergency circumstances make possible. This is good advice, but may better be
135 deleted in the tradition of avoiding advice that should not be needed.

136 The Committee has always been careful to reserve its final recommendation on Rule 87,
137 warning the Standing Committee that it might yet decide to withdraw the proposal as unnecessary.
138 One specific focus was suggested by Emergency Rules 4: why not simply add to Rule 4 a general
139 provision authorizing alternative methods of service on court order in a specific case? And have
140 courts perhaps found ways to avoid the seemingly absolute prohibition in Rule 6(b)(2) on
141 extending the time for post-judgment motions? Nothing in the public comments helps to guide this
142 decision.

143 Persuasive reasons remain, however, for recommending adoption of Rule 87. The
144 foundation was laid, not by reports of specific problems with Rule 4 service or Rule 6(b)(2) limits
145 on post-judgment motions, but by painstaking reading of all the civil rules to find provisions that
146 might be insufficiently flexible to permit wise adjustments to emergency circumstances. Many
147 candidates were suggested and evaluated. Only Rules 4 and 6(b)(2) remained at the end. The lack
148 of any confirming public comment does not belie the value of ensuring desirable flexibility,
149 remembering that emergency needs may arise from many events different from a global pandemic.

150 The Subcommittee thoroughly discussed the question whether to go forward to recommend
151 adoption of Rule 87. A persuasive case can be made for abandoning it as unnecessary. Two years
152 of experience with the Covid-19 pandemic have failed to show circumstances that defeat the
153 inherent capacity for flexibility that have enabled effective responses to all potential problems.
154 Public comments have not identified any exceptions. The comment by Lawyers for Civil Justice,
155 indeed, states that "Rule 4 has functioned well during the pandemic." And, as explored further
156 below, there are reasons to be concerned about the Emergency Rule 4 provisions that, although
157 carefully limited, allow a court to order service by a means reasonably calculated to give notice.

158 The Subcommittee, however, agreed by consensus to recommend Rule 87 for adoption.
159 Each of the three other advisory committees that study rules of procedure is recommending
160 adoption of emergency rules provisions. It is better to avoid the risk that failure to adopt a parallel
161 Civil Rule will lead to negative implications about the pervasive opportunities to address
162 emergency circumstances under all of the Civil Rules. And having Rule 87 on the books would
163 make it easier to add new emergency rules provisions in response to future emergencies without
164 having to recreate the entire structure and, perhaps, without the help of an all-committees process.
165 The Emergency Civil Rules authorized by Rule 87(c), moreover, are precisely focused. They can

166 be invoked only when the Judicial Conference declares a Civil Rules emergency -- a Criminal
167 Rules emergency, for example, would not suffice. The role of the Judicial Conference provides
168 vital protection against the potentially unwise invocation of emergency powers that might rely on
169 the discretion of a single judge. And they depend on case-specific orders that will enter only after
170 careful consideration of particular circumstances that require adjustment for emergency
171 circumstances that justify departing from the traditional Civil Rules 4 and 6 provisions that are
172 supplemented by the corresponding Emergency Rules.

173 A recommendation to adopt Rule 87 as published will reduce any immediate need to
174 consider the many long-range possibilities for revising Rule 4. An obvious possibility is to adopt
175 the emergency provisions for service in Rule 87(c)(1) as a general matter, perhaps extended to
176 more parts of Rule 4. A more modest recent proposal suggests that Rule 4(d)(1)(G) be amended to
177 allow a request to waive service to be sent by email. Another suggestion has been that it is
178 unnecessary to serve all the government officials designated in Rule 4(i) -- for example, it would
179 be possible to require service only on the United States Attorney for the district where the action
180 is filed, leaving it to the Department of Justice to arrange prompt notice to the Attorney General
181 and any involved federal agency.

182 Inevitably a time will come to consider more general provisions for service by electronic
183 means. A limited model is provided by the Supplemental Rules for Social Security review actions
184 provision for the court to send a notice of electronic filing to the United States Attorney and the
185 Social Security Administration. This model could be made more general, perhaps with agreement
186 of the Department of Justice to establish an electronic address, either for service by the plaintiff or
187 for receiving a notice of electronic filing from the district court. A still more general model might
188 allow service by the plaintiff, or a notice of electronic filing, sent to an electronic address
189 established by any entity that believes it would be advantageous to develop an efficient way to
190 centralize its processes for immediate notice to the proper persons within the entity. That advantage
191 might be real enough to overcome the reluctance to make it easier to be sued.

192 It may be too early to contemplate more general provisions for electronic service. Some
193 potential defendants may not have the means to receive electronic service. Many defendants are
194 unlikely to trust electronic service, treating it as so much spam. For that matter, spam filters might
195 relegate the attempted service to electronic obscurity while still reporting receipt. Means of
196 assuring use of a correct electronic address, and verifying actual receipt, may not yet be sufficiently
197 reliable. The day will come, but if a Rule 4 project is launched in the near- or mid-term future,
198 general provisions for electronic service may not yet be ripe for consideration.

199 SUMMARY OF COMMENTS

200 Anonymous, 21-CV-0005: We have three branches of government. "Your job is to bring
201 importance of a matter of emergency declaration then it should be evaluated between three
202 branches of government with respect to our constitution. We can't respect a party that only has
203 one point of you [sic] * * *."

204 Anonymous, CV-2021-0006: With an extensive quotation from Locke on delegating legislative
205 powers, urges that "to leave any entity sole power over anything would be opposite of what our

206 Constitution represents." So "changing any rule during a national emergency should be illegal.
207 Emergency powers are clearly being abused and extended by many offenders in order to
208 accommodate their agendas."

209 Federal Magistrate Judges Association, CV-2021-0007: Several members of the group thought the
210 Committee might forgo any new rule for emergencies because the Civil Rules "already provide
211 district courts with tools to address emergency circumstances." There is a great deal of flexibility.
212 But the consensus [apparently looking to Emergency Rule 6(b)(2)] was that the rule allows courts
213 discretion to address unique challenges that might arise from different kinds of emergencies. "We
214 did not identify any other areas of the Civil Rules where we thought emergency extensions would
215 be required and are not already permitted by court Order."

216 New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: Notes
217 that comments it offered last year on possible Civil Rules amendments to respond to an emergency
218 were based on assuming circumstances like the Covid-19 pandemic, "nationwide in scope, and of
219 a sufficient severity to cause the closure of public access to the federal courts." Proposed Rule 87
220 does not require an Executive Branch determination of emergency. "Indeed, there is no expressed
221 criteria by which the Judicial Conference can determine that such an emergency exists. We have
222 concerns about such an approach." If adopted, Rule 87 "should contain explicit criteria under
223 which the Judicial Conference may determine that an Emergency, either national or local, exists."

224 American Association for Justice, 21-CV-0012: This comment is detailed and provides strong
225 support for Rule 87 as published, while suggesting additional provisions for Rule 87 and further
226 rules changes to "facilitate flexibility in emergency situations." These suggestions cover issues
227 that were considered at length in subcommittee and committee, often by other advisory
228 committees, and at times by the Standing Committee. They are important and will be described in
229 some detail, with brief statements of the reasons why they were not recommended while generating
230 Rule 87. The fact that the issues have been considered in the past does not mean that further
231 consideration is inappropriate. But the reasons that proved persuasive once may remain persuasive.

232 AAJ conducted a survey at the end of January 2021 to gather information from its members
233 about experience during the first year of the Covid-19 pandemic. Its proposals rest in part on the
234 112 responses, and in part on more a more general sense of experience during the pandemic.

235 AAJ strongly supports the provisions in Rule 87 as published. The definition of a rules
236 emergency properly omits the "no feasible alternative measures" provision that appears in, and is
237 appropriate for, Criminal Rule 62. Confiding authority to declare a rules emergency in the Judicial
238 Conference is wise, although a "backup" provision should be added. The structure that provides
239 that a declaration of a civil rules emergency adopts all the emergency rules in Rule 87(c) unless it
240 excepts one or more of them "helps streamline the process and creates less work for the Judicial
241 Conference." The provisions for completing proceedings begun under an emergency rule after the
242 declaration terminates also are proper.

243 AAJ suggests there should be a backup plan to cover a situation in which the Judicial
244 Conference is unable to meet to declare a rules emergency. This subject was discussed and put
245 aside by each of the advisory committees. In January 2021, the Standing Committee thought it
246 deserved further consideration. The advisory committees deliberated further, and again

247 recommended that any attempt to create such a provision for a "doomsday" scenario would be
248 unwise, for reasons described at pages 80-81 of the June 2021 Standing Committee agenda
249 materials.

250 More specific recommendations suggest review of "several specific rules that would clarify
251 what can be done virtually versus in-person during emergencies," noting that "a hybrid of in-
252 person and virtual proceedings seems to be the direction courts are headed towards." Indeed, it
253 may be time to consider broader rules provisions to facilitate virtual trials. Several clarifications
254 of "in-person court requirements" are suggested. It is not always clear whether the suggestions are
255 for new emergency civil rules to be added to Rule 87(c); perhaps none of them are. Instead, the
256 suggestions at times clearly contemplate adding provisions to the regular rules that are available
257 only in emergency circumstances, without describing what constitutes an emergency or who --
258 most likely the trial judge -- decides whether there is an emergency. Some of the proposals suggest
259 general amendment of a current rule without being limited to an emergency.

260 The first set of three rules suggestions aim at allowing witnesses to appear by video
261 conference in emergency situations. (1) Rule 32(a)(4)(C) allows a deposition to be used at trial if
262 the witness is unable to attend because of age, illness, infirmity, or imprisonment. The suggestion
263 is to permit court and parties to determine the best ways to ensure the safety of witnesses while
264 protecting the rights of the parties "during a public health emergency." The suggestion seems to
265 extend beyond allowing use of the witness's deposition at trial, perhaps in part because of other
266 provisions in Rule 32(a) that allow a party's deposition to be used for any purpose and allow the
267 court to permit use of a deposition in exceptional circumstances. (2) Rule 45(c) limits the
268 geographic reach of a subpoena to command a person to attend a trial, hearing, or deposition. The
269 rule is not qualified by conferring a right not to attend during an emergent event, or when travel is
270 otherwise challenging or burdensome. It should be amended to permit appearance by video
271 conference, or even telephone, for good cause. Rule 43(a) now permits testimony in open court by
272 contemporaneous transmission from a different location, on terms that should be readily met in
273 any circumstances that would qualify as an emergency. And see also the general protective order
274 provisions of Rule 26(c). (3) Rule 77(b) directs that no hearing may be conducted outside the
275 district unless all affected parties consent. This provision was considered by the subcommittee, by
276 all advisory committees -- most especially the Criminal Rules Committee. 28 U.S.C. § 141(b)(1),
277 which provides for special sessions outside the district, also was considered. The conclusion was
278 that remote proceedings satisfy the current rule, at least as long as the judge is participating from
279 a place within the district, and likely more broadly if an emergency forces a court's judges to leave
280 the district. The question remains under consideration by other Judicial Conference committees.

281 The second set of three rules described by AAJ is more easily disposed of. (1) and (2):
282 Rules 28 and 30(b)(5)(A) direct that a deposition be conducted "before" an officer. AAJ recognizes
283 that courts have allowed remote connections to count as "before" during the pandemic, but
284 suggests time and resources would be saved by avoiding litigation of the issue. "Before" should
285 be clarified, it urges, to clarify that the reporter need not be in the same physical location as the
286 witness or counsel during an emergency situation. Subcommittee consideration of this issue
287 concluded that the present rule text meets the need. It seems likely that continuing practice during
288 the pandemic will confirm this conclusion. (3): Rule 30(b)(4) allows a deposition "by telephone
289 or other remote means." AAJ proposes an amendment to expressly include "video conference" as
290 an appropriate remote means, and to make virtual hearings the default means "during certain

291 emergencies." The present language suffices to authorize video conferencing. Defining "certain
292 emergencies" could prove difficult.

293 Finally, AAJ suggests that "language should be used" to clarify that local rules adopted
294 during an emergency may not conflict with Rule 87 and must conform to 28 U.S.C. §§ 2072 and
295 2075. 28 U.S.C. § 2071(a) and Rule 83(a)(2) suffice to ensure this proposition.

296 <u>Federal Bar Association, CV-2021-0013</u>: "[T]he FBA believes the judiciary is best suited to
297 declare an emergency concerning court rules of practice and procedure. The proposed amendments
298 * * * provide important flexibility for the U.S. Courts in unforeseen situations, some of which may
299 not rise to the level of a national emergency." The FBA also "agrees that the Judicial Conference
300 exclusively, rather than specific circuits, districts, or judges, should be permitted to declare a rules
301 emergency." This will help prevent a disjointed or balkanized response, particularly in
302 circumstances that affect only particular regions or subsets of federal courts. And the FBA
303 "applauds the Rules Committee's success in achieving relative uniformity across all four
304 emergency rules."

305 <u>Lawyers for Civil Justice, CV-2021-0014</u>: The need for any Emergency Rule 4 provisions should
306 be carefully considered. "Rule 4 has functioned well during the pandemic." "Reasonably
307 calculated to give notice" is a vague phrase that "could obviate established due process * * * by
308 permitting courts to authorize alternative methods of service that will not necessarily ensure that
309 actual notice occurs," e-mail or social media service might be authorized. "The potential
310 alternative methods of service are without limit * * *." The risks of failure of notice are significant,
311 particularly during an emergency situation. And the rule should provide that even if an alternative
312 method of service is authorized, a default can be entered only after requiring service by a traditional
313 method.

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

1 **Rule 87. Civil Rules Emergency**

2 **(a) Conditions for an Emergency.** The Judicial
3 Conference of the United States may declare a Civil Rules
4 emergency if it determines that extraordinary circumstances
5 relating to public health or safety, or affecting physical or
6 electronic access to a court, substantially impair the court's
7 ability to perform its functions in compliance with these
8 rules.

9 **(b) Declaring an Emergency.**

10 **(1)** ***Content.*** The declaration must:

11 **(A)** designate the court or courts affected;

12 **(B)** adopt all the emergency rules in
13 Rule 87(c) unless it excepts one or
14 more of them; and

[1] New material is underlined in red.

15 **(C)** be limited to a stated period of no
16 more than 90 days.
17 **(2)** ***Early Termination.*** The Judicial Conference
18 may terminate a declaration for one or more
19 courts before the termination date.
20 **(3)** ***Additional Declarations.*** The
21 Judicial Conference may issue
22 additional declarations under this
23 rule.
24 **(c) Emergency Rules.**
25 **(1)** ***Emergency Rules 4(e), (h)(1), (i), and***
26 ***(j)(2), and for serving a minor or***
27 ***incompetent person.*** The court may by order
28 authorize service on a defendant described in
29 Rule 4(e), (h)(1), (i), or (j)(2)—or on a minor
30 or incompetent person in a judicial district of
31 the United States—by a method that is
32 reasonably calculated to give notice. A

33 method of service may be completed under
34 the order after the declaration ends unless the
35 court, after notice and an opportunity to be
36 heard, modifies or rescinds the order.
37 **(2) *Emergency Rule 6(b)(2).***
38 **(A)** *Extension of Time to File Certain*
39 *Motions.* A court may, by order, apply
40 Rule 6(b)(1)(A) to extend for a period
41 of no more than 30 days after entry of
42 the order the time to act under
43 Rules 50(b) and (d), 52(b), 59(b), (d),
44 and (e), and 60(b).
45 **(B)** *Effect on Time to Appeal.* Unless the
46 time to appeal would otherwise be
47 longer:
48 **(i)** if the court denies an
49 extension, the time to file an
50 appeal runs for all parties

51 from the date the order
52 denying the motion to extend
53 is entered;
54 **(ii)** if the court grants an
55 extension, a motion
56 authorized by the court and
57 filed within the extended
58 period is, for purposes of
59 Appellate Rule 4(a)(4)(A),
60 filed "within the time allowed
61 by" the Federal Rules of Civil
62 Procedure; and
63 **(iii)** if the court grants an
64 extension and no motion
65 authorized by the court is
66 made within the extended
67 period, the time to file an
68 appeal runs for all parties

69 from the expiration of the
70 extended period.
71 **(C)** *Declaration Ends.* An act authorized
72 by an order under this emergency rule
73 may be completed under the order
74 after the emergency declaration ends.

Committee Note

Subdivision (a). This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local—familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The

emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

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

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

circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b). A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

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

Emergency Rules 4. Each of the Emergency Rules 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties, taking account of

the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. A modification that continues to allow a method of service specified by the order but not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50 (b) and (d), 52(b), 59(b), (d), and (e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension. [An extension of the time to file a Rule 60(b) motion would be superfluous so long as the motion is made within a reasonable time, except for the circumstance in which a rules emergency declaration is in effect and the emergency circumstances make it reasonable to permit a motion beyond the one-year limit for motions under Rule 60(b)(1), (2), or (3).]

Special care must be taken to ensure that the parties understand the effect of an order granting or denying an extension on the time for filing a notice of appeal. Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension.

Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for four separate situations.

The first situation is governed by the initial text: "Unless the time to appeal would otherwise be longer." One example that illustrates this situation would be a motion by the plaintiff for a new trial within the time allowed by Rule 59, followed by a timely motion by the defendant for an extension of time to file a renewed motion for judgment as a matter of law under Rule 50(b). The court denies the motion for an extension without yet ruling on the plaintiff's motion. The time to appeal after denial of the plaintiff's motion is longer for all parties than the time after denial of the defendant's motion for an extension.

Item (B)(i) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend. [The court may need some time to make a careful decision on the motion, although the time constraints imposed on post-judgment motions reflect the concerns that conduce to deciding as promptly as the emergency circumstances make possible.]

Items (B)(ii) and (iii) reset appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed "within the time allowed by" the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order "disposing of the last such remaining motion." If no authorized motion is made, appeal time runs from the expiration of the extended period.

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." This

Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the [original] final judgment.

Emergency Rule 6(b)(2)(C) addresses a situation in which a declaration of a Civil Rules emergency ends after an order is entered, whether the order grants or denies an extension. This rule preserves the integration of Emergency Rule 6(b)(2) with the appeal time provisions of Appellate Rule 4(a)(4)(A). An act authorized by the order, 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.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions,

and needs. Different provisions were compelled by these different purposes.

TAB 7

7. For Final Action: Rule 12(a)(4) Time to Respond

In August 2020, a proposal to amend Rule 12(a)(4) initiated by the Department of Justice was published for comment. Rule 12(a)(4) directs that unless the court sets a different time, a responsive pleading must be served within 14 days after the court denies a motion under Rule 12 or postpones its disposition until trial. The proposed amendment would set the time at "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."

In April 2020 the Committee unanimously recommended publication. Discussion after the comment period, however, focused on new concerns. The Committee recommended adoption after two revisions were considered and rejected by divided votes. One would have set the extended time at some period shorter than 60 days. The other would have limited the extended period -- whatever it might be -- to actions in which the defendant asserts official immunity. Further discussion of the new concerns in June led the Standing Committee to suggest further consideration in this Committee. The issues were discussed extensively last October and carried over for consideration of a final recommendation now.

The Department of Justice responded to the ongoing discussion in the committees in two steps. In an August 18, 2021 letter from Hon. Brian M. Boynton to Judge Dow, the Department repeated the reasons initially advanced to support its proposal, but recommended that "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." At the October meeting, the Committee renewed its request for detailed information about the frequency of motions to dismiss in these cases, how often official immunity defenses are raised, the rate of denials, the number of motions to extend the time to answer, how often time is extended, and how long are whatever extensions that are granted. The Department responded to this request in a message sent on January 21, 2022, by Hon. Joshua E. Gardner to the Rules Committee Support Office. The message recounts that over the five-year period from 2017 to 2021, the Department provided representation to individuals in numbers that ranged from a low of 1,226 in 2017 to a high of 2,028 in 2021. The Department, however, does not compile information of the sort requested by the Committee, and cannot reasonably gather it from the many people involved in these cases. This message concludes:

> Although the Department continues to believe that its proposal to amend Rule 12 is sensible, would best promote immunity principles, and would avoid needless motions practice, we understand that the lack of quantitative data makes the proposal difficult to evaluate. Under these circumstances, the Department believes the best course of action is to remove the Rule 12 proposal from the agenda. We appreciate the Committee's careful consideration of the Department's proposal.

The Department's suggestion that the Committee should recommend that the published proposal be withdrawn deserves great respect. But it is not controlling. The Committee remains responsible to decide for itself what to recommend to the Standing Committee. The Committee was initially persuaded by the reasons originally advanced by the Department for the 60-day period in all of these cases, without limiting the extended period to cases with an official immunity defense. Nor has the Department gainsaid these reasons. Beyond these reasons, Committee discussion suggested a perspective that could serve the courts and even plaintiffs well if actual

experience coincides with the Department's anecdotal account. It may be that requests for an extended time to answer are made in virtually all these cases, that they are generally granted as a matter of routine, and that the extended periods ordinarily run to 60 days or beyond. In that world, a presumption in favor of a 60-day period, to be shortened or extended in appropriate circumstances, would save the court and the parties from needless motion practice.

Department anecdotes about general experience are not the same as the detailed empirical information the Committee sought. But if experience ordinarily shows routine motions, routinely granted for periods of 60 days or longer, it may be that the Department indeed is better off without amending Rule 12(a)(4) to provide a period shorter than 60 days. Amending the rule to provide 45 days could easily become a strong argument against extending for a longer period. An amendment providing 30 days would exert even greater pressure.

The reasons for the 60-day proposal are familiar from repeated consideration. They are detailed at length in the agenda materials for the October 2021 meeting and in the October minutes. In short compass, they include the unique circumstances confronting the Department when it undertakes to represent an individual United States officer or employee. These complications have been urged to distinguish the Department's need for time from the needs of a private attorney retained by the defendant. And a unique complication arises in cases that include an official immunity defense. Denial of the motion to dismiss, or postponement to trial, supports a collateral-order appeal. The Department must weigh carefully the reasons for and against appeal in ways that differ from the concerns considered by private counsel. More distinctively, all appeals must be approved by the Solicitor General, after careful review that cannot be completed in 14 days, and perhaps in less than 60 days. The purposes of immunity would be eroded if the Department were required to plead, and perhaps even to begin discovery, before 60 days, only to be suspended if an appeal is authorized and taken.

The great respect due the Department's suggestion that the Committee recommend against adopting the published proposal may well conclude the matter without extended discussion. But the conclusion must rest on the Committee's considered judgment.

EXCERPT FROM OCTOBER 2021 AGENDA MATERIALS

6. Rule 12(a)(4): 20-CV-B

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.

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

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

401 **(a) Time to Serve a Responsive Pleading.**

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

404 * * * * *

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

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

414 * * * * *

415 20-CV-B was submitted by the Department of Justice. Two rather distinct justifications
416 were offered to support the additional 46 days, more than quadrupling the ordinary time to respond.
417 First, the Department often represents individual federal employees sued in an individual capacity
418 for actions in the course of their federal duties. The Department may need more time than other
419 litigants, at times because it comes to represent the defendant late in the action--perhaps even after
420 the Rule 12 motion has been filed, and regularly because its many competing responsibilities
421 across a wide universe of litigation impede the opportunities for nimble response that are available
422 to private lawyers. This general condition is said to be justification enough.

423 But a second and distinctive justification is also advanced. An employee sued in an
424 individual capacity often raises an official immunity defense, commonly qualified immunity but
425 perhaps absolute immunity. Denial of a motion to dismiss that presents an official immunity
426 defense is ordinarily appealable as a collateral order. The government can represent the individual
427 defendant on appeal only if the Solicitor General approves the appeal. Time is required to
428 determine whether an appeal is available and whether an immediate appeal is desirable. If appeal
429 seems desirable, more time is needed to decide whether the reasons are so strong as to seek
430 approval by the Solicitor General. And if approval is sought, some time is needed for the Solicitor

431 General to decide. Maintaining this effective central control is an important means of establishing
432 and implementing uniform government-wide appeal practices and substantive positions as well.

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

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

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

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

449 The Committee's full discussion is summarized in the draft April Minutes. One perspective
450 that recurred frequently began with the first words of Rule 12(a)(4): "Unless the court sets a
451 different time * * *." Under the present rule, a response is presumed due within 14 days, but the
452 government can win an extension. Under the published rule, a response is presumed due within 60
453 days, but the plaintiff can seek an order setting a shorter time. Moving the presumption to 60 days
454 can make sense if the government generally needs more time. Keeping the time at 14 days likely
455 will mean frequent government motions to extend. If motions are frequently made and commonly
456 granted, little is accomplished by the 14-day presumption apart from waste motion. In addition,
457 the government will feel compelled to begin to prepare a response to enable it to meet the deadline
458 if an extension is denied. A 14th-day response, moreover, is likely to be less helpful than a more
459 deliberately prepared response. On the other hand, if the government does not often truly need
460 more than 14 days, keeping the rule as it is may -- although not always -- expedite eventual
461 disposition of the action. When unusual circumstances justify an extension, the government can
462 seek it. The choice should depend on pragmatic considerations of actual experience that should be
463 better explained by the Department.

464 A related question asked why an amendment should extend the time to 60 days. The
465 Department offers two analogies. One is to Rules 12(a)(2) and (3), which set the time to answer at
466 60 days when the defendant is the United States or its agency, officer, or employee. The 60-day
467 period for actions against an employee in an individual capacity was added in 2000 to reflect the
468 amendment of Rule 4(i) that required service on the United States, reasoning that the United States
469 needs the time to decide whether to provide representation and to do so. The analogy, however, is
470 imperfect. The 14 days allowed after disposition of a Rule 12 motion is added on top of the time

471 allowed for making the motion, which is the 60-day time for the answer; the time for the plaintiff
472 to respond and for the motion to be submitted; and the time to decide. Why cannot the Department,
473 just as other litigants, use this time to learn enough about the case to prepare an answer within the
474 general 14-day period?

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

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

492 The problem of actions with multiple defendants was briefly noted. The simplest case
493 would be an action in which all defendants but one are not federal entities, officers, or employees,
494 and in which the Department is involved only in representing an employee sued in an individual
495 capacity. All the others are subject to the 14-day response period. Or the Department may represent
496 two or more defendants, but some are the government itself, an agency, or an officer sued in an
497 official capacity; the published amendment would not extend the 14-day period as to them. More
498 poignantly, a government employee may be sued in both an individual capacity and an official
499 capacity; the published amendment would seem to require an official-capacity answer in 14 days,
500 and the individual-capacity answer in 60 days. So too, the government might be substituted as the
501 defendant for some claims, but not others.

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

506 A similar question might ask whether the rule should distinguish between cases in which
507 the Department represents the defendant and those in which it does not. An effort to draft the
508 distinction in rule text could become complicated by the prospect that the Department might
509 represent the defendant at the time of the motion and then withdraw, or begin to represent the
510 defendant only after the motion is submitted -- and, conceivably, after the 14-day period has

511 expired. This complication seems better avoided, so that any extended period is available to the
512 defendant even if the Department has never been involved.

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

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

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

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

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

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

534 A concluding suggestion in the Standing Committee was that the Committee Note should
535 provide a better justification for any extended period that may be recommended. The vote for
536 further consideration reflected both the question whether any amendment should be limited to
537 cases with an immunity defense and the question whether any additional time should be for some
538 period well short of 60 days.

539 So the question on remand is framed.

540 The Department of Justice has responded to the concerns expressed in this Committee and
541 in the Standing Committee in a letter attached below. The letter continues to emphasize two points.
542 The internal structure and procedures of the Department make extra time to respond necessary
543 even in cases that do not involve an immunity defense. And when an immunity defense and a
544 possible appeal are involved, the time needed for deliberation and approval by the Solicitor
545 General cannot be reduced. Time is needed to assess the questions involved in the specific case,
546 and also to maintain uniformity in Department practice and -- often more important -- substantive
547 legal issues of nationwide importance. Forcing a response within 14 days leads to motions to

548 extend. If extra time is not allowed, a 14-day response is not likely to be well developed, and the
549 purpose of protecting the defendant against the burdens of litigation is thwarted. Sixty days was
550 deliberately and carefully chosen as the appeal period for these reasons, and should be matched by
551 a 60-day period to respond. The full 60 days is so important, indeed, that the Department believes
552 that amending the rule to provide any shorter period is not worth the effort.

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

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

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

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

> 584 The confluence of two well-intentioned doctrines, notice pleading and qualified
> 585 immunity, give rise to this exercise in legal decisionmaking based on facts both
> 586 hypothetical and vague. *** The unintended consequence of this confluence of
> 587 procedural doctrines is that the courts may be called upon to decide far-reaching
> 588 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.

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

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

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

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

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

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

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

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[1] See "advanced" and footnote 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 footnote 1.

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

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

5 **(a) Time to Serve a Responsive Pleading.**

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

9 * * * * *

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

13 **(A)** if the court denies the motion or postpones
14 its disposition until trial, the responsive pleading must be
15 served within 14 days after notice of the court's action, or
16 within 60 days if the defendant is a United States officer or

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

17 employee sued in an individual capacity for an act or

18 omission occurring in connection with duties performed on

19 the United States' behalf; or

20 * * * * *

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.

U. S. Department of Justice

20-CV-B

Civil Division

Assistant Attorney General

Washington, D.C. 20530

FEB 2 6 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NW
Washington, DC 20544

Dear Ms. Womeldorf:

I am writing on behalf of the United States Department of Justice to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 12(a)(4)(A).

Currently, the time to answer a complaint after a district court has denied a motion to dismiss is 14 days. *See* Federal Rule of Civil Procedure 12(a)(4)(A). Personal liability suits against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), however, are subject to immunity defenses that usually carry an immediate appeal right when they are rejected by a federal district court. The appeal time under such circumstances is 60 days, the same as in suits against the federal government itself. Requiring an answer when the appellate court might uphold the immunity defense is inconsistent with the idea of "suit immunity" underlying modern official immunity defenses. It also risks jump-starting the mandatory disclosure obligations and pretrial discovery that immunity is supposed to guard against. An official's timely compliance with Rule 12(a)(4)(A) might also create confusion as to whether she is foregoing appeal.

As discussed in more detail below, we propose consideration of an amendment to Civil Rule 12(a)(4)(A) that would extend the answer deadline in suits against government officers and employees in their individual capacity to 60 days from notice of the district court's action. Such an amendment would eliminate the official's need to respond to the complaint before the federal government has made an appeal decision.

DISCUSSION

A district court decision denying a dismissal motion asserting an official immunity defense is usually subject to an immediate appeal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996). The Solicitor General must authorize the appeal if the government is to take it on the official's behalf. *See* 28 C.F.R. § 0.20(b). For that reason Federal Rule of Appellate Procedure 4(a)(1)(B)(iv) gives federal officers and employees 60 days in which to appeal even though the government itself is not a party. But while the Solicitor General considers appeal, the official remains subject to the requirement in

Rebecca A. Womeldorf, Secretary
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Federal Rule of Civil Procedure 12(a)(4)(A) that she serve an answer to the complaint 14 days after notice of the district court's ruling on his motion. The requirement that the official plead in response to the complaint's allegations is inconsistent with the immunity defense, which is conceived as "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

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

The extended time periods under these rules reflect two things. First, the government needs more time than private litigants to assess a case and determine a district court response. Second, the government, and the Solicitor General in particular, require an extended time to make an appeal decision. The same considerations also warrant allowing a government employee 60 days in which to answer a complaint after denial of a dismissal motion. The need for 60 days is especially acute when the order is appealable. The current 14-day response period requires an employee to answer a complaint before the Solicitor General has had time to decide whether to file an appeal. That undercuts the "suit immunity" protection official immunity defenses promise, and it risks creating confusion about whether the employee will forego appeal and instead defend in district court.

Rebecca A. Womeldorf, Secretary
Page 3

"The basic thrust of" qualified immunity and similar defenses "is to free officials from the concerns of litigation," *Iqbal*, 556 U.S. at 685. Those include "disruptive discovery," *id.*, but it also includes more. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1990). The obligation to answer a complaint is one such customary litigation burden and one not properly imposed before immunity is resolved. The qualified-immunity defense presents a particularly good example. It is the most often-litigated immunity. It bars suit unless an official violated clearly-established rights. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The point of making "clearly-established law" the immunity standard is to avoid as much as possible the need for officials to join issue on and to litigate the facts. *See Mitchell*, 472 U.S. at 526-27. By limiting liability to clearly-established violations, the qualified-immunity standard achieves that by narrowing the range of cases that require further pleading, discovery, or trial. It is why, for example, a genuine dispute of material fact on the underlying constitutional claim does not foreclose summary judgment when the law is not clearly established. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled in part on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009).

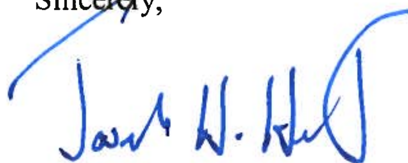
When an official *does* answer a complaint, the next likely event is an order for the parties to meet and confer and to plan for discovery and other pretrial activities. Those also are customary litigation burdens and ones qualified immunity is intended to guard against. *See Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). Taken in that light, qualified immunity is properly understood as "a right not to be subjected to litigation beyond the point at which immunity is asserted." *Id.* At least so long as an immediate appeal might vindicate an official's immunity claim, the obligation to answer a complaint should lie beyond that point.

Answering the complaint would avoid the chance of default, but it risks causing confusion as to whether the official will appeal. And as just mentioned, answering also carries the risk that the court will require the parties to begin discovery and other pretrial activities. An official might seek an extension of time, but an impatient court might deny it or even condition relief on undertaking disclosure or engaging in discovery planning. The extended times already available under Civil Rule 12(a)(3) and Appellate Rule 4(a)(1) correctly reflect the insight that extension motions are not a sufficient safeguard for the government's interests in these cases.

The proposed amendment to Civil Rule 12(a)(4) would solve these problems. It is a modest proposal consistent with the 2000 amendment to Civil Rule 12(a)(3) and the 2011 amendment to Appellate Rule 4(a)(1). A sketch of the proposed amendment is included. The draft adapts the Rule 12(a)(3) extended-response time language to the situation in which a district court denies a federal officer or employee's motion to dismiss.

Please let me know if I can provide any more information regarding this proposal. Thank you for your consideration.

Sincerely,



Joseph H. Hunt
Assistant Attorney General

Attachment

Fed. R. Civ. P. 12

(a) Time to Serve a Responsive Pleading.

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

(A) A defendant must serve an answer:

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

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

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

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

(2) ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity***. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

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

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

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

* * * *

Sketch of Suggested Advisory Committee Note:

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days in which to serve a responsive pleading after a court denies a motion under this rule or postpones its disposition until trial. Suits against United States officers and employees often involve an official immunity defense and a right of immediate appeal if a court denies a motion asserting the defense. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299 307-308 (1996). The 60-day period under amended Rule 12(a)(4) corresponds to the appeal time under Federal Rule of Appellate Procedure 4(a)(1)(B). The Committee Note to the 2011 amendment to that rule explains that if the United States provides representation to the defendant officer or employee additional time is needed for the Solicitor General to decide whether to file an appeal. Extending the time for serving a responsive pleading after denial of a motion under this rule avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

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 BOYNTON

Digitally signed by BRIAN BOYNTON
Date: 2021.08.18 11:45:11 -04'00'

Brian M. Boynton
Acting Assistant Attorney General

From: Gardner, Joshua E (CIV)
Sent: Friday, January 21, 2022 7:28 AM
To: Julie Wilson
Cc: Bridget Healy; Scott Myers
Subject: RE: Civil Rule 12(a)(4)

Julie:

I wanted to update you and the Committee on the Department's efforts to gather information responsive to the Committee's request at the last Advisory Committee meeting concerning the Department's proposal to amend Rule 12(a)(4). The Department's proposal was prompted by the experiences of those in the Department who litigate individual capacity claims and who have had to seek enlargements of time when a motion to dismiss on immunity grounds was denied by the court. The concern was that participation by a *Bivens* defendant in litigation before the time for appeal has run was inconsistent with general immunity principles, and that an amendment to Rule 12(a)(4) that would enlarge the time to respond to a complaint after the denial of a motion to dismiss on immunity grounds would best preserve those important principles. It also would eliminate the need to engage in motions practice concerning such enlargements, which would conserve the resources of both litigants and the courts.

The Committee understandably seeks quantitative information to assess the magnitude of the problem. Since the last Committee meeting I have endeavored to work with components of the Department to gather this information. Unfortunately, the Department does not track the number of cases where a motion to dismiss on immunity grounds is denied, or, when such a motion is denied, the number of cases in which a motion for an enlargement is sought (or the frequency of such motions being granted or denied). The data the Department does have indicates that between 2017 and 2021, the total number of individuals approved by the Department for individual-capacity representation ranged from a high of 2,028 individuals in calendar year 2021 to a low of 1,226 individuals in calendar year 2017. We further understand that in the vast majority of cases, the Department will move to dismiss individual capacity claims on immunity grounds. Although as mentioned above the Department does not track the total number of cases in which a motion to dismiss on immunity grounds is denied, an anecdotal survey of the Department suggests that when a motion is denied, motions for a stay or an enlargement pending an appeal decision are common. As discussed above, however, the Department does not track the frequency by which such motions are granted or denied by the district court.

Although the Department continues to believe that its proposal to amend Rule 12 is sensible, would best promote immunity principles, and would avoid needless motions practice, we understand that the lack of quantitative data makes the proposal difficult to evaluate. Under these circumstances, the Department believes the best course of action is to remove the Rule 12 proposal from the agenda. We appreciate the Committee's careful consideration of the Department's proposal.

Josh

TAB 8

8. For Final Approval: Rule 15(a) -- Closing a Gap

This proposal to amend Rule 15(a)(1) was published in August 2021. It is ready for a recommendation for adoption as published, for the reasons described in the Committee Note. Public comments offer no reason to reconsider. The brackets may be removed from the sentence that explains the problem generated by a literal reading of "within."

(a) Amendments Before Trial.

(1) ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course ~~*within*~~ <u>no later than</u>:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

* * * * *

Committee Note

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. [The amendment could not come "within" 21 days after the event until the event had happened.] There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

Summary of Comments

<u>Andrew Straw, Disability Party, CV-2021-0003</u>: "I have no problem with the minor change, but the rule must allow an amendment to the operative complaint when an appeal comes back down under certain conditions." (The balance of the comment complains, among other things, of mistreatment by two federal courts of appeals, dishonest actions by them, inappropriate use of the "frivolous" characterization, and "the 5 law licenses taken away from me with suspension for 54 months.")

<u>Federal Magistrate Judges Association, CV-2021-0007</u>: "Based on the explanation of the amendment, we foresee no unintended consequences from this modest change."

715 New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The
716 proposal is “salutary and desirable.”

717 Audrey Lessner, CV-2021-0004: It is not clear what proposed amendment this comment addresses,
718 or whether it is intended as a suggestion for a new amendment of Rule 12(a): “I am strongly
719 encouraging the Federal Courts to have a 90-day limit on time to answer a civil case concerning
720 families.”

721 Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal
722 judicial system. No objections.

723 Aaron Ahern, CV-2021-0015: Again, it is not clear which proposed rule amendment this comment
724 addresses: “This must not e[sic]ffect victims of major crime including gross negligent domestic
725 violence. Who haven’t collected relief. In good faith.”

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

1 **Rule 15. Amended and Supplemental Pleadings**

2 **(a) Amendments Before Trial.**

3 (1) ***Amending as a Matter of Course.*** A party

4 may amend its pleading once as a matter of

5 course ~~within~~no later than:

6 (A) 21 days after serving it, or

7 (B) if the pleading is one to which

8 a responsive pleading is required, 21

9 days after service of a responsive

10 pleading or 21 days after service of a

11 motion under Rule 12(b), (e), or (f),

12 whichever is earlier.

13 * * * * *

Committee Note

Rule 15(a)(1) is amended to substitute "no later than" for "within" to measure the time allowed to amend once as a

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

matter of course. A literal reading of "within" would lead to an untoward practice if a pleading is one to which a responsive pleading is required and neither a responsive pleading nor one of the Rule 12 motions has been served within 21 days after service of the pleading. Under this reading, the time to amend once as a matter of course lapses 21 days after the pleading is served and is revived only on the later service of a responsive pleading or one of the Rule 12 motions. [The amendment could not come "within" 21 days after the event until the event had happened.] There is no reason to suspend the right to amend in this way. "No later than" makes it clear that the right to amend continues without interruption until 21 days after the earlier of the events described in Rule 15(a)(1)(B).

TAB 9

9. For Final Approval: Rule 72(b)(1): Notice of Magistrate Judge Recommendations

This proposal to amend Rule 72(b)(1) was published for comment in August 2021. Public comments advance no reason for changing or withdrawing the proposal. It is ready to be recommended for adoption as published:

(b) Dispositive Motions and Prisoner Petitions.

> **(2)** ***Findings and Recommendations.*** * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must ~~promptly mail~~ immediately serve a copy ~~to~~ on each party as provided in Rule 5(b).

Committee Note

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). [Service of notice of entry of an order or judgment under Rule 5(b) is permitted by Rule 77(d)(1) and works well.][1]

SUMMARY OF COMMENTS

Federal Magistrate Judges Association, CV-2021-0007: "We endorse this update, which much more accurately reflects current expectations regarding service, and avoids confusion caused by the outdated mailing requirement."

New York State Bar Association Commercial and Federal Litigation Section, 21-CV-0008: The proposal is "salutary and desirable."

Shane Jeansonne, 21-CV-0010: This is a bad idea. Prisoners have no access to the CM/ECF system. If they do not have access to mailed copies of the recommendations, they will be unable to adequately object or appeal. (This comment seems to overlook the provision of Rule 5(b)(2)(E) that allows sending notice by filing with the court's electronic-filing system only as to a registered user.)

Federal Bar Association, 21-CV-0013: The proposal is consistent with strengthening the federal judicial system. No objections.

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[1] The brackets around the final sentence of the Committee Note mark a statement that was useful for purposes of seeking comments on contrary experience. The sentence does not seem important for implementation of the amended rule and might be deleted.

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

1 **Rule 72. Magistrate Judges: Pretrial Order**

2 * * * * *

3 **(b) Dispositive Motions and Prisoner Petitions.**

4 (1) ***Findings and Recommendations.*** * * * The

5 magistrate judge must enter a recommended disposition,

6 including, if appropriate, proposed findings of fact. The

7 clerk must ~~promptly mail~~immediately serve a copy ~~to~~on each

8 party as provided in Rule 5(b).

9 * * * * *

Committee Note

Rule 72(b)(1) is amended to permit the clerk to serve a copy of a magistrate judge's recommended disposition by any of the means provided in Rule 5(b). [Service of a notice of entry of judgment under Rule 5(b) is permitted by Rule 77(d) as well.]

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

TAB 10

752 **10. For Adoption Without Publication: Rule 6(a)(6)(A): Juneteenth Holiday**

753 Last October the Committee voted to recommend adoption of an amendment of Rule
754 6(a)(6)(A) to include Juneteenth National Independence Day in the list of statutory holidays
755 included in the definition of "legal holiday." The amendment reflects the Juneteenth National
756 Independence Act, P.L. 117-17 (2021).

757 The Committee also concluded that the amendment should be recommended for adoption
758 without publication. Present rule 6(a)(6)(B) achieves the same result by including as a legal holiday
759 "any day declared a holiday by the President or Congress." This recommendation depends on the
760 expectation that the other advisory committees will make the same recommendation for the parallel
761 amendments of their rules.

762 The recommendation can be carried forward to the June meeting of the Standing
763 Committee.

764 As amended, Rule 6(a)(6)(A) would read:

765 **Rule 6. Computing and Extending Time; Time for Motion Papers**

766 **(a) Computing Time.** * * *

767 **(6)** ***"Legal Holiday" Defined.*** "Legal Holiday" means:

768 (A) the day set aside by statute for observing * * * Memorial Day,
769 <u>Juneteenth National Independence Day,</u> Independence Day, * * *.

770 **Committee Note**

771 Rule 6(a)(6) is amended to add Juneteenth National Independence Day to the days set aside
772 by statute as legal holidays.

TAB 11

773 **11. Report of Rule 9(b) Subcommittee**

774 At its April 2021 meeting, the Committee received an initial report on the proposal by
775 Committee member Dean and Professor A. Benjamin Spencer to amend the second sentence of
776 Rule 9(b) in light of the interpretation of that rule in the Supreme Court's decision in *Ashcroft v.*
777 *Iqbal*, 556 U.S. 662, 686–87 (2009). The proposal, 20-CV-Z, was supported by an article, A.
778 Benjamin Spencer, Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage
779 Wrought by *Iqbal*, 41 Cardozo L. Rev. 1015 (2020). The article was circulated in the agenda book
780 for the April 2021 meeting and, to provide additional background, is also included in this agenda
781 book. The proposal focused on the second sentence of the rule, and was advanced as a way to
782 guarantee an opportunity to plead intent, knowledge and state of mind generally in all cases.

783 In October, 2021, a Rule 9(b) Subcommittee was appointed, chaired by Judge Sara Lioi,
784 and including Judge Cathy Bissoon, Justice Thomas Lee, Joseph Sellers and Helen Witt.
785 Meanwhile, Kevin Crenny, the Rules Law Clerk at the time, did research on the application of
786 Rule 9(b) before the Supreme Court's *Twombly* decision in 2007. The resulting research
787 memorandum is included in this agenda book.

788 On Dec. 15, 2021, the Rule 9(b) Subcommittee met via Teams and thoroughly discussed
789 the issues raised by Dean Spencer's article and addressed by Mr. Crenny's research. At the end of
790 this discussion, the subcommittee voted unanimously to recommend that this proposal be removed
791 from the agenda. Notes of that online conference are included in this agenda book.

792 The following discussion draws considerably on the agenda report for the April 2021
793 Advisory Committee meeting. But some overall background information may prove of use to put
794 the issues in perspective.

795 Past Committee Consideration of
796 of Pleading Requirements

797 In *Conley v. Gibson*, 357 U.S. 355 U.S. 41 (1957), the Supreme Court announced that "a
798 complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that
799 the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.
800 at 45-46. In 1998, Professor Hazard noted that "Conley v. Gibson turned Rule 8 on its head by
801 holding that a claim is insufficient only if the insufficiency appears from the pleading itself."
802 Hazard, From Whom No Secrets Are Hid, 76 Texas L. Rev. 1665, 1685 (1998).

803 Meanwhile, lower courts sometimes seemed not to take *Conley v. Gibson* seriously. For
804 example, in *Albany Welfare Rights Organization Day Care Center v. Schreck*, 463 F.2d 620 (2d
805 Cir. 1972), the court of appeals upheld dismissal of a suit claiming that defendant county officials
806 refused to refer children to receive care from the plaintiff organization in retaliation for the political
807 activities of its executive director. The majority found that the complaint "presents no facts to
808 support the allegation that the refusal to refer children was in retaliation for [the executive
809 director's] organizing activities." Id. at 623. Judge Feinberg dissented, emphasizing the detailed
810 factual allegations in the complaint, but agreeing that dismissal would be warranted had the

811 complaint relied on the "bald assertion" of a retaliatory motive. Id. at 624-25. There was no
812 suggestion that Rule 9(b) had any bearing on the decision.

813 Rule 9(b) was, moreover, interpreted to require specifics to support allegations of
814 knowledge or intent despite the provisions of the rule's second sentence. For example, in *Ross v.*
815 *A.H. Robins Co., Inc*, 607 F.2d 545 (2d Cir. 1979), plaintiff shareholders in the Robins company
816 asserted a securities fraud claim, alleging that defendants failed to disclose the risks of litigation
817 resulting from problems with its product the Dalkon Shield. Applying the second sentence of Rule
818 9(b) to this securities fraud claim, the court ruled that specifics were required to support plaintiffs'
819 allegations of knowledge (id. at 558):

> 820 [A]lthough Rule 9(b) requires that the "circumstances constituting fraud . . . shall
> 821 be stated with particularity" it provides that "[m]alice, intent, *knowledge*, and other
> 822 condition of mind of a person may be averred generally." (emphasis added [by the
> 823 court]). Of course, defendants' awareness of the facts alleged in paragraph 18 [of
> 824 the complaint] indicating that there were serious questions about the safety and
> 825 efficacy of the Dalkon Shield is central to plaintiffs' Rule 10b-5 claim. However,
> 826 at this stage of the litigation, we cannot realistically expect plaintiffs to be able to
> 827 plead defendants' actual knowledge. On the other hand, plaintiffs can be required
> 828 to supply a factual basis for their conclusory allegations regarding that knowledge.
> 829 It is reasonable to require that the plaintiffs specifically plead those events which
> 830 they assert give rise to a strong inference that the defendants had knowledge of the
> 831 facts contained in * * * the complaint or recklessly disregarded their existence.

832 These cases were not anomalies. See Marcus, The Revival of Fact Pleading Under the
833 Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 447-50 (1986) (describing demanding
834 pleading requirements in securities fraud, civil rights, and conspiracy cases); Marcus, The Puzzling
835 Persistence of Pleading Practice, 76 Texas L. Rev. 1749 (1998) (finding that courts continued to
836 require specifics to support certain claims into the late 1990s). In sum, there is not a body of
837 precedent applying the second sentence of Rule 9(b) in the way proposed.

838 In 1995, Congress passed the Private Securities Litigation Reform Act [PSLRA], which
839 specifies that plaintiffs in securities fraud cases must "state with particularity facts giving rise to a
840 strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).
841 In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), the Court interpreted that
842 statutory directive. Writing for the Court, Justice Ginsburg noted that Congress "adopt[ed] the
843 Second Circuit's 'strong inference' standard," id. at 322, citing *Ross v. A.H. Robins*, quoted above.
844 Id. at 320. Since this standard is now specified by statute for claims governed by the PSLRA,
845 amending Rule 9(b) as suggested would not affect the handling of those claims because there is no
846 thought to use an amended Rule 9(b) to supersede the PSLRA.

847 In 1993, the Supreme Court made it clear that though the first sentence of Rule 9(b) applies
848 to fraud cases, it does not apply to all cases. In *Leatherman v. Tarrant County Narcotics &*
849 *Coordination Unit*, 507 U.S. 163 (1993), the Supreme Court rejected a Fifth Circuit "heightened
850 pleading" standard in a suit against local officials, noting: "Perhaps if Rules 8 and 9 were rewritten
851 today, claims against municipalities under § 1983 might be subjected to the added specificity

requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Id. at 168.

The Court's reference in *Leatherman* to amending the rules prompted considerable Advisory Committee study but ultimately no amendment was proposed. Meanwhile, at least some academics urged that Rule 9(b) be abrogated. See Christopher M. Fairman, An Invitation to the Rulemakers -- Strike Rule 9(b), 38 UC Davis L. Rev. 281 (2004); William M. Richman, Donald E. Lively & Patricia Mell, The Pleading of Fraud: Rhymes Without Reason, 60 So. Cal. L. Rev. 959, 994 (1987) (Rule 9(b) "should be abandoned as a relic whose time is past"); Jeff Sovern, Reconsidering Federal Rule 9(b): Do We Need Particularized Pleading Requirements in Fraud Cases?, 104 F.R.D. 143 (1985) (urging that Rule 9(b) "be eliminated from the federal civil rules").

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court "retired" the "no set of facts" standard from *Conley v. Gibson*. Id. at 562–63. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), it held that plaintiff's complaint had to be dismissed under the pleading standard articulated in *Twombly*, because that standard applied to all cases governed by Rule 8(a)(2), something commentators had questioned after 2007. As a consequence, plaintiff's allegation that the Attorney General and the Director of the FBI adopted an aggressive law-enforcement posture after the September 11, 2001, attacks to discriminate on grounds of religion or national origin was found insufficient. Plaintiff urged that the second sentence of Rule 9(b) excused him from alleging specifics to support his claim of discriminatory intent. Writing for the Court, Justice Kennedy rejected this argument on the ground that plaintiff's allegation was "conclusory" (Id. at 686–87):

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, knowledge, and other conditions of mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid -- though still operative -- strictures of Rule 8.

See also A. Benjamin Spencer, Plausibility Pleading, 49 Bos. Col. L. Rev. 431, 473 (2008) (describing the second sentence of Rule 9(b) as "a reference to the pleading standard of Rule 8(a)(2)").

Until it was advanced by plaintiff in *Iqbal*, the second sentence of Rule 9(b) had not received much attention in the courts. In *Leatherman*, the Supreme Court ruled that at least the first sentence of the rule did not apply to non-fraud claims. In the Second Circuit reading of the second sentence of the rule in *Ross v. A.H. Robins*, quoted above, it was found to permit demanding pleading requirements of knowledge of the sort Congress later enacted in the PSLRA. And in the 1972 discrimination case described above, there was no suggestion that Rule 9(b) had a bearing on the pleading of specifics to support a claim of retaliation for First Amendment protected activities.

The Supreme Court's decisions in *Twombly* and *Iqbal* prompted a very large amount of academic writing, most of it unfavorable to the Court's decisions. Even though the Court did not

(as it had in its *Leatherman* decision in 1993) invite rulemaking, the decisions also prompted much Advisory Committee activity. Various possible revisions of Rule 8 appeared in a number of agenda books. The Rules Law Clerk at the time compiled a massive study of post-*Iqbal* decisions in the lower courts (eventually some 700 pages long).

Meanwhile, the Federal Judicial Center did a thorough study that compared decisions before 2007 (when *Twombly* was decided) and after 2009 (when *Iqbal* was decided), and concluded that there was no statistically significant increase in the granting of motions to dismiss. See J. Cecil, G. Cort, M. Williams & J. Batillon, Motions to Dismiss for Failure to State A Claim After *Iqbal*, Report to the Judicial Conference Advisory Committee on Civil Rules (2011). This report was challenged as being too cautious in applying standards of statistical significance. See Hoffman, *Twombly* and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 Fed. Cts. L. Rev. 1 (2011); see also Dodson, A New Look at Dismissal Rates of Federal Civil Claims, 96 Judicature 127 (2012) (finding a statistically significant increase in the rate of dismissals after *Iqbal* compared to the rate before *Twombly*, but also that dismissal was quite common before *Twombly*).

The current proposal
[The following draws heavily
on the agenda report in April 2021]

As noted above, in *Iqbal* the Court interpreted the second sentence of Rule 9(b) against the first sentence, so the entire subdivision is important:

> **(b) Fraud or Mistake; Conditions of Mind.** In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The proposed amendment would revise the second sentence:

> Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

The article that explains the proposal is tightly constructed. The summary that follows is designed to guide careful reading, not to substitute for it. The conclusion presents three choices. The preferred choice is to recommend the proposed amendment to correct the "errant construction" in *Iqbal*. The next preferred choice is to amend the rule text to clearly express the Court's interpretation, "unless we want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice." The last choice, "doing nothing," "should not be an option" — but is feared to be "precisely the most likely thing that we will do."

The overall approach reflects deep dissatisfaction with the general "plausibility" pleading standard that has evolved over the last 14 years, but does not argue for an attempt to restore whatever muddled standards might be identified in the practice of "notice pleading" before *Bell*

Atlantic Corp. v. Twombly.[1] The focus on Rule 9(b) and allegations of malice, intent, knowledge, and other conditions of a person's mind leads to a proposal that could be accepted without a frontal attack on *Twombly* and *Iqbal*, and might be accepted by those who have become comfortable with the current general approach to pleading a claim for relief under Rule 8(a)(2). At the same time, as illustrated in the many examples of decisions that would be superseded by an amended Rule 9(b), there would be a dramatic reduction of pleading burdens across a broad range of contemporary litigation.

Dean Spencer's article proceeds through three main blocks to a fourth section that repeats the proposed new rule text, accompanied by a committee note "crafted to ensure that there is no room for courts -- including the Supreme Court -- to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since Iqbal."

The first block describes Iqbal and lower court decisions that have followed it in assessing pleadings of purpose, knowledge, intent, or malice. The decisions are described as "the epitome of what plausibility pleading requires."

The second block challenges the Court's interpretation of Rule 9(b), first on the face of the rule text as it relates to other pleading rules, and then on an exploration of the intent of the original rules committee that drafted Rule 9(b). Rule 8(a)(2), applied by the Court to determine what it means to allege conditions of mind "generally," relates to stating a claim. Rule 9(b) relates to alleging a particular part of a claim. Ambiguous allegations are to be challenged by moving for a more definite statement under Rule 12(e), not by moving to dismiss. Rule 8(d)(1), further, directs that each allegation in a pleading "must be simple, concise, and direct"; it does not require supporting facts. Looking further in the immediate vicinity, Rule 9(a)(2) requires a party that challenges an allegation of capacity or authority to do so by a specific denial "which must state any supporting facts that are peculiarly within the party's knowledge." This requirement is an explicit exception to an assumed general rule that knowledge can be pleaded without supporting facts. Former Form 21, tracing back to the original rules, further demonstrates the intended pleading standard by providing a simple statement in a complaint for fraudulent conveyance that a conveyance of described property was made to a named defendant "for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."

Going beyond the integrated analysis of rules texts, the article explores the original understanding. The 1937 committee note for the 1938 Rule 9(b) refers simply to English practice. Examination of the English practice, tracing well back into the Nineteenth Century, shows that it permitted allegations of "malice, fraudulent intention, knowledge, or other condition of the mind of any person" "as a fact without setting out the circumstances from which the same is to be inferred." Several examples of decisions under this English rule are offered. One of them is particularly intriguing because it illustrates that allegations of knowledge are appropriate across a wide range of actions. The court in that 1884 case accepted an allegation in an action for negligence

[1] See p. 1054, n. 145: "[T]he Court's interpretation of Rule 8(a)(2) -- like its interpretation of Rule 9(b) -- diverges from the meaning supported by all relevant textual and historical evidence . . . . Unfortunately, it appears that ship has sailed."

967 that the defendant "knew or ought to have known of the defective, unsafe, and insecure condition
968 of the said iron door."

969 The third block goes directly to the controlling concern. It is unfair to require a pleader to
970 provide the particulars of another person's condition of mind without the benefit of discovery.
971 Wrongful intentions are likely to be obscured from external view. Invoking the general test of
972 plausibility pleading that invokes "judicial experience and common sense," and that looks to the
973 court to draw the inference that the defendant is liable, invites stereotypical reasoning and requires
974 pleaders "to overcome the categorical schemas dominant within the judicial class." The Court in
975 *Iqbal* relied on preconceptions that shaped the conclusion that the allegations of intent were
976 implausible. Employment discrimination cases are offered as a leading example. Requiring a
977 complaint to articulate facts to substantiate an alleged state of mind, indeed, may run afoul of the
978 First Amendment's prohibition of any law prohibiting the right of the people to petition the
979 Government for the redress of grievances. The risk of "decisions based on various biases and
980 categorical or stereotypical reasoning," is aggravated when lacking complete information about an
981 individual or a situation. "A civil claim is all about deviation from the norm"; pleaders should not
982 be obliged "to offer sufficient facts to convince normatively biased judges that an allegation of
983 deviant intent is plausible."

984 With this inadequate summary, some further observations may be helpful, beginning with
985 a reminder of the *Iqbal* decision itself.

986 The *Iqbal* opinion elaborated now-familiar general Rule 8(a)(2) standards for pleading "a
987 short and plain statement of the claim showing that the pleader is entitled to relief." The details of
988 the Iqbal complaint deserve a brief summary to pave the way for the Rule 9(b) ruling. The plaintiff,
989 "a citizen of Pakistan and a Muslim," was arrested on fraud charges, pleaded guilty, served a term
990 of imprisonment, and was removed to Pakistan. He did not challenge the arrest or the confinement
991 as such. But he did claim that he was designated a "person of high interest" in connection with the
992 terrorist attacks of September 11, 2001, and placed in administrative maximum confinement, "on
993 account of his race, religion, or national origin." The Court accepted the prospect that he had
994 pleaded claims against some of the many defendants. The case came to it on qualified immunity
995 appeals by two of the defendants — John Ashcroft, the former Attorney General, and Robert
996 Mueller, the Director of the FBI. Iqbal alleged that Ashcroft was the principal architect of the
997 unconstitutional policy, and that Mueller was instrumental in its adoption. He further alleged that
998 they "knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions
999 of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national
1000 origin and for no legitimate penological interest."

1001 The Court found these allegations failed to push the claim beyond mere possibility into
1002 plausibility. It applied a legal standard that "purposeful discrimination requires more than 'intent
1003 as volition or intent as awareness of consequences.'" * * * It instead involves a decisionmaker's
1004 undertaking a course of action "'because of,' not merely 'in spite of,' [the action's] adverse effects
1005 upon an identifiable group." Knowledge of, and acquiescence in, discriminatory acts by their
1006 subordinates would not suffice to hold the Attorney General and the Director of the FBI liable.
1007 The allegations of these defendants' purpose "are conclusory, and not entitled to be assumed true."
1008 "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful

1009 nature, that disentitles them to the presumption of truth." The allegations were "consistent with"
1010 an unlawful discriminatory purpose, but did not plausibly establish this purpose "given more likely
1011 explanations." Lower-ranking government officials may have designated the plaintiff a person of
1012 high interest and subjected him to unlawful conditions of confinement for unlawful reasons, but
1013 nothing more could be inferred against these two defendants than seeking "to keep suspected
1014 terrorists in the most secure conditions available until the suspects could be cleared of terrorist
1015 activity."

1016 The Court addressed Rule 9(b) after setting the general pleading requirements. It
1017 characterized the plaintiff's argument to be that by allowing discriminatory intent to be pleaded
1018 "generally," Rule 9(b) permits a conclusory allegation without more. This argument was rejected
1019 on the face of the rule text. "Generally" is used to distinguish allegations of malice, intent,
1020 knowledge, or other conditions of a person's mind from the particularity standard established for
1021 fraud or mistake. "Generally" "does not give [a party] license to evade the less rigid — although
1022 still operative — strictures of Rule 8. * * * And Rule 8 does not empower respondent to plead the
1023 bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint
1024 to survive a motion to dismiss."

1025 There is much more in the article than this bald introduction. It provides a comprehensive
1026 study that illuminates the simpler reaction of those who were surprised by the Court's reading of
1027 Rule 9(b). At least some procedure mavens had continued to believe that "generally" allowed
1028 pleading of a state of mind as if a fact, just as the English rule said more explicitly. On this view,
1029 sufficient notice was given by pleading the facts whose legal consequences are measured by the
1030 defendant's state of mind. And the difficulty of pleading more, particularly without an opportunity
1031 to discover facts and circumstances available only to the defendant or uncooperative witnesses, is
1032 neatly expressed in the aphorism that "The devil himself knoweth not the thought of men."[2]

1033 Pursuing this invitation toward actual proposal of an amendment for publication will
1034 require careful development. One task might be to examine the development of Rule 9(b) practices
1035 in the lower courts before the Iqbal decision. The story of general "notice" pleading practices
1036 before the *Twombly* and *Iqbal* decisions was decidedly mixed, not only in the lower courts but in
1037 the Supreme Court itself. Broad and frequent repetitions of the "no set of facts" phrase retired by
1038 the *Twombly* opinion were interspersed with decisions that not only departed from any (and
1039 improbable) literal meaning, but went well into the realm of fact pleading. The story of Rule 9(b)
1040 may prove to have been similar, offering an example of hard-earned judicial experience that,
1041 whether or not aware of the intentions communicated only by citing a mid-late Nineteenth Century
1042 British practice, found a need for more detailed pleading. A standard suited to pleading common-
1043 law claims and such statutory claims as existed then in England might well prove inadequate in
1044 the civil-action environment of the Twentieth and Twenty-First Centuries.

1045 An initial exploration of earlier cases turns up evidence of an interpretation quite at odds
1046 with the assumption that the second sentence in Rule 9(b) is an independent provision for pleading
1047 under Rule 8(a)(2). A starting point would be that it is puzzling to insert a qualification of Rule

[2] Justice Frankfurter, dissenting, in *Leland v. Oregon*, 343 U.S. 790, 803 (1952), quoting "Brian, C.J., in the fifteenth century."

1048 8(a)(2) as a second sentence in Rule 9(b), without even a cross-reference to Rule 8. Instead, the
1049 second sentence is no more than an amelioration of the particular pleading requirement in the first
1050 sentence, allowing the condition-of-mind elements of a claim of fraud or mistake to be pleaded
1051 generally. On this view, Rule 8(a)(2) has all along governed allegations of malice, intent,
1052 knowledge, and other conditions of a person's mind outside the realm of fraud and mistake.
1053 Variations in the general Rule 8(a)(2) standard over time apply to such allegations as intent to
1054 discriminate or actual malice in defaming a public figure, but that is a direct consequence of Rule
1055 8(a)(2) fashions, not a departure from the second sentence of Rule 9(b).

1056 Apart from the evolution of substantive law, the procedural framework also has evolved.
1057 In the general pleading part of the *Iqbal* opinion, the Court observed that while Rule 8 departs
1058 from "the hypertechnical, code-pleading regime of a prior era, * * * it does not unlock the doors
1059 of discovery for a plaintiff armed with nothing more than conclusions." The Committee has
1060 frequently wrestled with the prospect that at least some guided discovery should be permitted to
1061 support an amended complaint based on information not available to the plaintiff but often
1062 available to the defendant, or perhaps to nonparties. Writing into the rules a provision for discovery
1063 in aid of pleading has not proved an easy task.

1064 A more pointed set of questions about the role of substantive law is illustrated by the
1065 Committee's deliberations about enhanced pleading during the period from the *Leatherman*
1066 decision in 1993, when the Supreme Court ruled that heightened pleading can be required only as
1067 specifically provided in rule text, and 2007, when the *Twombly* opinion was announced. The issue
1068 began with qualified official immunity cases. That example expanded into questions about the
1069 difficulty of identifying which substantive theories might be required to satisfy heightened
1070 pleading requirements. Those questions in turn led both to abstract concerns about
1071 transsubstantivity and to practical concerns about the need to have a solid grasp of litigation
1072 realities in any substantive area that might be captured in a specific pleading rule. The present
1073 proposal recognizes this possibility by suggesting that a desire to protect defendants who may be
1074 entitled to official immunity could be vindicated by a pleading rule specific to immunity cases,
1075 "not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule
1076 9(b)." p. 1052 n. 137.

1077 The official immunity example finds parallels in the examples recounted by the proposal.
1078 What elements of underlying substantive law, and what realities of litigation practice, might
1079 distinguish the pleading standards appropriate for actual malice in an action for defamation of a
1080 public figure? For discrimination in employment, under RLUIPA, or as a "class of one" equal
1081 protection claim? For malicious prosecution? For "fraudulent" conveyances? Rule 9(b), as some
1082 had understood it from 1938 to 2009, and as it might be revised, covers a wide universe of
1083 substantive law. And its reach may be uncertain.

1084 The uncertain reach of the proposed amendment is illustrated by an observation toward the
1085 close of the article that it would not "entirely undo the *Twombly* and *Iqbal* regime." *Twombly*
1086 would not be affected "because the allegation of an unlawful agreement is not a condition of mind
1087 * * *. Rather, it is an allegation pertaining to something that the defendants have done." pp. 1050–
1088 51. But Twombly involved a claim of "conspiracy" under § 1 of the Sherman Act, a concept often
1089 translated as "agreement" but without any coherent concept to identify the line between "conscious

1090 parallelism" and some more closely convergent states of competitors' minds. The basis for
1091 decision commonly is a detailed set of facts of behavior in the marketplace, not any direct evidence
1092 of collusion. Time and again, "agreement" is no more than an inference from such facts. But it is
1093 an inference that looks to the state of mind of two or more actors, as inferred from the facts. The
1094 *Twombly* complaint included detailed statements of facts, and explicit allegations of conspiracy,
1095 but the Court did not find plausible support for the required inference. But unless the antitrust
1096 question is answered by ruling that "agreement" requires explicit offer and acceptance, how is an
1097 allegation of intent — for example, an intent to exclude competition by rivals for incumbent
1098 carriers — not an allegation of a condition of mind? How should a new rule for pleading conditions
1099 of mind be framed to avoid overruling *Twombly*?

1100 One approach to the general proposal might be to examine multiple areas of the law where
1101 a claim depends on proving malice, intent, knowledge, or other conditions of a person's mind,
1102 seeking to develop an appropriate pleading standard for each. But if that task seems as
1103 unmanageable as a parallel task seemed from 1993 to 2007, which general rule would be better?
1104 Whatever practices emerge from adapting the general and highly variable standards of Rule 8(a)(2)
1105 as mandated by the Supreme Court? Or a return to a practice that treats as a sufficient allegation
1106 of fact a direct averment of "malice," "intent," "knowledge," or some other condition of a person's
1107 mind as required by the substantive claim asserted in the pleading?

1108 These are difficult questions. Any potential revision of the second sentence of Rule 9(b)
1109 will inevitably be highly contentious. Many will find the proposal fully persuasive in its own terms,
1110 particularly those who are dissatisfied with current pleading standards in general. Even those who
1111 have come to accept current pleading standards may believe that Rule 9(b) can be amended in
1112 ways that will improve access to justice, saving worthy claims that otherwise would fail at the
1113 pleading stage without opportunity for discovery, and in ways that support flexible administration
1114 that accommodates the reasonable variations in pleading standards that best fit different
1115 substantive areas of the law. Much work will be required to elaborate and justify any proposed
1116 amendment. This is the first meeting that may present a good opportunity to begin the work.

1117 The Subcommittee's deliberation

1118 As noted in April 2021, this proposal raises many questions. One is whether the second
1119 sentence of Rule 9(b) actually has been applied in non-fraud cases, as proposed in this submission.
1120 As noted above, the Second Circuit seemed not to apply it in the manner proposed even in a
1121 securities fraud case, and Congress adopted the Second Circuit standard for securities fraud claims
1122 governed by the PSLRA. As also noted above, long before the *Iqbal* decision lower courts required
1123 more than "conclusory" allegations of discriminatory intent.

1124 Dean Spencer catalogues English decisions that antedate the adoption of Rule 9(b) in 1938.
1125 So (as suggested in April 2021), an important avenue of research was about whether there was a
1126 body of American law applying the second sentence outside the fraud context. Mr. Crenny, then
1127 the Rules Law Clerk, investigated pre-2007 court of appeals decisions, producing the research
1128 memorandum included in this agenda book. He found "fewer than twenty circuit cases between
1129 1938 and 2007 in which courts applied Rule 9(b) in cases that were not about fraud or mistake,"

1130 concluding "I did not find much evidence that anyone was thinking about the second sentence of
1131 Rule 9(b) in the way that Suggestion 20-CV-Z does." Memo at 1.

1132 Against this background, the Rule 9(b) Subcommittee carefully considered the suggested
1133 amendment. One consideration was whether the Advisory Committee would be well advised to
1134 pursue, in effect, a change in a recent Supreme Court holding without some indication from the
1135 Court that it was receptive to such rulemaking. On occasion, the Court invites rulemaking to
1136 change a result it has reached. A recent example is *Hall v. Hall*, 138 S.Ct. 1118 (2018), holding
1137 that under Rule 42 as presently written a final judgment in one of two consolidated cases is
1138 immediately appealable. That Rule 42 issue remains on the Advisory Committee's agenda.

1139 Though the Court did seem to invite consideration of rulemaking in its 1993 *Leatherman*
1140 decision, there does not seem to be any such invitation in its *Twombly* or *Iqbal* decisions. But the
1141 Advisory Committee does not await invitations from the Court to pursue rule amendments, though
1142 it is worth noting that the Court is the body that prescribes the rules and amends them, not the
1143 Judicial Conference or its committees. A key point would often be whether there seems to be a
1144 real problem in practice under the current rule. But there does not really seem to be such a problem.

1145 The subcommittee also noted that it seems that the greatest unhappiness about the pleading
1146 rules since 2009 has come from the academic community. Certainly some on the plaintiff side
1147 regard the Court's pleading decisions as harmful. Within the subcommittee, there was some
1148 sympathy for an effort to clarify what "generally" means in the second sentence. Among judges,
1149 however, the "plausibility" standard has turned out to be useful as a case management tool. One
1150 view was "Folks have grown accustomed to the new pleading regime." From that perspective,
1151 making a change might produce mischief instead of desirable results; any change introduces a new
1152 argument to litigate.[3]

1153 Though the submission cites examples of recent rulings one might question, the
1154 subcommittee discussion suggested that judges know that "people are not mind readers," and a

[3] On that score, it seems worth noting something from the minutes of the Bankruptcy Rules Advisory Committee meeting on September 14, 2021, regarding a report from Judge McEwen (liaison to the Civil Rules Committee from the Bankruptcy Rules Committee) about this Rule 9(b) submission. Judge McEwen explained to the Bankruptcy Rules Advisory Committee that the goal of the Rule 9(b) amendment proposal was to "undo the portion of the Supreme Court's *Iqbal* decision holding that although mental state need not be alleged 'with particularity,' the allegation must still satisfy Rule 8(a) -- meaning some facts much be pleaded." Here is the concern of the Bankruptcy Rules Committee, as expressed in its minutes:

> This is of serious interest to the Bankruptcy Advisory Committee. Rule 9(b) comes up often in bankruptcy (adopted by reference in Fed. R. Bankr. P. 7009) because some of the section 523(a) exceptions to discharge and some of the objections to discharge under § 727 have state of mind elements. The Bankruptcy Advisory Committee will want to watch this proposed amendment closely and consider weighing in when the time comes.

Agenda Book, Standing Committee meeting, Jan. 4, 2022, at 170.

1155 lawyer noted that in state courts governed by a "fact pleading" standard the judges are realistic
1156 about allegations of motive or intent even under that standard.

1157 After a thorough discussion of the issues, the subcommittee voted unanimously to
1158 recommend that the Advisory Committee remove this item from its agenda.

Notes of Teams Meeting
Rule 9(b) Subcommittee
Dec. 15, 2021

On Dec. 15, 2021, the Rule 9(b) Subcommittee of the Advisory Committee on Civil Rules met via Microsoft Teams to discuss the proposal by Dean Spencer for an amendment to the second sentence of Rule 9(b) (20-CV-Z).

Participating were Judge Sara Lioi (Chair, Rule 9(b) Subcommittee), Judge Robert Dow (Chair, Advisory Committee), Judge Cathy Bissoon, Justice Thomas Lee, Joseph Sellers, Helen Witt, Prof. Edward Cooper (Reporter, Advisory Committee), and Professor Richard Marcus (Associate Reporter, Advisory Committee).

Judge Lioi introduced the discussion as presenting the question whether the subcommittee should recommend that the amendment proposal move forward, either for drafting an amendment proposal for publication or, instead, for further research. This seems largely a practical question, looking to whether there exists a problem "on the ground," and if there is no such problem proceeding further may not be indicated.

The discussion began with background. One starting point could be a reaction of surprise at the interpretation the second sentence of Rule 9(b) in *Ashcroft v. Iqbal*. As some have said, "only the Devil knows what's in a person's mind." How can pleaders be expected to provide specifics about such matters? But a second thought was the wide array of sorts of claims in which state of mind -- be it intention, knowledge or something else -- plays a role, and sometimes a crucial role, in determining liability.

In addition, the submission provides substantial ground for appreciating that the application of the rule has not always adhered to what the English sources cited in the 1938 Committee Note say.

At the same time, much experience since 1938 has pursued the application of both Rule 9(b) and, more generally, Rule 8(a)(2), on the sufficiency of allegations. The 1957 *Conley v. Gibson* decision announced that "notice pleading" was all that was required, but Supreme Court decisions since then and before the Twombly and Iqbal decisions have sometimes emphasized the authority of the district courts to insist on more specific pleadings before allowing cases to proceed.

Another starting point might be the role of the Advisory Committee in regard to a Supreme Court interpretation of a current rule. There certainly have been occasions when the Court interprets a rule a certain way but signals that changing the rule is an appropriate concern of the Committee. The *Hall v. Hall* interpretation of Rule 42, still pending before the Advisory Committee, is an example.

There have even been examples relating directly to Rule 9(b). The Court's 1993 Leatherman decision invoked the first sentence of that rule while holding that a "heightened pleading standard" could not be applied to a case not governed by the rule. Instead, the Court suggested, the rule could be rewritten through the amendment process to make non-fraud claims

subject to its requirements. But it rejected the idea that same result could be obtained by judicial interpretation of the existing rule. Thereafter, the Advisory Committee spent considerable effort considering possible rule amendments but eventually did not propose publication of a draft amendment.

Some contend that the Court's decisions in Twombly (2007) and Iqbal (2009) do something like what it declined to do in Leatherman -- "amend" a rule by court decision. Of course, one could make a similar argument about the 1957 interpretation of Rule 8(a)(2) in *Conley v. Gibson*, which Professor Hazard said "turned Rule 8 on its head" -- something quoted by the Court in its opinion in Twombly.

In any event, after the Court's decisions in Twombly and Iqbal a great deal of Committee effort was devoted to considering various rule changes that might respond to concerns about the application of those decisions. The Rules Law Clerk at the time compiled a memorandum that ultimately approached 700 pages in length about lower court interpretations of these Supreme Court decisions. And the FJC did research as well, focusing both on attorney experience with the decisions and an analysis of whether actual outcomes before Twombly and after Iqbal appeared significantly different. The attorney reports indicated scant impact of the decisions, and the pre-*Twombly* v. post-*Iqbal* comparison did not indicate a statistically significant difference in actual outcomes.

Meanwhile, it has seemed that the Court remains committed to the interpretation of Rule 8(a)(2) that it announced in Twombly and Iqbal. The current submission, on the other hand, could be interpreted as using the second sentence of Rule 9(b) to circumvent or weaken the Court's interpretation of Rule 8(a)(2).

Another introductory point is that a major source of continued unhappiness with Twombly and Iqbal is the academic community, perhaps more than the practicing bar or the judiciary. That may bear on whether there is an important problem to be solved by proposing a rule amendment. Somewhat curiously, however, during the 1980s and 1990s, a recurrent academic proposal was that Rule 9(b) be abrogated, not that it be given wider application.

In terms of attitudes in the bar about the Twombly/Iqbal interpretation of Rule 8(a)(2), meanwhile, it seems that among plaintiff lawyers there have not been widespread reports of difficulty satisfying the "plausibility" standard. Instead, at least some plaintiff lawyers in employment cases report that they screen cases carefully, and file suit only when there are plenty of circumstances supporting a claim of discrimination. In such cases, including more of these circumstances in the complaint need not be a problem.

Against this background, the participants in the call offered reactions regarding the extent of an actual problem and the value of an amendment to respond to that problem. The first judge to speak reported rereading Mr. Crenny's memo in preparation for this meeting and found little or no indication in that memorandum that there is an actual problem.

To the contrary, it seems that many judges regard "plausibility" pleading as a sort of case management tool -- a recognition that district courts can, when appropriate, direct that pleadings

be improved. "It does not change very much." Instead, as with proportionality in Rule 26(b)(1), this is a tool district judges can use to manage their cases. In particular, in regard to the concern that judges would often demand that plaintiffs provide support regarding matters totally within defendants' control for allegations of intent or the like, the reality is that judges recognize they can't ask the impossible, and the material before the Subcommittee does not suggest that they make unreasonable demands on plaintiffs.

Another judge agreed. "Folks have grown accustomed to the new pleading regime." There does not seem to be a real issue out there. Indeed, one might instead worry about whether making a rule change might actually throw a monkey wrench into pleading practice that is currently running rather smoothly. Any rule change can generate arguments in court about what is new and different.

Another judge reported having the same perspective. There is not really a problem; to the extent these Supreme Court decisions from more than a decade ago have had a noticeable effect, they seem to have had a positive effect on pleadings. But this judge does not see dismissals without leave to amend. And it does seem that if district judges dismiss too quickly or without good justification the courts of appeals reverse those decisions.

Another judge suggested that most judges know that "people are not mind readers." As a result, they ordinarily read the current approach in a way that approximates what this amendment appears to achieve.

Another judge agreed. It is certainly true that the Committee must not cower before a Supreme Court interpretation of the existing rules. When it identifies a significant problem with a rule or the Court's interpretation of a rule, it should pursue solutions. But this does not seem to be a situation in which there is a significant problem to be solved, or that there is a need for the Committee to push back against the Court's interpretation. Indeed, it seems that the Court is fairly resolute in its interpretation.

A lawyer member of the Subcommittee reported that, within the plaintiff bar there have been some concerns. For example, they come up in some antitrust cases. One might understand the proposed amendment to rephrase Rule 9(b) in terms that embody what the Court was getting at in Iqbal -- to explain what "generally" means. The proposal therefore could be seen as a pretty good way to clarify the rule.

Another lawyer member contrasted practice in state courts, where "fact pleading" is the official standard in scrutinizing pleadings. But the state-court judges are realistic about application of even that fact pleading standard; if the sole source of information is under the command of the defendant, the judges take that into account. Everything before the Subcommittee suggests that there is no problem here.

Another judge reminded the Subcommittee that one could view the proposal as changing the application of Rule 8(a)(2), which applies to all types of cases. That comment prompted a further observation about the proposed amendment. One view is that it is designed to overturn at least the decision in Iqbal, but it seems to go beyond that and alter the decision in Twombly. That

case involved a claimed agreement or conspiracy in restraint of trade, something that could be interpreted to involve state of mind (entering into a "contract, combination, or conspiracy"). Indeed, the alternative possibility in antitrust terms that does not lead to liability is *conscious* parallelism, itself a term that seems to invoke state of mind. A wide variety of other claims might be similarly affected; knowledge or intent is a critical element of many claims.

A concluding thought invoked Sisyphus -- the Advisory Committee sometimes undertakes the challenging task of rewriting a rule to alter the result the Supreme Court reached under the current rule. Sometimes the Court makes it clear that it would be receptive to such an amendment, as with *Hall v. Hall*. But in the absence of such an indication, ordinarily the Committee needs a strong justification in terms of a pressing current problem to justify such a course.

The question, then, was whether the material before the Subcommittee indicated that it should recommend that the full Advisory Committee proceed either to advance the proposal for possible publication (perhaps in a modified form) or embark on further research on the issues.

The Subcommittee voted unanimously not to recommend proceeding with this proposal.

MEMORANDUM

To: Professor Cooper, Professor Marcus
Reporters, Advisory Committee on Civil Rules

From: Kevin Crenny, Rules Law Clerk

Date: July 9, 2021

Re: Rule 9(b)

Civil Rule 9(b) reads as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

This memo concerns Rule Suggestion 20-CV-Z, from Dean A. Benjamin Spencer. His proposal is that the second sentence of Civil Rule 9(b) be amended to state that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged without setting forth the facts or circumstances from which the condition may be inferred" rather than "generally." The reasoning behind this suggested change is laid out in detail in Dean Spencer's 2020 article in the Cardozo Law Review,[1] and because this research does not really comment on the wisdom of the proposal I will not reiterate those details here. It's enough to say here that the proposal is intended to counter some of the changes to pleading standards resulting from *Ashcroft v. Iqbal*.[2]

The impetus behind this memo was the fact that Suggestion 20-CV-Z is premised on the idea that the second sentence of Rule 9(b) states a general rule concerning the pleading of mental states that applies in all cases, not only cases involving fraud or mistake. In other words, the suggestion reads the two sentences in Rule 9(b) as fairly disconnected. Professors Cooper and Marcus asked me to look for pre-*Iqbal* decisions that relied on the second sentence of Rule 9(b) when adjudicating claims that were not about fraud or mistake. To the extent that such cases could be found, it would suggest that the courts were, in fact, reading the second sentence as a general rule unrestricted by the first sentence. Professor Marcus also suggested that I look at the extent to which any arguments concerning Rule 9(b) were raised in *Iqbal*, either in the Supreme Court or in the lower courts.

In all, I did not find much evidence that anyone was thinking about the second sentence of Rule 9(b) in the way that Suggestion 20-CV-Z does. I found fewer than twenty circuit cases between 1938 and 2007 in which courts applied Rule 9(b) in cases that were not about fraud or mistake. I did not look for district court cases. None of these cases contained any discussion of

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[1] A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal, 41 CARDOZO L. REV. 1015 (2020).
[2] 556 U.S. 662 (2009).

how the two sentences of Rule 9(b) should be read in relation to one another. For the most part they quoted or cited the relevant sentence while stating that a mental state had been sufficiently alleged, with little discussion beyond the quote or citation. In reviewing the *Iqbal* docket I found one reference to Rule 9(b) it in a brief at the circuit level and some discussion in an amicus brief in the Supreme Court. These findings are discussed in more detail below, and I am happy to follow up on any points that are unclear or that warrant deeper research.

I. <u>Rule 9(b) in Non-Fraud Cases</u>

A. Methodology

In order to find a manageable universe of cases to review, I began by looking at opinions from the courts of appeals and Supreme Court that cited Rule 9 prior to May 21, 2007, the date *Iqbal* was decided. I searched within these results for <"9(b)" OR "alleged generally">. This gave me 1,204 results, which was too many to review. I revised the search within to focus on the relevant language from the second sentence of 9(b). The new search terms were <"alleged generally" OR "malice, intent" OR "intent, knowledge" OR "other conditions" OR "conditions of a person's mind">. This yielded 249 results.

My findings below are based on these 249 cases that cited 9(b) and quoted some of its second sentence. It's possible that this search missed some cases that simply cited Rule 9(b) without quoting it, but it seemed to me unlikely that a court could say anything significant about the second sentence of 9(b) without quoting or repeating at least part of its text. I reviewed each of these cases, but cannot say I "read" all of them. Most of them concerned allegations of fraud. It was almost always easy to identify a fraud case from its opening sentences. Again, it's always possible that I missed a case that mostly concerned fraud but also included another claim that would belong in this memo. The time it would take to review every fraud case for other claims did not seem worth the small chance of finding something.

B. Findings

I did not find anything that would amount to a circuit-wide rule about how to interpret or apply the second sentence of Rule 9(b). What I found appeared to be discrete cases in which that second sentence was cited to support the proposition that the facts alleged in a particular set of pleadings was sufficient for the case to go forward. It is hard to organize these beyond just providing you a list. The footnotes in this section are basically a list, and the small amount of text I've written provide some organizational structure, though it's fairly arbitrary.

I found several cases from the early 2000s that pointed to the second sentence of Rule 9(b) while elaborating on the Supreme Court's holdings in *Crawford–El v. Britton,* 523 U.S. 574 (1998), and *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 122 S. Ct. 992 (2002). These cases saw Rule 9(b) as helping to establish that there is no heightened pleading standard for certain civil rights cases. Of course, this is arguably what all these 9(b) cases are doing, but here I am specifically identifying opinions where a court positioned its decision as following on *Crawford-El* or *Swierkiewicz*. None of these cases was focused primarily on Rule 9(b). Those recent Supreme Court decisions were driving the analysis and Rule 9(b) was only cited to bolster the

analysis.[3] A fifth case, from the Seventh Circuit, was less explicit on this point but was decided the same year as *Crawford-El* and cited it alongside Rule 9(b) when holding that an incarcerated

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[3] These cases were: *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001) (§ 1983),

> Nevertheless, as the Supreme Court made clear in *Crawford–El,* neither the holding nor the reasoning of *Harlow,* a qualified immunity case, warranted a change in the requirements of a plaintiff's affirmative case. *See Crawford–El,* 118 S.Ct. at 1590–94. Like the D.C. Circuit's heightened proof requirement, this court's heightened pleading requirement finds no support in the Federal Rules of Civil Procedure and constitutes a deviation from the notice-pleading standards of Rule 8. *See* Fed. R. Civ. P. 8(a) ("A pleading which sets forth a claim for relief ... shall contain ... a short and plain statement of the claim showing that the pleader is entitled to relief...."); Fed R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").

Pryor v. Nat'l Collegiate Athletic Ass'n., 288 F.3d 548, 564 (3d Cir. 2002) (Title VI, § 1981),

> In this case, Plaintiffs have stated a claim for purposeful discrimination. . . . [A]s the Supreme Court has recently confirmed, a complaint requires only a "short and plain statement" to show a right to relief, not a detailed recitation of the proof that will in the end establish such a right. *See Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002) (discussing the notice-pleading requirements of Fed. R. Civ. P. 8(a)(2) for claims alleging intentional discrimination); *see also* Fed. R. Civ. P. 9(b) (enumerating specific claims and defenses that require particularized allegations but omitting intentional discrimination as one such claim or defense). "Malice, *intent,* knowledge, and other *condition of mind* of a person may be averred *generally*." Fed. R. Civ. P. 9(b) (emphasis added). . . .
>
> In short, the complaint alleges that the NCAA adopted Proposition 16 because it knew that policy would prevent more black athletes from ever receiving athletic scholarship aid in the first place.

Phelps v. Kapnolas, 308 F.3d 180, 186 (2d Cir. 2002) (§ 1983, Eighth Amendment),

> The district court erred by holding that on the subjective element of his Eighth Amendment claim Phelps was required to plead other facts in addition to and in support of his allegation of the Defendants' knowledge. This requirement amounted to a heightened pleading standard and is unwarranted under Fed. R. Civ. P. 8(a)(2). *See also,* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other condition of mind of a person may be averred generally.").
>
> As the Supreme Court has recently had occasion to remind us, a complaint adequately states a claim when it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506 (2002) (quoting FRCP 8(a)(2)); *see also Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 168 (1993).

plaintiff had sufficiently alleged an intentional deprivation of his access to courts by a prison property clerk (though the complaint was still properly dismissed for other reasons).[4]

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and *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004).

> *Swierkiewicz* has sounded the death knell for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific Civil Rule requires that result. In all other cases, courts faced with the task of adjudicating motions to dismiss under Rule 12(b)(6) must apply the notice pleading requirements of Rule 8(a)(2). Under that rule, a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47 (1957). State of mind, including motive and intent, may be averred generally. *Cf.* Fed. R. Civ. P. 9(b) (reiterating the usual rule that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally").

[4] *Nance v. Vieregge*, 147 F.3d 589, 590–91 (7th Cir. 1998)

> The district court dismissed Nance's complaint, ruling that Nance had not pleaded facts showing that Vieregge acted deliberately.
>
> The ground the district court gave for its decision is incompatible with Fed. R. Civ. P. 8, which establishes a system of notice pleading. . . . The district judge wrote that all of the events mentioned in the complaint are consistent with negligence, which is true but irrelevant. None of Nance's factual averments *rules out* the possibility that Vieregge acted deliberately, so the complaint may not be dismissed on this ground even if negligence is a more likely explanation than malice. Only later—via summary judgment or trial—does a court sift the probable from the merely possible. Civil rights complaints are not held to a higher standard than complaints in other civil litigation. *Crawford–El v. Britton*, 523 U.S. 1584 (1998). Although the first sentence of Fed. R. Civ. P. 9(b) establishes a special rule for allegations of fraud (which must be pleaded "with particularity"), the second sentence reads: "Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Nance's complaint alleges that Vieregge acted intentionally; nothing more is required.
>
> Nonetheless, the district judge was right to dismiss the complaint. [Because there was no plausible ongoing hindrance of his efforts to pursue a legal claim.]

Nearly all the cases I identified were civil rights cases of one kind or another, though a few were not. I found one malicious prosecution case,[5] one libel and slander case,[6] one ERISA case,[7] one case under the Freedom of Access to Clinic Entrances Act ("FACE Act"),[8] and one dissent in a Federal Tort Claims Act case.[9] In all but one of these cases, the Court said that the second sentence of Rule 9(b) made the pleadings sufficient to survive a motion to dismiss. In the FACE Act case the Court said that Rule 9(b) showed that the plaintiff ought to have been given the chance to amend her pleadings.[10]

The remaining cases I identified can be categorized by the mental state they concerned.

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[5] *Rannels v. S.E. Nichols, Inc.*, 591 F.2d 242, 246 (3d Cir. 1979) (overturning a district court dismissal because "the [district] court . . . overlooked the specific allegation . . . averring that Nichols' president 'supported the malicious prosecution'" and noting: "Rule 9(b) provides that '[m]alice, intent, knowledge and other condition of mind of a person may be averred generally.' Measured by these standards, plaintiff's averments . . . constitute an allegation of malice more than sufficient to withstand a Rule 12(b)(6) motion.").

[6] *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 588–89 (5th Cir. 1967) (holding that "the Federal Rules of Civil Procedure require only that 'Malice, intent, knowledge, and other condition of mind of a person . . . be averred generally.' Rule 9(b)" and that "charg[ing] the defendants with actual malice in publication of the allegedly libelous article . . . [was] sufficient on its face to establish a basis for a showing of actual malice by defendants . . . .").

[7] *Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493 (5th Cir. 1999) (quoting the second sentence of Rule 9(b), stating that "[this] rule recognizes the unworkability and undesirability of requiring specificity in pleading a condition of mind; describing a state of mind with exactitude is inherently difficult," and concluding that [f]rom the above facts alleged in the complaint, it can reasonably be inferred that . . . [defendants] had the specific intent to interfere with [plaintiffs' benefits]"), *overruled on other grounds by Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003), and *holding modified on other grounds by Hoskins v. Bekins Van Lines*, 343 F.3d 769 (5th Cir. 2003).

[8] *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678 (11th Cir. 2001) ("If Roe chooses to amend her complaint to include allegations regarding defendants' motive, it will not be a difficult matter for her to draft allegations that would satisfy Rule 9(b). The second sentence of Rule 9(b) provides that '[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally.' Fed. R. Civ. P. 9(b)"). FACE "provides civil remedies for anyone whose ability to obtain reproductive health: services has been intentionally interfered with." *Id.* at 679.

[9] *Johnson by Johnson v. U.S.*, 788 F.2d 845, 856 (2d Cir. 1986) (Pratt, J., dissenting) ("Nowhere does the majority suggest how plaintiff, presuit, could ever obtain [information about the government's knowledge concerning plaintiff's supervisor's mental state]. . . . Further, the strict pleading requirement suggested by the majority opinion ignores Rule 9 of the Federal Rules of Civil Procedure. Under Rule 9(b), while averments of fraud or mistake must be stated 'with particularity,' the rule specifically permits 'malice, intent, and the state of mind at issue here—knowledge—to be "averred generally.'").

[10] *Roe*, 253 F.3d at 684.

The earliest of these was a 1975 en banc case from the Second Circuit explaining, in a footnote, that "[t]he requirement that plaintiffs make allegations of malice in order to state a claim . . . is hardly likely to prove burdensome to those plaintiffs who have meritorious claims . . . . 'Malice, intent, knowledge, and other condition of mind of a person may be averred generally.' Fed.R.Civ.P. 9(b)."[11]

Two addressed a retaliatory intent. These were a First Amendment case holding that plaintiffs had sufficiently alleged retaliation[12] and an equal protection and due process case holding that a plaintiff had adequately alleged a retaliatory motive behind a zoning board's decisions.[13]

Three more concerned knowledge. Two were from the Seventh Circuit. In the earlier of these, the court said a plaintiff could proceed with a claim premised on the fact that county officials had acted knowingly when they placed a child with foster parents who proved to be dangerously incompetent.[14] In the later one, the court allowed a plaintiff to go forward with a case against the

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[11] *Brault v. Town of Milton*, 527 F.2d 730, 738–39 & n.6 (2d Cir. 1975) (en banc) (dismissing *Bivens* claim for damages based on alleged Fourteenth Amendment due process violation because the plaintiffs had not alleged any malice on the part of the defendant town).

[12] *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194–95 (2d Cir. 1994):

> The ultimate question of retaliation involves a defendant's motive and intent, which are difficult to plead with specificity in a complaint. . . . . Indeed, Rule 9(b) of the Federal Rules of Civil Procedure provides that "[m]alice, intent, knowledge and other conditions of mind ... may be averred generally." While a bald and uncorroborated allegation of retaliation might prove inadequate to withstand a motion to dismiss, it is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred.

[13] *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002), *abrogation on other grounds recognized by Sagaponack Realty, LLC v. Vill. of Sagaponack*, 778 F. App'x 63 (2d Cir. 2019):

> The ultimate question of retaliation involves a defendant's motive and intent, both difficult to plead with specificity in a complaint. It is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[m]alice, intent, knowledge and other conditions of mind ... may be averred generally." *E.g.*, *Gagliardi,* 18 F.3d at 195.

(some citations omitted).

[14] *Hutchinson on Behalf of Baker v. Spink*, 126 F.3d 895, 900–01 (7th Cir. 1997):

> The district court refused to allow Hutchinson to proceed on this claim because it thought the complaint failed to allege any facts supporting an inference that the state officials acted deliberately in placing Andrew in an unsafe environment. Complaints need not plead facts, however, as we have frequently noted. . . . It is enough if the complaint puts the defendants on notice of the claim and that some set of facts could be presented that would give rise to a right to relief. . . This

city of Chicago where municipal liability depended on the city knowing about a police officer's supervisor's discriminatory actions.[15] This one may not count for our purposes, though, because the decision also relied on "the liberal pleading standard for pro se plaintiffs."[16] There was also an Eighth Amendment case from the Tenth Circuit holding that a plaintiff had sufficiently alleged the defendant's knowledge that the plaintiff needed medical attention.[17]

> complaint meets that standard; it is clearly not frivolous or malicious. Furthermore, the district court's criticism of the complaint for failing to allege the officials' state of mind did not take into account the explicit instruction in Fed. R. Civ. P. 9(b) permitting "malice, intent, knowledge, and other condition of mind" to be "averred generally." At the very least, for purposes of § 1915(d) it presents an arguable case for relief, and the facts that are alleged are not the kind of irrational or delusional musings to which the Supreme Court referred in *Denton*. Hutchinson, on behalf of the estate, must be allowed to go forward on this claim.

[15] *McCormick v. City of Chicago*, 230 F.3d 319, 326 (7th Cir. 2000):

> Taking into account the liberal pleading standard for pro se plaintiffs, we are convinced that the district judge erred in dismissing McCormick's municipal liability claims in his second amended complaint. Contrary to the district judge's opinion, McCormick does not need to plead facts "demonstrating that the City was the moving force behind the alleged discrimination." In fact, the Federal Rules of Civil Procedure provide that "malice, intent, knowledge and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). McCormick alleged that the City knew about Banaszkiewicz's and Dr. Leong's discriminatory actions and encouraged it. In announcing its decision, the district judge relied on cases resolved by a jury verdict, not at the motion to dismiss stage. In those cases, plaintiff's burden was to prove by a preponderance of the evidence that the City was liable. Here, McCormick's burden was simply to allege facts that would give the City notice of his municipal liability claim. He met that burden and should have been permitted to proceed against the City. Therefore, we find that the district court erred in granting the City's motion to dismiss McCormick's municipal liability claim.

[16] *Id.*

[17] *Kikumura v. Osagie*, 461 F.3d 1269, 1293–94 (10th Cir. 2006):

> Based on the magistrate judge's recommendation, the district court dismissed all four of [plaintiff] Mr. Kikumura's Eighth Amendment claims . . . on the ground that [he] "alleged no facts that demonstrate" that [defendant] possessed "a sufficiently culpable state of mind." This was an error. Mr. Kikumura is merely required to provide "a short and plain statement" of his Eighth Amendment claims, Fed. R. Civ. P. 8(a), and "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally" in the complaint, Fed. R. Civ. P. 9(b). According to Mr. Kikumura's amended complaint, Mr. Osagie "knew" that Mr. Kikumura "require[d] prompt medical attention and ... that delay would exacerbate [his] health problem," but deliberately "disregarded that risk." Am. Compl. 9.

Another case concerned discriminatory animus. It held that a complaint's "general allegations of an underlying race-based animus" were sufficient to survive a motion to dismiss because of Rule 9(b)'s second sentence.[18] This case included a footnote with some more substantial discussion of the Rule.[19]

> These allegations satisfy the pleading requirement of Rule 8(a) for the subjective component of a deliberate indifference claim.

(some citations omitted).

[18] *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1269–70 (10th Cir. 1989):

> In order to state a claim based on the Equal Protection Clause, plaintiff must sufficiently allege that defendants were motivated by racial animus. The First Amended Complaint alleges that one of the newspaper articles described plaintiff as "a black man's lawyer, 'a modern-day John Brown', and 'a savior' to blacks in Kansas" and that those statements reveal a race-based animus. Although we do not believe that the newspaper article by itself is sufficient to establish a discriminatory intent, the First Amended Complaint also contains general allegations of an underlying race-based animus. In evaluating the sufficiency of plaintiff's allegations, we cannot ignore the plain language of Rule 9(b) of the Federal Rules of Civil Procedure, which permits "malice, intent, knowledge, and other condition of mind of a person" to be "averred generally." Accordingly, we conclude that plaintiff has sufficiently alleged racial animus and that it was, therefore, error to grant the motion to dismiss his equal protection claim brought under Section 1983.

(citations and footnotes omitted)

[19] *Id.* at 1270 n.5:

> Many courts and commentators have interpreted Rule 9(b) to permit a general averment of intent unaccompanied by supporting factual allegations. *See, e.g., McGinty v. Beranger Volkswagen, Inc.,* 633 F.2d 226, 228 (1st Cir.1980); *Cramer v. General Tel. & Electronics Corp.,* 582 F.2d 259, 272–73 (3d Cir.1978), *cert. denied,* 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 90 (1979); *Walling v. Beverly Enterprises,* 476 F.2d 393, 397 (9th Cir.1973); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1297, 1301 (1969); 2A *Moore's Federal Practice* ¶ 9.03 [1], 9.03[3] (2d ed. 1989). In contrast, some cases have held that a plaintiff making a general averment as to a defendant's intent must also allege facts that create a "strong inference" that the defendant possessed the averred intent. *Ross v. A.H. Robins Co.,* 607 F.2d 545, 558 (2d Cir.1979), *cert. denied,* 446 U.S. 946, 100 S.Ct. 2175, 64 L.Ed.2d 802 (1980); *see also Devaney v. Chester,* 813 F.2d 566, 569 (2d Cir.1987); *Connecticut Nat'l Bank v. Fluor Corp.,* 808 F.2d 957, 962 (2d Cir.1987). Absent Rule 9(b), the approach taken in those cases requiring more specific factual allegations would have considerable appeal. However, because we cannot reconcile that approach with the plain language of Rule 9(b), we do not adopt it.

Finally, two not quite as helpful cases are worth mentioning. An unpublished Fifth Circuit decision that came at the summary judgment stage held that the plaintiff had failed to properly plead an intentional tort and had also failed to produce evidence supporting one.[20] I also found one case relying on the second sentence of Rule 9(b) to say that vicarious liability, like states of mind, "need not be pled with particularity."[21]

II. Iqbal

As I mentioned above, Professor Marcus also asked me to look into the extent to which Rule 9(b) had come up in *Iqbal* before the Supreme Court's decision. I found one reference to it in a brief at the circuit level and some discussion in an amicus brief in the Supreme Court.

In the Second Circuit, Iqbal cited Rule 9(b) only to support the proposition that whether discriminatory animus existed was a factual question, not a legal one:

> Even if the allegation that [certain defendants] were motivated by discriminatory animus were to be considered a legal conclusion rather than factual one (in apparent contravention of controlling authority, see Fed. R. Civ. P. 9(b); Philip, 316 F.3d at 291), here, plaintiff has set forth the following facts supporting an inference of unlawful discrimination . . . .[22]

In the Supreme Court, an amicus brief by a group of civil procedure scholars[23] cited Rule 9(b) and *Leatherman* to make an argument that sounds a lot like Dean Spencer's. They argued that "the heightened-pleading standard proposed by the Government [was] inconsistent with

[20] *Squire v. USAA Life Ins. Co.*, 108 F.3d 333, 1997 WL 73793 (5th Cir. 1997) (not published)

> Paragraph 14 of Squire's complaint charges USAA with acting "in a *negligent* manner" in Lux's hiring and employment, and avers further that "each *negligent* act or omission" by USAA caused Squire's injuries. Under Texas law, "[t]he fundamental difference between negligent injury, or even grossly negligent injury, and intentional injury is the specific intent to inflict injury." Under Federal Rule of Civil Procedure 9(b), intent or other conditions of the mind must be averred in the pleadings. Squire failed to properly plead an intentional tort and did not move in the district court to amend those pleadings; accordingly, her state law claims are barred by the workers' compensation exclusivity provision. In any event, the summary judgment evidence is wholly insufficient to sustain a finding that USAA had any intent to inflict injury on Squire.

(citation omitted)

[21] *Petro-Tech, Inc. v. W. Co. of N. Am.*, 824 F.2d 1349, 1362 (3d Cir. 1987) (citing *In re National Student Marketing Litigation,* 413 F.Supp. 1156, 1158 (D.D.C. 1976); *Keys v. Wolfe,* 540 F. Supp. 1054, 1066 (N.D.Tex.1982)).

[22] Brief for Plaintiff-Appellee Javaid Iqbal, 2006 WL 5234423 at 102–03 (Apr. 26, 2006)

[23] Stephen Burbank, Richard Freer, Helen Hershkoff, Allan Ides, Judith Resnik, David Shapiro, and Suzanna Sherry.

Rules 8(a)(2) and 9 and with the Federal Rulemaking Process."[24] These professors argued that the Government was seeking "a pleading standard that is 'more demanding' than the general pleading standard of Rule 8(a)(2)" because of the qualified immunity defense being raised.[25]

The Government had described the plaintiffs' claims as ones where "an unconstitutional motive is an element of the alleged illegality" and had argued that "a lax pleading standard [would make] it all-too-easy for plaintiffs to impose unwarranted burdens on government officials."[26] The amici responded:

> The Government's reference to claims involving "unconstitutional motive" is particularly telling since Rule 9(b) of the Federal Rules expressly provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." So not only is the Government asking this Court to alter the standards of Rule 8(a)(2), it is also asking the Court to ignore the text of Rule 9. The words of the *Leatherman* Court are directly relevant:
>
>> [T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius.*
>
> 507 U.S., at 168. The case against a heightened pleading standard for "unconstitutional motive" is even stronger since Rule 9 specifically provides that such allegations "may be alleged generally."[27]

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[24] Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents at 22 ("*Iqbal* Amicus Br."), 2008 WL 4792462 (capitalization altered).

[25] *Id.* at 24.

[26] Brief for Petitioners at 20, 2008 WL 4063957.

[27] *Iqbal* Amicus Brief at 26.

WILLIAM & MARY
LAW SCHOOL

OFFICE OF THE DEAN

August 28, 2020

Honorable John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Proposed Amendment to Rule 9(b)

Dear Judge Bates:

Please find attached a copy of an article in which I propose an amendment to Rule 9(b) of the Federal Rules of Civil Procedure. In brief, the proposal is to amend the rule as follows:

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

Although a full explanation of the motivations and justifications for this proposed amendment are reflected in the attached article, the following draft proposed committee note aptly summarizes the design of the change:

> **Subdivision (b).** Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media*, LLC, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against

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the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [year], defendant [name of defendant 1] conveyed all of defendant's real and personal property to defendant [name of defendant 2] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."

Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

As I point out in the attached article, Rule 9(b) was based on an English rule that manifestly did not require the pleading of facts in support of allegations pertaining to conditions of the mind. Justice Kennedy's interpretation of Rule 9(b) in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has unfortunately been taken to mean the exact opposite of that, which is unfortunate given the inordinate difficulty of factually substantiating condition-of-the-mind allegations at the pleading stage.

I urge you to review the article in its entirety to fully appreciate the complete set of arguments in favor of revising Rule 9(b) as I propose. I look forward to being able to discuss this item at one of our next meetings and am hopeful that the committee will determine that the proposal warrants further consideration, perhaps by a newly formed subcommittee.

Best regards,

A. Benjamin Spencer
Dean & Chancellor Professor

Cc: Hon. Robert M. Dow, Jr.
Prof. Ed Cooper
Prof. Rick Marcus
Ms. Rebecca A. Womeldorf, Esq.

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PLEADING CONDITIONS OF THE MIND UNDER RULE 9(b): REPAIRING THE DAMAGE WROUGHT BY *IQBAL*

A. Benjamin Spencer†

"There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail."

—Charles E. Clark, 1937[1]

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† Bennett Boskey Visiting Professor of Law, Harvard Law School; Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. I would like to thank those who were able to give helpful comments on the piece.

1 Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

INTRODUCTION

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*,[2] in which it pronounced—among other things[3]—that the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure—which permits allegations of malice, intent, knowledge, and other conditions of the mind to be alleged "generally"—requires adherence to the plausibility pleading standard it had devised for Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.[4] That is, to plead such allegations sufficiently, one must offer sufficient facts to render the condition-of-the-mind allegation plausible. This rewriting of the standard imposed by Rule 9(b)'s second sentence—which came only veritable moments after the Court had avowed that changes to the pleading standards could only be made through the formal rule amendment process[5]—is patently unsupportable for two reasons.

First, the *Iqbal* Court's interpretation of Rule 9(b) is at odds with a proper text-based understanding of the Federal Rules: (1) The plausibility pleading obligation purports to be derived from the Rule 8(a)(2)

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2 556 U.S. 662 (2009).

3 To view a fuller discussion of the *Iqbal* decision, see A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) [hereinafter Spencer, Iqbal *and the Slide Towards Restrictive Procedure*].

4 550 U.S. 544, 555 (2007).

5 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); Hill v. McDonough, 547 U.S. 573, 582 (2006) ("Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."). The Supreme Court has never indicated that rules promulgated pursuant to the Rules Enabling Act may be interpreted more loosely by the Court because of the Court's unique role in promulgating such rules; to the contrary, the Court has steadfastly adhered to the notion that it is not free to revise such rules through judicial interpretation. *See, e.g.*, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed [through the Rules Enabling Act process] limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2000))); Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.").

obligation to "show[]" entitlement to relief,[6] an obligation that reflects the standard for sufficiently stating claims, not the standard for sufficiently stating the individual component allegations thereof—which is found in Rule 8(d)(1), not Rule 8(a)(2); (2) text from elsewhere in the Federal Rules and from the Private Securities Litigation Reform Act (PSLRA) reveals that the *Iqbal* interpretation of Rule 9(b) is unsound; and (3) evidence from the now-abrogated Appendix of Forms—in effect at the time of *Iqbal*—contradicts any attempt to place a plausibility pleading gloss on Rule 9(b).

Second, the Court's alignment of Rule 9(b)'s second sentence with the 8(a)(2) plausibility pleading standard runs counter to the original understanding of Rule 9(b), which was borrowed from English practice extant in 1937. A review of the English rule that formed the basis of Rule 9(b), as well as the English jurisprudence surrounding that rule at the time, make clear that Rule 9(b) cannot be faithfully interpreted as requiring pleaders to set forth the circumstances from which allegations pertaining to conditions of the mind may be inferred.

Beyond reflecting an errant interpretation of Rule 9(b), the *Iqbal* understanding has resulted in tremendous harm to litigants seeking to prosecute their claims. Lower courts have embraced the *Iqbal* revision of Rule 9(b) with zeal, dismissing claims for failure to articulate facts underlying condition-of-mind allegations left, right, and center. This is undesirable not only because it turns on its head a rule that was designed to facilitate rather than frustrate such claims, but also because it contributes to the overall degradation of the rules as functional partners in the larger civil justice enterprise of faithfully enforcing the law and vindicating wrongs. In light of these ills arising from *Iqbal*'s adulteration of Rule 9(b), it should be amended to make the original and more appropriate understanding of the condition-of-mind pleading requirement clear, or at least revised to conform its language to the *Iqbal* Court's reimagining of it. What follows is an exploration of these points.

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[6] *Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."); *see also Iqbal*, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (quoting FED. R. CIV. P. 8(a)(2))).

I. THE ADULTERATION OF RULE 9(b)

A. Iqbal *and Pleading Conditions of the Mind*

Although there are multiple aspects of the *Iqbal* decision worthy of critique,[7] our focus here will be on its perversion of the standard applicable to alleging conditions of the mind found in Rule 9(b). Rule 9(b) reads, in its entirety, as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.[8]

The question is what pleading standard does the second sentence of Rule 9(b)—which I will refer to as the conditions-of-the-mind clause—impose?

According to Justice Kennedy—the author of the *Iqbal* opinion—the conditions-of-the-mind clause should be read to mean that allegations of malice, intent, knowledge, and other conditions of mind must be pleaded consistently with the plausibility pleading standard of Rule 8(a)(2). Justice Kennedy made this pronouncement in the following way:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—

7 *See, e.g.*, Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–201(criticizing *Iqbal* for its endorsement of a subjective approach to scrutinizing pleading that will permit courts to restrict claims by members of social outgroups). I have criticized the *Twombly* decision as well. *See, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013) [hereinafter Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*]; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) [hereinafter Spencer, *Plausibility Pleading*].

8 FED. R. CIV. P. 9(b).

> though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.[9]

In this passage, Justice Kennedy declared that in pleading conditions of the mind, one must apply the "still operative strictures of Rule 8." Those strictures require "well-pleaded factual allegations"—not mere legal conclusions—that "show[]" plausible entitlement to relief:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." FED. RULE CIV. PROC. 8(a)(2).[10]

In *Iqbal*, the condition of the mind being pleaded was discriminatory intent: that the defendants undertook the challenged course of action—the detention of certain individuals and subjugation of them to harsh conditions of confinement—"solely on account of" the plaintiff's race, religion, or national origin.[11] Justice Kennedy declared that this was a "bare" assertion, amounting to nothing more than a "'formulaic recitation of the elements' of a constitutional discrimination claim."[12] He acknowledged, however, that "[w]ere we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[13] But, alas, they (the *Iqbal* majority) could not accept it as true because the allegations' "conclusory nature . . . disentitle[d] them to the presumption of truth"[14] and "the Federal Rules do not require courts to

9 *Iqbal*, 556 U.S. at 686–87.

10 *Id.* at 678–79.

11 *Id.* at 680.

12 *Id.* at 681 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

13 *Id.* at 686.

14 *Id.* at 681.

credit a complaint's conclusory statements without reference to its factual context."[15] Thus, the plaintiff's claims against Ashcroft and Mueller were dismissed.[16] Although this was an adverse outcome for Mr. Iqbal's individual case, the consequences of this view of Rule 9(b) have reverberated throughout the lower courts, facilitating the dismissal of a countless number of claims involving condition-of-mind allegations.[17]

B. *Lower Courts and Rule 9(b) after* Iqbal

By interpreting Rule 9(b) in a way that subsumed it within the pleading standard applicable to stating claims, the *Iqbal* Court empowered lower courts to apply the "still operative strictures of Rule 8"—the plausibility requirement—to the determination of whether an allegation pertaining to a condition of the mind is sufficient, thereby infusing fact skepticism into an analysis in which the Court purports that alleged facts are assumed to be true.[18] What this has meant operationally

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15 *Id.* at 686.

16 *Id.* at 687.

17 *See infra* Section I.B. A perhaps unexpected distinct consequence of the *Iqbal* Court's interpretation of the term "generally" in Rule 9(b) has been that lower courts have adopted and applied that interpretation to the use of the term "generally" in Rule 9(c), which permits the satisfaction of conditions precedent to be pleaded generally. *See, e.g.*, Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017) ("This Court agrees, and holds that the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)."); Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc., 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements should likewise be indistinguishable."); Napster, LLC v. Rounder Records Corp., 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (deeming the allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement" an insufficient "legal conclusion," and recognizing that the cited cases suggesting that such "general statement[s]" are sufficient under Rule 9(c) "all predate *Twombly* and *Iqbal*"). This interpretation of Rule 9(c) is as inappropriate as, I will endeavor to show, the *Iqbal* Court's interpretation of Rule 9(b). However, this Article will maintain a focus on the erroneousness and implications of the *Iqbal* Court's misinterpretation of Rule 9(b). For a discussion of the history and purpose of Rule 9(c), as well as coverage of post-*Iqbal* cases interpreting it, see 5A CHARLES A. WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE §§ 1302–1303 (4th ed. 2018).

18 *See* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 192 ("[T]he *Iqbal* Court's rejection of Iqbal's core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.").

is that lower courts require what Justice Kennedy called "well-pleaded facts"[19] in support of their allegations: Pleaders must offer specific facts plausibly showing an alleged condition of the mind.[20] Many examples of

[19] *Iqbal*, 556 U.S. at 679.

[20] Lower courts have also expanded the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) into Rule 8(a)(1), requiring the pleading of facts sufficient to support the plausible inference that there are grounds for the court to exercise subject matter jurisdiction, notwithstanding the fact that Rule 8(a)(1) does not impose a requirement to "show" that there is jurisdiction and that abrogated Form 7 did not reflect any such requirement. *See, e.g.*, Wood v. Maguire Auto., LLC, 508 F. App'x 65, 65 (2d Cir. 2013) (complaint failed to properly allege subject matter jurisdiction because allegation of amount in controversy was "conclusory and not entitled to a presumption of truth" (citing *Iqbal*, 556 U.S. 662)); Norris v. Glassdoor, Inc., No. 2:17-cv-00791, 2018 WL 3417111, at *7 n.2 (S.D. Ohio July 13, 2018) ("To establish diversity jurisdiction, a complaint must allege facts that could support a reasonable inference that the amount in controversy exceeds the statutory threshold. . . . Here, the Amended Complaint leaves the amount in controversy to pure speculation. Therefore, 28 U.S.C. § 1332 does not provide a basis for the Court's jurisdiction over Mrs. Norris's breach of contract and fraud claims."); Weir v. Cenlar FSB, No. 16-CV-8650 (CS), 2018 WL 3443173, at *12 (S.D.N.Y. July 17, 2018) ("[J]urisdictional [dollar] amount, like any other factual allegation, ought not to receive the presumption of truth unless it is supported by facts rendering it plausible."); Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 156 (D. Conn. 2016) (plaintiff required to "allege facts sufficient to allow for a plausible inference that the amount in controversy meets the jurisdictional threshold").

this practice abound both at the circuit[21] and district court levels[22] and are too numerous to list in full.[23] A few examples will illustrate the point.

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21 *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 525 (5th Cir. 2016) ("The complaint must thus set forth specific facts supporting an inference of fraudulent intent." (citing Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994))); Biro v. Condé Nast, 807 F.3d 541, 544–45 (2d Cir. 2015) ("*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent."); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377 (4th Cir. 2012) ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated."); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012) ("[T]o make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred."). Although particularity is required for allegations of *fraud*, alleging fraudulent *intent* may be done generally. *See, e.g.*, *In re* Cyr, 602 B.R. 315, 328 (Bankr. W.D. Tex. 2019) ("As previously explained, [Bankruptcy] Rule 7009(b) [the counterpart to Rule 9(b) in the bankruptcy context] distinguishes between pleading the circumstances of the alleged fraud and the conditions of the defendant's mind at the time of the alleged fraud. Thus, the heightened standard requiring the specifics of the 'who, what, when, where, and how' of the alleged fraud applies to the circumstances surrounding the fraud, not the conditions of the defendant's mind at the time of the alleged fraud.").

22 *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients' indebtedness made by Samaritan Hospital. . . . Indeed, the Amended Complaint provides no facts . . . from which the Court could draw a reasonable inference that ORDD and O'Brien knew or should have known that Plaintiff did not owe the debt."); Rovai v. Select Portfolio Servicing, Inc., No. 14-cv-1738-BAS-WVG, 2018 WL 3140543, at *13 (S.D. Cal. June 27, 2018) ("Although th[e] general averment of intent and knowledge may be sufficient for Rule 9(b), '*Twombly* and *Iqbal*'s pleading standards must still be applied to test complaints that contain claims of fraud.' This means that '[p]laintiffs must still plead facts establishing *scienter* with the plausibility standard required under Rule 8(a).'" (citations omitted)); Mourad v. Marathon Petroleum Co., 129 F. Supp. 3d 517, 526 (E.D. Mich. 2015) ("Plaintiffs have also failed to sufficiently allege facts in support of their claim that Defendant's acts, though lawful, were malicious. This is because Plaintiffs have not alleged facts from which this Court can reasonably infer that Defendant acted with the requisite state of mind. Although Plaintiffs correctly point out that Federal Rule of Civil Procedure 9(b) permits '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally[,]' this Rule does not, as Plaintiffs insist, permit a party to simply parrot the state of mind required by a particular cause of action. Rather, to withstand dismissal, factual allegations corroborating Defendant's malicious intent are necessary." (citation omitted)); United States *ex rel.* Modglin v. DJO Glob. Inc., 114 F. Supp. 3d 993, 1024 (C.D. Cal. 2015) (dismissing allegations "that defendants 'knew that they were falsely and/or fraudulently claiming reimbursements' and 'knew [their devices] were being unlawfully sold for unapproved off-label cervical use'" because "[n]one of the facts relators plead[ed] . . . support[ed] their conclusory allegation that defendants knowingly submitted false claims," and therefore, notwithstanding "that Rule 9(b) does not require particularized

The Second Circuit fully embraced the *Iqbal* interpretation of Rule 9(b) in *Biro v. Condé Nast*, a defamation case involving a public figure.[24] After noting the requirement of showing "actual malice" to prevail on a defamation claim in the public figure context, the court rebuffed the plaintiff's claim that Rule 9(b) absolved him of the duty "to allege facts sufficient to render his allegations of actual malice plausible" with the following retort: "*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent. . . . It follows that malice must be alleged plausibly in accordance with Rule 8."[25] The Seventh Circuit similarly cited *Iqbal* in imposing a requirement that allegations of bad faith be backed up with allegations of substantiating facts:

> Bare assertions of the state of mind required for the claim—here "bad faith"—must be supported with subsidiary facts. *See Iqbal*, 556 U.S. at 680–83, 129 S. Ct. 1937. The plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels—that the unnamed union officials acted "invidiously" when they failed to process the grievances, or simply that the union's actions were "intentional, willful, wanton, and malicious." They supply no factual detail to support these conclusory allegations, such as (for example) offering facts that suggest a motive for the union's alleged failure to deal with the grievances.[26]

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allegations of knowledge," the complaint "f[e]ll short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*"), *aff'd*, 678 F. App'x 594 (9th Cir. 2017).

23 A more comprehensive citation to the relevant cases illustrating this trend may be found in WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301. An example of a case in which this trend was bucked is *United States ex rel. Dildine v. Pandya*, in which the court accepted the government's bald allegations of state of mind as sufficient to plead scienter. 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) ("Since Federal Rule of Civil Procedure 9(b) provides '[m]alice, intent knowledge, and other conditions of a person's mind may be alleged generally' and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.").

24 *Condé Nast*, 807 F.3d 541.

25 *Id.* at 544–45; *see also* Krys v. Pigott, 749 F.3d 117, 129 (2d Cir. 2014) (indicating that based on *Iqbal*, one must plead nonconclusory facts that give rise to an inference of knowledge).

26 Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009)).

The Eleventh Circuit too, confronting this issue in 2016, concluded that the *Iqbal* approach to Rule 9(b) with respect to allegations of malice had to carry the day:

> Indeed, after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings.[27]

District courts are imposing *Iqbal*'s condition-of-mind particularity requirement with respect to allegations of malice as well.[28] For example, in *Moses-El v. City and County of Denver*[29] the court wrote:

> [W]here Mr. Moses-El must plead a defendant's malicious intent, coming forward with a set of facts that permit the inference that the defendant instead acted merely negligently will not suffice; rather, Mr. Moses-El must plead facts that, taken in the light most favorable to him, dispel the possibility that the defendant acted with mere negligence. As noted in *Iqbal*, Fed. R. Civ. P. 9(b)'s allowance that facts concerning a defendant's *mens rea* may be "alleged generally" does not alter this analysis.[30]

As a result of embracing this stringent view of the second sentence of Rule 9(b) in light of *Iqbal*'s interpretation of it, the court in *Moses-El* dismissed

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27 Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016) (citations omitted).

28 *See, e.g.*, Diehl v. URS Energy & Constr., Inc., No. 11-cv-0600-MJR, 2012 WL 681461, at *4 (S.D. Ill. Feb. 29, 2012) ("Although paragraph 18 of Count V establishes that Plaintiff Diehl is proceeding against Defendant Walls under the theory that Walls was acting in his own self-interest when he terminated Diehl's employment, like paragraph 17, paragraph 18 is merely a conclusory statement. Count V (and the Complaint as a whole), does not set forth any factual content from which the Court can reasonably draw the inference that Diehl was acting maliciously and in his own self-interest."); Ducre v. Veolia Transp., No. CV 10-02358 MMM (AJWx), 2010 WL 11549862, at *5-6 (C.D. Cal. June 14, 2010) ("Ducre alleges that her supervisors at Veolia knew she had a disability that required her to wear a leg brace, and that they unjustly discriminated against her because of this disability by reassigning her to 'light duty' work and eventually terminating her. She asserts that she lost income and suffered hardship as a result of these actions. These factual allegations adequately allege malice and oppression under Rule 8(a) and *Iqbal*.").

29 376 F. Supp. 3d 1160 (D. Colo. 2019).

30 *Id.* at 1172.

the plaintiff's malicious prosecution claim—in the face of an express allegation of malice—on the ground that the substantiating facts did not *rule out* the possibility of negligence as an alternate explanation of the defendant's actions:

> The sole allegation in the Amended Complaint that purports to demonstrate that malice is Paragraph 118, which reads "[g]iven [Dr. Brown's] qualifications and experience, as well as her previous testimony where she recognized the significant inferences that could be deduced by results such as those described above, her gross mischaracterization of the serological evidence in this case as inconclusive . . . was malicious." But the conclusion—maliciousness—does not necessarily flow from the facts: that Dr. Brown was experienced and qualified and that she recognized that inferences about the perpetrator could be drawn from the blood test results. Although malice is one inference that might be drawn from these facts, other equally (if not more likely) permissible inferences are that Dr. Brown was mistaken in her testing or analysis or that she conservatively chose not to ignore the (admittedly) small possibility that the test did *not* exclude Mr. Moses-El. Once again, *Iqbal* requires Mr. Moses-El to plead facts that establish a *probability*, not a *possibility*, that Dr. Brown acted with malice against him, and describing a set of facts that could readily be consistent with mere negligence does not suffice. Accordingly, the malicious prosecution claim against Dr. Brown is dismissed.[31]

This is a truly remarkable decision: although Rule 9(b) states that "Malice . . . may be alleged generally," and the plaintiff in this instance alleged that the actions were "malicious"—and the court acknowledged that "malice is one inference that might be drawn from these facts"—the claim was still dismissed for insufficiency under the *Iqbal* Court's perverse interpretation of Rule 9(b).[32]

Moving beyond allegations of malice for defamation claims, the Sixth Circuit has shown that it is on board with the *Iqbal* interpretation of Rule 9(b) as well. In the context of a claim under the Family and Medical Leave Act (FMLA), a Sixth Circuit panel wrote as follows:

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31 *Id.* at 1173–74.

32 *Id.* at 1174.

> [A]fter the Supreme Court's decisions in *Iqbal* and *Twombly*, a plaintiff must do more than make the conclusory assertion that a defendant acted willfully. The Supreme Court specifically addressed state-of-mind pleading in *Iqbal*, and explained that Rule 9(b) . . . does not give a plaintiff license to "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). As we have explained in a non-FMLA context, although conditions of a person's mind may be alleged generally, "the plaintiff still must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).[33]

Imposing a requirement to "plead facts" that "make the state-of-mind allegation 'plausible on its face,'" the court concluded that the "complaint contains no facts that allow a court to infer that [the defendant] knew or acted with reckless disregard of the fact that it was interfering with [the plaintiff's] rights."[34]

The Third Circuit offers yet another instance of this trend, here in the context of an allegation of knowledge. In *Kennedy v. Envoy Airlines, Inc.*, a New Jersey district court reflected *Iqbal*'s heightened intent pleading requirement when it wrote, "Plaintiff has not alleged any particularized facts which, if true, would demonstrate that Ms. Fritz or any other Envoy employee actually *knew* that the positive test results were false."[35] The court went on to indicate that it could not accept the plaintiff's allegation of the defendant's knowledge of falsity because "such generalized and conclusory statements are insufficient to establish knowledge of falsity."[36] On appeal to the Third Circuit, the court questioned the district court's conclusion, but not because it disagreed with the standard the district court applied.[37] Instead, the Third Circuit

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33 Katoula v. Detroit Entm't, LLC, 557 F. App'x 496, 498 (6th Cir. 2014).

34 *Id.* (quoting Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 247 (6th Cir. 2012)).

35 Kennedy v. Envoy Airlines, Inc., No. 15-8058 (JBS/KMW), 2018 WL 895871, at *5 (D.N.J. Feb. 14, 2018).

36 *Id.*

37 Kennedy v. Am. Airlines, Inc., 760 F. App'x 136 (3d Cir. 2019).

embraced the standard but concluded that the plaintiff arguably satisfied it by offering additional facts showing the basis for the allegation of the defendant's knowledge:

> However, we conclude that this is a closer question than the District Court's opinion postulates. Here, while Kennedy does generally assert Appellee "should have known" of the falsity, he also offers several reasons *why* Appellee should have known. In addition to his assertion that Appellee has "administered thousands of tests and is aware of the uniform and constant rate at which alcohol is metabolized," he also references Judge Ferrara's findings on the matter in an exhibit to his complaint . . . . These facts, perhaps, lend themselves to a reasonable inference that Appellee knew, or should have known, the results from the breathalyzer were inaccurate—at least for purposes of surviving a Rule 12(b)(6) motion.[38]

Thus, we have here the endorsement of a requirement to offer "particularized facts" that "would demonstrate"[39] the defendant's knowledge or "lend themselves to a reasonable inference"[40] that the defendant had the requisite knowledge.

Again, district courts are requiring the allegation of substantiating facts in support of allegations of knowledge as well, citing *Iqbal*'s interpretation of Rule 9(b).[41] For instance, in *United States ex rel. Morgan v. Champion Fitness, Inc.*,[42] although the court recognized the tension between the language of Rule 9(b) and the *Iqbal* Court's interpretation of it, the district court felt it was bound to adhere to that interpretation, finding that the plaintiff in the case before it could survive a motion to dismiss only because "the Complaint's representative examples have sufficient detail to support a reasonable inference providing the necessary factual support for the assertion of Defendants' knowledge."[43]

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38 *Id.* at 140–41.

39 *Kennedy*, 2018 WL 895871, at *5.

40 *Kennedy*, 760 F. App'x at 141.

41 *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients indebtedness made by Samaritan Hospital.'").

42 No. 1:13-cv-1593, 2018 WL 5114124 (C.D. Ill. Oct. 19, 2018).

43 *Id.* at *7.

II. ASSESSING THE *IQBAL* VIEW OF RULE 9(b)

Certainly, as a matter of common sense, one would be hard pressed to suggest that the pleading requirements that have been outlined above are faithful reflections of what it means to permit conditions of the mind to be "alleged generally." As we have seen, courts are imposing a requirement for "well-pleaded facts," "specific facts," or "particularized facts" that "demonstrate," "show," or "establish" an alleged condition of the mind, which is the epitome of what plausibility pleading requires.[44] But does Justice Kennedy's analysis of Rule 9(b)—which has wrought all of this—stand up to scrutiny?

A. *Textual Evidence*

Justice Kennedy's determination that the conditions-of-the-mind clause must be read to incorporate the pleading standard of Rule 8(a)(2) was a facile—if not thoughtless—conclusion based on apparent logic: If "with particularity" in the first sentence of Rule 9(b) means a heightened pleading standard, "generally" in the second sentence of Rule 9(b) must mean the ordinary pleading standard of Rule 8(a)(2), which now—post *Twombly*—requires plausibility pleading. This "reasoning" represents an abject failure of statutory interpretation for multiple reasons,[45] three of which are text-based and the fourth of which is historical.[46]

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44 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

45 *See, e.g.*, McCauley v. City of Chicago, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("*Iqbal* is in serious tension with these other decisions [Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Erickson v. Pardus, 551 U.S. 89 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)], rules, and forms, and the Court's opinion fails to grapple with or resolve that tension.").

46 See *infra* Section II.B for a discussion of historical evidence demonstrating the erroneous nature of Justice Kennedy's interpretation of Rule 9(b).

First. The object of the admonitions of Rule 9(b)—and its close cousin, Rule 9(c)[47]—are distinct from that of Rule 8(a)(2). Rule 8(a)(2)—the provision the Court was interpreting and applying in *Twombly* and *Iqbal*—supplies a standard for sufficiently stating a *claim for relief*, which requires making a "showing" of entitlement to relief,[48] and which, according to the Court, requires the satisfaction of the plausibility pleading standard.[49] Rule 9(b), on the other hand, supplies a standard for sufficiently stating *allegations*,[50] which are the building blocks of claims. In other words, when the *allegations* of a complaint are joined with one another and viewed as a whole, one asks whether they amount to a *claim*, i.e., do they show entitlement to relief under the applicable law.[51] The plausibility pleading standard of Rule 8(a)(2) applies to an assessment of the latter question—whether the allegations add up to *a claim*—not to the assessment of whether *an allegation* has been properly stated. This distinction tracks the intended distinction between a motion to dismiss for failure to state a claim under Rule 12(b)(6)—which challenges *claims* based on the plausibility standard of *Twombly*—and a motion for a more

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47 FED. R. CIV. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.").

48 FED. R. CIV. P. 8(a)(2) ("CLAIM FOR RELIEF. A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."); *see also Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.—Also termed *claim for relief*.").

49 Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("[*Twombly* and *Iqbal*] concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, [*Twombly* and *Iqbal*] instruct, must plead facts sufficient to show that her claim has substantive plausibility.").

50 Prior to the restyling of the Rules in 2007, references to "allegation" and "allege" in the rules were to variations of the term "averment" instead. *Compare* FED. R. CIV. P. 9(b) (2006) ("In all *averments* of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be *averred* generally." (emphasis added)), *with* FED. R. CIV. P. 9(b) (2007) ("In *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be *alleged* generally." (emphasis added)); *see also Allegation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or illegal. 2. Something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved; AVERMENT.").

51 FED. R. CIV. P. 8(a)(2).

definite statement under Rule 12(e)[52]—which challenges *allegations* as being "so vague or ambiguous that the party cannot reasonably prepare a response."[53] Thus, in *Iqbal*, Justice Kennedy carelessly conflated the standard for articulating allegations—the province of Rule 9(b)—with the standard for judging the sufficiency of entire claims.

In fact, the Federal Rules of Civil Procedure do set forth the general standard for stating *an allegation* in a pleading, but not in Rule 8(a)(2). Rather, one finds the standard applicable to stating allegations in Rule 8(d)(1), which reads as follows: "(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required."[54] This provision was meant to solidify the notion that the Federal Rules of Civil Procedure—which took effect in 1938—were intended to be a departure from the highly technical pleading requirements of the past.[55] Indeed, the

52 *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *Hearing*] (statement of Professor Stephen B. Burbank) ("The architecture of *Iqbal*'s mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e).").

53 FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(e). I have previously argued that a complaint containing insufficient factual details to render a claim plausible under *Twombly* should be the target of a motion for a more definite statement under Rule 12(e), not dismissal under Rule 12(c). *See* Spencer, *Plausibility Pleading*, *supra* note 7, at 491 ("[When faced with] a complaint with insufficient detail . . . [t]he appropriate remedy for such defects is the grant of a motion for a more definite statement, not dismissal of the claim. The defendant . . . is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.").

54 FED. R. CIV. P. 8(d)(1). Prior to the restyling of the Rules in 2007, this provision was found in Rule 8(e)(1) and read, "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1) (2006) (amended 2007).

55 Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942) (indicating that subsection (e) (now subsection (d)) of Rule 8 was designed "to show that ancient restrictions followed under certain more technical rules have no place"); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) ("Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady."); *see also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1281 (3d ed. 2004 & Supp. 2019) ("By including a provision such as Rule 8(d)(1) the draftsmen of the original federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued English and American courts under common law

Supreme Court—prior to *Iqbal*—cited this provision as evidence of the simplified notice pleading regime ushered in by the Federal Rules.[56] Why Justice Kennedy did not cite Rule 8(d)(1) when attempting to understand what Rule 9(b)'s second sentence required is unclear. What is clear, however, is that Rule 8(d)(1) does not require pleaders to state supporting facts to make a proper factual allegation.[57] Neither does the conditions-of-the-mind clause of Rule 9(b) impose such a requirement.

Second. Evidence from elsewhere in the Federal Rules and from the PSLRA reveals that the *Iqbal* interpretation of Rule 9(b) is not sound from a textualist perspective. Requiring facts that make state-of-mind allegations plausible amounts to a requirement for particularity, which the first sentence of Rule 9(b) only requires for allegations of fraud and mistake.[58] Further, it is only in an adjacent provision—Rule 9(a)(2)—that one finds an express obligation to state supporting facts; a party who wants to raise the issues of capacity or authority to sue or be sued, or the legal existence of an entity, must do so "by a specific denial, which must *state any supporting facts* that are peculiarly within the party's knowledge."[59] If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot

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and code practice."). This provision has also been applied to curtail overly lengthy or convoluted allegations. *See, e.g.*, Gordon v. Green, 602 F.2d 743 (5th Cir. 1979) (verbose pleadings of over four thousand pages violated the rule).

56 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) ("Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required.'").

57 Abrogated Form 15 provided an illustration of pleading in conformity with Rule 8(d)(1): "On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*." FED. R. CIV. P. Form 15 (2014) (abrogated 2015). No facts supporting the allegation of conversion are supplied in the form, which was authoritative at the time *Iqbal* was decided. *See also* Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." (citing FED. R. CIV. P. 8(d)(1))).

58 *See* FED. R. CIV. P. 9(b); *see also* Brief for Respondent at 33, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at *33 ("If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with 'particularity,' that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity.").

59 FED. R. CIV. P. 9(a)(2) (emphasis added); *see also* WRIGHT, MILLER & SPENCER, *supra* note 17, § 1294 (discussing Rule 9(a)(2)).

be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts sub silentio. *Expressio unius est exclusio alterius.*[60] Interpreting the general standard for stating allegations to require the statement of supporting facts would render Rule 9(a)(2)'s express imposition of a requirement redundant surplusage.[61] Finally, in the PSLRA Congress imposed a requirement for plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[62] If Rule 9(b)'s second sentence imposes a requirement to plead facts that support an inference of intent and other conditions of the mind, Congress's move to impose a particularity requirement with respect to state of mind in the PSLRA would have been largely unnecessary.[63]

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60 ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Swierkiewicz*, 534 U.S. at 513 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); *cf.* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1064 (2019) (Thomas, J., dissenting) ("The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. . . . Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court."); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). . . . That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released.").

61 *See* Jay v. Boyd, 351 U.S. 345, 360 (1956) ("We must read the body of regulations . . . so as to give effect, if possible, to all of its provisions."); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

62 15 U.S.C. § 78u-4(b)(2)(A) (2018).

63 Retirement Bd. of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc., 767 F. App'x 139, 141 (2d Cir. 2019) ("While Federal Rule of Civil Procedure 9(b) provides that 'conditions of a person's mind may be alleged generally,' under the Private Securities Litigation Reform Act ('PSLRA'), a securities plaintiff must nevertheless allege facts that suggest a 'strong inference' of scienter.").

Third. What used to be Official Form 21—now conveniently abrogated,[64] but in force at the time *Iqbal* was decided—provided the definitive and authoritative[65] illustration of what both sentences of Rule 9(b) permit and require. It read, in pertinent part, as follows:

> 4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.[66]

In this example we have both an allegation of fraud and two allegations of intent, each of which must look to Rule 9(b) for the applicable standard of sufficiency. Regarding the allegation of fraud—the "circumstances" of which must be stated "with particularity"—Form 21 taught that offering the "who, what, when, where and how" of the fraud is sufficient, an understanding innumerable courts have recognized.[67] When we turn to the two allegations relating to intent—(1) that the aforementioned actions by the defendant were undertaken "for the purpose of defrauding the plaintiff" and (2) that those same actions were done "for the purpose of . . . delaying the collection of the debt"—Form 21 taught that bald,

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[64] FED. R. CIV. P. 84 (2014) (abrogated 2015); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (2013) ("[T]he pleading forms live in tension with recently developing approaches to general pleading standards."); *see generally* A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015) [hereinafter Spencer, *The Forms Had a Function*] (discussing the significance of the abrogated Official Forms and the motivation behind their abandonment).

[65] Prior to its abrogation in 2015, Rule 84 provided: "The forms in the Appendix of Forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84 (2014) (abrogated 2015). That the forms were sufficient under the rules was an important component of the rule that was added in a 1946 amendment for the very reason that courts were treating the forms as merely illustrative rather than authoritative. *See* Spencer, *The Forms Had a Function*, *supra* note 64, at 1122–24.

[66] FED. R. CIV. P. Form 21 (2014) (abrogated 2015).

[67] WRIGHT, MILLER & SPENCER, *supra* note 17, § 1297 ("A formulation popular among courts analogizes the standard to 'the who, what, when, where, and how: the first paragraph of any newspaper story.'"); *see, e.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 490 (3d Cir. 2016) (applying the formulation to a securities fraud class action); Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015) (applying the formulation to a claim of aiding and abetting fraud); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 36 (1st Cir. 2013) (applying the formulation to a qui tam action under False Claims Act).

conclusory, and factless statements suffice to allege intent properly.[68] What we undeniably do not have in Form 21 is the slightest support for Justice Kennedy's homespun, improvised diktat that allegations of intent and other conditions of the mind must be supported by facts that render the allegations plausible. That such lawless imperialism—which would be derided as judicial activism if it came from another quarter—was endorsed by the sometimes textualists Antonin Scalia[69] and Clarence Thomas[70] is a dismaying but unsurprising instance of the inconsistency that has too often characterized their purported interpretive commitments.[71]

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[68] FED. R. CIV. P. Form 21 (2014) (abrogated 2015); *see* Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940) ("The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments."); Spencer, *Plausibility Pleading*, *supra* note 7, at 474 ("The allegation [in Form 21], however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate.").

[69] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16, 22 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter. . . . The text is the law, and it is the text that must be observed.").

[70] *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000) (Thomas, J.) ("[O]ur inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members.").

[71] Justice Thomas's inconstancy is manifestly self-evident on this score, having admonished in *Swierkiewicz v. Sorema N.A.* that the pleading requirements imposed by Rule 8(a)(2) cannot be amended by the Court outside the rule amendment process but then signing on to two opinions doing just that in *Twombly* and *Iqbal*. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))). For an example of Justice Scalia's fair-weather textualism, one can consult *Walmart Stores, Inc. v. Dukes*, in which Justice Scalia abandoned a faithful application of the plain text of Rule 23(a)—which requires questions "common to the class"—to impose his own wished-for requirements that there be a common injury among class members and that the common issues must be central to the dispute. 564 U.S. 338 (2011); *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) ("Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*. The language of Rule 23(a)—that 'there are questions of law or fact common to the class'—expresses no need for class members to have suffered the 'same injury.'"); *id.* at 474 ("Rather than follow his own textualist diktats, Justice Scalia pronounces efficiency as the objective policed by the commonality rule, then uses that to banish those common questions that do little to further

B. *The Original Understanding of Rule 9(b)*

Although the textual arguments against the *Iqbal* Court's interpretation of Rule 9(b) provide compelling evidence of its waywardness, and the review of the caselaw on this point above demonstrates that this erroneous interpretation of Rule 9(b) has real world negative implications for claimants, there is historical support for the view that *Iqbal* got the interpretation of Rule 9(b) terribly wrong. When Rule 9(b) was originally promulgated in 1938, the drafters of the rule provided helpful guidance as to its meaning in the committee notes. The note pertaining to Rule 9(b) read as follows: "See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22."[72] What this citation refers to is Order 19, Rule 22 of the English Rules of the Supreme Court (the English Rules) that were promulgated under the Judicature Acts of 1873 and 1875.[73] That rule—which the Advisory Committee indicated was the source of Rule 9(b)—read as follows:

> 22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.[74]

Here we see that the lineage of the second sentence of our Rule 9(b)—the conditions-of-mind clause—is an English rule that provides that conditions of the mind may be alleged "as a fact without setting out the circumstances from which the same is to be inferred."[75] Given that the 1938 rulemakers cited to Order 19, Rule 22 as their source—or at least as their inspiration—for Rule 9(b),[76] it is reasonable to suspect that "averred generally" (now "alleged generally") must have been intended to mean something akin to "without setting out the circumstances from which the

efficiency from its ambit, without regard to the fact that commonality, not efficiency, is the unambiguous requirement of Rule 23(a)(2).").

72 FED. R. CIV. P. 9 advisory committee's note to 1937 adoption.

73 Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, *as amended by* Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77.

74 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

75 *Id.*

76 *See, e.g.*, Love v. Commercial Cas. Ins. Co., 26 F. Supp. 481, 482 (S.D. Miss. 1939) ("This rule [Rule 9(b)] very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22.").

same is to be inferred."[77] What did this language mean and how was it interpreted at the time the 1938 rules of procedure were first crafted?

Commentator's Notes and Official Forms Accompanying the English Rules. As the notes that appear following Order 19, Rule 22, in the 1937 edition of the Rules of the Supreme Court explain, to plead knowledge under the rule, "[i]t is sufficient to plead, 'as the defendant well knew,' or 'whereof the defendant had notice,' without stating when or how he had notice, or setting out the circumstances from which knowledge is to be inferred."[78] Respecting allegations of malice, the notes remark, "But he [the plaintiff] need not in either pleading [the statement of the claim or the reply] set out the evidence by which he hopes to establish malice at the trial."[79] The same was said of allegations of fraudulent intent; although under the English Rules allegations of fraud had to be specified by stating the acts alleged to be fraudulent,[80] the notes to Rule 22 indicated that "from these acts fraudulent intent may be inferred; and it is sufficient to aver generally that they were done fraudulently."[81]

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77 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22. The Supreme Court has employed similar reasoning when interpreting other Federal Rules of Civil Procedure. For example, in seeking to understand the meaning of Rule 42(a), the Court wrote the following:

> [This case is] about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (internal citation omitted).

78 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22 (note).

79 *Id.*

80 *Id.* O. 19, r. 6 ("In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items if necessary) shall be stated in the pleading . . . .").

81 *Id.* O. 19, r. 22 (note).

Reference to the forms in Appendix C of the English Rules[82] confirms the view set forth in the notes discussed above. For example, one finds there the following model allegation of the defendant's knowledge:

> 3. The wilful default on which the plaintiff relies is as follows:—
>
> *C.D.* owed to the testator 1000*l.*, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. *The defendants were aware of this fact*, but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.[83]

No facts from which it might be inferred that the defendants had such knowledge are offered anywhere within this model form. In another instance of pleading knowledge—this time within a complaint for a "fraudulent prospectus"—Appendix C offered the following example:

> 4. The prospectus contained misrepresentations, of which the following are particulars :—
>
> (a) The prospectus stated ". . . . " whereas in fact . . . .
>
> (b) The prospectus stated ". . . . " whereas in fact . . . .
>
> (c) The prospectus stated ". . . . " whereas in fact . . . .
>
> 5. *The defendant knew of the real facts* as to the above particulars.
>
> 6. The following facts, *which were within the knowledge of the defendants*, are material, and were not stated in the prospectus . . . .[84]

The next form in Appendix C, which is for a "fraudulent sale of a lease," similarly contained an unadorned and unsupported allegation of the defendant's knowledge. It read as follows: "The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by fraudulently representing

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[82] *Id.* O. 19, r. 5 ("The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings . . . .").

[83] The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § II, No. 2 (emphasis added).

[84] *Id.* § VI, No. 13 (emphasis added).

to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, *to the defendant's knowledge*."[85]

Allegations of malice—like allegations of knowledge—were protected from particularized pleading by Order 19, Rule 22;[86] thus, it is helpful to find an example of such pleadings in Appendix C as well. The malicious prosecution form read as follows: "The defendant *maliciously* and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon . . . ."[87] Here, consistent with Order 19, Rule 22, we find no greater specificity than was presented in the context of the allegations of the defendant's knowledge outlined above.

English caselaw. The scant but available contemporaneous decisions of English courts interpreting and applying the pleading rules confirm that they did not require the pleading of any facts substantiating the basis for condition-of-the mind allegations. *Glossop v. Spindler*[88] is particularly illustrative. In that case, the plaintiff alleged—in paragraph one—that the defendant maliciously printed and published in a newspaper certain defamatory matter and—in paragraph two—that "the defendant, on previous occasions, and in furtherance of malicious motives on his part towards the plaintiff, maliciously printed and published of the plaintiff various statements and paragraphs in the said newspaper, and these, for convenience of reference, are set forth in the appendix hereto."[89] The defendant sought to have paragraph two and the appendix stricken as a violation of the pleading rules.[90] The court ruled that the allegation of paragraph two itself was sufficient, in that "it contained a statement of material facts upon which the plaintiff would rely at trial as constituting malicious motives."[91] However, the court also ruled that the appendix must be stricken because "it contained the evidence to prove the alleged

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85 *Id.* § VI, No. 14 (emphasis added).

86 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

87 The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § VI, No. 15 (emphasis added).

88 (1885) 29 SJ 556 at 556 (Eng.).

89 *Id.*

90 *Id.* at 557.

91 *Id.*

facts in paragraph 2, and was, therefore, a violation of ord. 19, r. 4."[92] Two things are worth noting here. First, Rule 4, which was cited by the Court, supplied the ordinary pleading standard, which required "only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . but not the evidence by which they are to be proved . . . ."[93] Providing additional details beyond the allegation of malicious intent violated that rule. Second, when the plaintiff went above and beyond what was required, offering (in an appendix) additional facts from which malicious intent could be inferred, that was not lauded as helpful to the presentation of the case but was challenged by the defendant as a pleading offense and thrown out by the court as inappropriate. Thus, not only were facts from which malice might be inferred not required of pleaders under Order 19, Rule 22, the pleading of such factual detail appears to have been affirmatively prohibited by Order 19, Rule 4.[94]

Herring v. Bischoffsheim[95] offers similar insight into the minimal pleading burden under the English Rules in the context of an allegation of fraudulent intent. There, the plaintiff's claim was that the prospectus issued by the defendant was fraudulent to the knowledge of the defendant company; the plaintiff offered extensive evidentiary details in support of that allegation. The court, in response to a motion to strike these details

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92 *Id.*

93 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4. A "material fact" might be described as what in the United States previously was referred to an "ultimate fact" under code pleading, as opposed to evidentiary facts. *See, e.g.*, *In re* Dependable Upholstery Ltd (1936) 3 All ER 741 at 745–46 (Eng.) (holding an allegation that dividends were paid from an improper source to be a "material fact" under Rule 4 and that plaintiffs would not be ordered to give particulars of that fact, which would merely disclose the evidence by which that fact was intended to be proved). *But see* Millington v. Loring (1880) 6 CPD 190 at 190, 194 (Eng.) ("[I]n my opinion those words ['material facts'] are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial."). Thus, in *Glossop v. Spindler* the "material fact" is that the publication was with malicious intent, while the evidentiary facts are those details on which the ultimate fact of malicious intent is based. Glossop v. Spindler (1885) 29 SJ 556 at 557 (Eng.). An innovation of the Federal Rules of Civil Procedure was to avoid distinguishing between ultimate and evidentiary facts by abandoning any reference to pleading facts altogether. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 242 (2d ed. 1947).

94 *See also* Gourard v. Fitzgerald (1889) 37 W.R. 265 (Eng.) (rejecting a lower court's order for particulars pertaining to the plaintiffs' allegation that statements were maliciously published by the defendants).

95 [1876] WN 77 (Eng.).

from the statement of the claim, agreed with the defendant that the pleading violated Order 19, Rule 4, and permitted the plaintiff to amend.[96] In doing so, the court wrote,

> It is unnecessary for the statement of claim to state the motives which led to the issuing of the prospectus, or the scheme of which it is a part. It is sufficient to state generally that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.[97]

Finally, we have some evidence of how allegations of knowledge generally were permitted under these rules. In *Sargeaunt v. Cardiff Junction Dry Dock & Engineering Co.*,[98] the court rejected a request for particulars setting out how certain knowledge on the part of the defendant came to exist, citing and relying on Order 19, Rule 22 in the process. In *Griffiths v. The London & St. Katharine Docks Co.*,[99] the court reported that the plaintiff alleged that the defendant company "knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door" without further elaborating the facts supporting the allegation.[100] No fault was found with this allegation; the claim only failed because the plaintiff failed to allege also that he was unaware of the said defective condition, a critical element of stating the negligence claim asserted in the case.[101]

From the previous discussion, it is readily apparent that the progenitor of Rule 9(b)'s conditions-of-the-mind clause—Order 19, Rule 22 of the English Rules (and the English cases that applied that rule)—give lie to the notion that Rule 9(b) may properly be interpreted to require the pleading of facts that make state-of-mind allegations plausible. That the 1938 rulemakers cited to the English rule in the notes accompanying Rule 9(b) can reasonably be read as evidence of their intent to embrace the associated English practice of not requiring pleaders to allege facts from which conditions of the mind might be inferred. But Rule 9(b)'s

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96 *Id.*

97 *Id.*

98 [1926] WN 263, 264 (Eng.) ("[T]he plaintiff had no right under the rule [Order 19, Rule 22] to obtain the particulars asked for, and they must be refused.").

99 (1884) 12 QBD 493 (Eng.).

100 *Id.* at 494.

101 *Id.* at 496.

admonition must also be understood in the wider context of the liberal general pleading ethos of the English Rules embraced by the drafters of the 1938 rules.[102] As Charles Clark, reporter to the original rules committee, noted at the Cleveland Institute on Federal Rules:

> I think there is no question that the rules can not [sic] be construed to require the detailed pleading that was the theory, say, in England in 1830 . . . . About the only time when this specialised detailed pleading was really tried was in England in the 1830's, after the adoption of the Hilary Rules. The Hilary Rules were the first step in the procedural reform in England, and they got the expert Stephen to write the rules. He went on the theory, which many experts have, that what you want is more and better and harsher rules, and never at any time in the history of English law was pleading so particularised, and never were the decisions so strict and technical, and never was justice more flouted than in that short period in the '30's, . . . which led immediately to greater reform, finally culminating in the English Judicature Act and the union of law and equity.[103]

In other words, the pleading reforms brought about by the English Judicature Acts, which were a response to the highly particularized pleading regime of the Hilary Rules, were the inspiration for much of what Charles Clark and the 1938 drafters were trying to do with their new pleading rules. But the result of the *Iqbal* revision of Rule 9(b)—and the antecedent rewriting of the ordinary pleading standard of Rule 8(a)(2) in *Twombly*—is that we have regressed very nearly to the state of affairs that the 1938 rule reformers sought to save us from. That this was done without due regard for the previously-reviewed evidence of Rule 9(b)'s proper meaning is problematic. Equally (if not more) disconcerting,

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102 A.B.A., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (Edward H. Hammond ed., 1938) ("I would say this, that I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful.").

103 A.B.A., RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220–22 (William W. Dawson ed., 1938); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98 (5th ed. 2019) (discussing the Hilary Rules and their development).

however, is that the *Iqbal* interpretation of Rule 9(b) is at variance with the policies that underlie the rule, a topic to which we now turn.

III. THE AFFRONT TO THE POLICY BEHIND RULE 9(b)

By applying the plausibility fact-substantiation standard to allegations of conditions of the mind, this heightened pleading standard is being applied to the very kinds of allegations Rule 9(b)'s second sentence was quite obviously crafted to protect.[104] Requiring pleaders to provide the particulars of a person's state of mind is not something that all pleaders will be able to do without the benefit of discovery,[105] making the imposition of such a requirement at the pleading stage unfair.[106] This is particularly true for plaintiffs asserting discrimination claims, who are more likely (than fraud plaintiffs or public figure defamation plaintiffs, for example) to lack the resources to overcome the information asymmetry that exists at the pleading stage.[107] Wrongful conduct is already something not likely to be broadcast; wrongful intentions—which lurk within a person's mind—are even more likely to be obscured from external view. The drafters of Rule 9(b) understood this, agreeing with the English system that requiring complainants to articulate facts

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104 WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301 ("[T]he trend seems to be an embrace of the more rigid pleading requirements for conditions of mind that the second sentence of Rule 9(b) was designed to suppress.").

105 *Id.* ("The concept behind this portion of Rule 9(b) is an understanding that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery.").

106 *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 160 (2008) ("[T]o the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal. It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain . . . .").

107 *See, e.g.*, Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) ("We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, *i.e.*, that there was an official policy or a de facto custom which violated the Constitution.").

substantiating an alleged condition of the mind would be unreasonable.[108] In a system in which the right to petition courts for redress is constitutionally protected by the Petition Clause of the First Amendment,[109] the pleading standard must be one that avoids blocking potentially legitimate claims solely based on the inability of claimants to articulate supporting facts—such as those pertaining to conditions of the mind—that it would be nearly impossible for them to know.[110] As we have seen, Rule 9(b)'s second sentence was designed with this concern in mind, as was Rule 11(b)'s allowance of making "factual contentions [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[111] The *Iqbal* fact-substantiation interpretation of Rule 9(b) thus has pushed the system over the line that the Petition Clause was designed to protect, something that a reparative revision to Rule 9(b) could address.[112]

An additional consideration suggesting that imposing a heightened burden for condition-of-the-mind pleading is problematic from a policy perspective derived from the *Iqbal* Court's endorsement of the use of "judicial experience and common sense" to inform judges' plausibility assessments.[113] Research has shown that people make decisions based on various biases and categorical or stereotypical reasoning, particularly when they lack complete information about an individual or a situation.

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108 *See supra* Part II.

109 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

110 *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 29–30 (2009) [hereinafter Spencer, *Understanding Pleading Doctrine*] ("[R]equiring particularized pleading in these types of cases [e.g. discrimination cases] effectively prevents some claimants from seeking redress for what could be legitimate grievances. If the constitutional line is drawn at permitting procedural rules to bar 'baseless' claims that lack a 'reasonable basis'—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases." (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983))).

111 FED. R. CIV. P. 11(b)(3).

112 *See* Spencer, *Understanding Pleading Doctrine*, *supra* note 110, at 30 ("Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.").

113 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

Jerry Kang and his collaborators explained this phenomenon in the context of the 12(b)(6) motion to dismiss after *Iqbal*:

> [W]hen judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.
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> . . . .
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> Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas.[114]

The "judicial experience and common sense" that the Court empowered judges to rely upon in assessing claims necessarily complicates the now-imposed duty to offer facts substantiating

114 Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160, 1162 (2012).

conditions of the mind because pleaders will have to overcome the categorical schemas dominant within the judicial class.[115] Thus, we see Justice Kennedy himself providing exhibit number one: In *Iqbal*, he found insufficient facts to substantiate the allegation that Ashcroft was the "principal architect" of the discriminatory policy, "and that Mueller was 'instrumental' in adopting and executing it," but credited the allegation that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11" and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER . . . ."[116] Because both sets of allegations were articulated with the same level of specificity, it cannot be—as Justice Kennedy suggested—that the difference between them is that the former are conclusory and the latter are factual.[117] Rather, Justice Kennedy is applying a schema that tells him that it is plausible for the FBI Director to have directed the arrests and detention of thousands of Arab Muslim men, and for the FBI Director and the Attorney General to have "cleared" the policy of holding those men in restrictive conditions, while it is not plausible to believe—without substantiating facts—that the same

115 Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–98 ("Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites."); *Hearing*, *supra* note 52, at 13 ("Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts.").

116 *Iqbal*, 556 U.S. at 681.

117 *Id.* at 699 (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."); *see also* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 193 ("These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say 'Mr. Smith was the "principal architect" of the Chrysler building,' that would be a non-conclusory factual claim, as would the statement that 'Ms. Smith "approved" the design plans for the Chrysler building.' These statements are factual because they make claims about what transpired and who took certain actions.").

men designed and had a hand in the execution of a discriminatory arrest and detention policy.[118]

Because it is well documented that the use of categorical thinking and explicit and implicit biases infect all of us[119]—including judges[120]—and because among those biases are background assumptions about the behaviors and tendencies of members of various groups—whether those groups are public officials, racial,[121] ethnic,[122] or religious groups,[123]

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118 *See Iqbal*, 556 U.S. at 682 (indicating that because "Arab Muslims" were responsible for the September 11 attacks, an "obvious alternative explanation" for the arrests in question was Mueller's "nondiscriminatory intent" to detain aliens "who had potential connections to those who committed terrorist acts").

119 *See, e.g.*, JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx [https://perma.cc/WYQ3-4X27].

120 *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) ("Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued, how corporations are implicitly perceived, and how fundamental legal principles are unconsciously intertwined with group assumptions. This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009) (finding among judges a strong implicit bias favoring Caucasians over African Americans); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) ("I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.").

121 *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (showing biases connecting African-American faces with perceptions of the presence of a weapon).

122 *See, e.g.*, Levinson, Bennett & Hioki, *supra* note 120, at 89–92 (discussing implicit bias against Asians).

123 *See, e.g.*, *id.* at 110–11 ("The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant.").

cultural minorities,[124] or women[125]—allegations of discriminatory intent (for example) will run up against judicial presumptions of non-discrimination, which research has proven are unwarranted.[126] Nevertheless, because of the presumption of non-discrimination, a pleader will be under a particularly stringent burden to offer facts that dislodge judges from this presumption if it is hoped that they will accept an allegation of discrimination as plausible. As I have previously argued,

> [o]nce we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do. When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished.[127]

Freeing pleaders from the obligation to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible is necessary if we wish to give such claimants the opportunity to access a judicial process in which they can employ the tools of discovery to further substantiate and vindicate legitimate claims.

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124 Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

125 *See, e.g.*, Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005) (finding study participants shifted their valuation of the worth of various credentials to preference a male in selecting a police chief).

126 *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (showing that identical applicants with White-sounding versus Black-sounding names received fifty percent more callbacks for interviews).

127 Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7, at 1734.

More broadly, an interpretation of Rule 9(b) that obligates pleaders to substantiate condition-of-mind allegations with supporting facts is inconsistent with any sound theory of what worthwhile procedural rules should be designed to accomplish. If we want rules that promote the classic law enforcement objectives of general and specific deterrence, as well as the reification of abstract legal rules and the pacification of the governed that comes from its perception of systemic legitimacy and efficacy, then those rules must be—or at least must be seen to be—facilitative of efforts to vindicate transgressions of the law. No rule—or interpretation thereof—that by design shields many wrongdoers from culpability on the basis of the inability of their accusers to perform the metaphysical task of mind reading will succeed at permitting the translation of our laws as written into meaningful prohibitions that would-be transgressors will be inclined to respect.

IV. Restoring Rule 9(b)

We have seen that the *Iqbal* majority's interpretation of Rule 9(b)—and the lower courts' subsequent application of it—are inconsistent with the proper and original understanding of Rule 9(b). Further, we have seen that the more faithful understanding of the rule laid out in this Article has the benefit of reflecting a wiser approach to the kind of pleading obligations that are sensible to impose with respect to state-of-mind allegations. Rule 9(b) should thus be restored to its intended meaning, which can happen in one of two ways. The first would be for the Supreme Court to correct its error in *Iqbal* in a future case concerning the application of Rule 9(b). Lower courts, equipped with the insight it is hoped this Article will provide, could (and should) make an effort to interpret and apply Rule 9(b) in ways that honor the language, history, and intent behind it. However, because both of these responses seem unlikely, a second approach—a restorative amendment to Rule 9(b)—should be pursued.

To revise Rule 9(b) to eliminate *Iqbal*'s requirement that sufficiently alleging conditions of the mind requires the statement of well-pleaded facts that render the allegation plausible, the rule should be amended as follows:

> (b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the

> circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ <u>without setting forth the facts or circumstances from which the condition may be inferred</u>.

This revised language borrows directly from Order 19, Rule 22—the original source of the admonition that was promulgated as the second sentence of Rule 9(b) in 1938. It also has the benefit of directly and unambiguously addressing what has become problematic about lower court application of Rule 9(b)—the imposition of a requirement to state facts that provide the basis for condition-of-the-mind allegations.

An accompanying committee note for this revision would need to be crafted to ensure that there is no room for courts—including the Supreme Court—to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*. The following may be a possible approach:

> *Subdivision (b).* Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g.*, *Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in

> Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [*year*], defendant [*name of defendant 1*] conveyed all of defendant's real and personal property to defendant [*name of defendant 2*] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
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> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

Were Rule 9(b) to be revised in this manner, one might argue that it would entirely undo the *Iqbal* and *Twombly* regime, permitting conclusory legal allegations to receive credit that permits claims to proceed without having to demonstrate plausibility. Not so. Take *Twombly* itself, for instance. There the key allegation was that the defendants entered into an unlawful agreement to exclude certain players from the market; the Court's beef was that there were not sufficient facts to which one could point that would assure courts that that allegation was more than mere speculation.[128] The proposed revision of Rule 9(b) would not alter this result because the allegation of an unlawful agreement is not

[128] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

a condition of the mind that would be covered by Rule 9(b). Rather, it is an allegation pertaining to something that the defendants have done.[129] Thus, the Court would have still been able to hold (under its plausibility pleading approach) that the complaint fell short under Rule 8(a)(2).

Amended Rule 9(b) would comport with the result that the Court produced in *Swierkiewicz v. Sorema N.A.*,[130] a result the Court endorsed in *Twombly*. In *Swierkiewicz*, the plaintiff alleged that he had been discriminated against in employment based on his nationality but—in the district court's words—"ha[d] not adequately alleged circumstances that support an inference of discrimination."[131] The Court disagreed and found the complaint to be sufficient.[132] As the *Twombly* Court explained it, "Swierkiewicz's pleadings 'detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination'" and indicated that "[w]e reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[133] The proposed revision of Rule 9(b) simply honors the approach to pleading discrimination endorsed by the Court in *Swierkiewicz* and *Twombly*—specific facts substantiating an allegation of discrimination are not necessary; the sufficiency of a discrimination complaint will rest on whether the facts alleged beyond those pertaining to conditions of the mind plausibly show entitlement to relief. In the context of Swierkiewicz's discrimination claim, by alleging that he had been fired and replaced with a younger person of a different nationality, coupled with his allegations of negative age-based comments from his supervisor,[134] Swierkiewicz crafted a complaint that satisfied the Rule 8(a)(2) standard without having to provide the substantiation of

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129 *Id.* at 551 (reporting that the plaintiff alleged that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another").

130 534 U.S. 506 (2002).

131 *Id.* at 509.

132 *Id.* at 515.

133 *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz*, 534 U.S. at 508, 514).

134 *Swierkiewicz*, 534 U.S. at 508–09.

discriminatory intent that the defendants and lower courts had demanded.

That said, amending Rule 9(b) as proposed would alter the outcome in *Iqbal*. A key requirement for being able to state a claim against the government officials in *Iqbal* was that their conduct was done with discriminatory intent. Justice Kennedy declared that a bald allegation of discriminatory intent was not entitled to the assumption of truth because it was conclusory and not supported by well-pleaded facts.[135] He reached this conclusion by interpreting Rule 9(b)'s second sentence as imposing a plausibility requirement as described above.[136] However, Justice Kennedy acknowledged that a rule obligating the Court to accept an allegation of discriminatory intent as true would require a different result: "Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[137] Allegations of discriminatory intent, like all allegations pertaining to a defendant's state of mind, are factual contentions because they pertain to experienced reality rather than to the legal consequences that flow therefrom. Thus, once conditions of the mind are permitted to be simply stated under revised Rule 9(b), those allegations of fact will be entitled to benefit from the accepted assumption-of-truth rule that the Court continues to endorse.[138]

Similarly, revised Rule 9(b) would undo the position that the circuit courts have taken in this field, abrogating the decisions in which they have dismissed claims based on a determination that substantiating facts must

135 Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) ("These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy '"because of," not merely "in spite of," its adverse effects upon an identifiable group.' As such, the allegations are conclusory and not entitled to be assumed true." (citations omitted)).

136 *See supra* Section I.A.

137 *Iqbal*, 556 U.S. at 686. Were there to be an interest in providing a greater degree of protection against litigation for defendants who are potentially entitled to qualified immunity (as may have characterized the defendants in *Iqbal*), it would be appropriate to vindicate that interest through an amendment to the Federal Rules (or via a legislative enactment) tailored to such cases, not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b).

138 *Id.* at 678 (referring to "the tenet that a court must accept as true all of the allegations contained in a complaint"); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation omitted)).

be offered to support allegations pertaining to conditions of the mind. This, of course, is by design and is the principal purpose behind the revision. Thus, in a case like *Biro*,[139] in which the Sixth Circuit required the plaintiff to offer facts substantiating the allegation of actual malice,[140] the result would be different. There, the plaintiff alleged as follows regarding actual malice:

> Biro generally alleged that each of the New Yorker defendants "either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them," and that they "acted with actual malice, or in reckless disregard of the truth, or both."[141]

Malice and knowledge are conditions of the mind protected from particularized pleading by Rule 9(b). As revised, Rule 9(b) would treat the quoted allegations as sufficient. As in *Iqbal*, crediting these allegations as true would result in rendering the complaint sufficient under Rule 8(a)(2). Indeed, there are certainly a great many cases in which crediting allegations of condition of the mind as true will render them impervious to attack under Rule 8(a)(2). If such a result is not desired, then making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue.[142]

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139 807 F.3d 541 (6th Cir. 2015).

140 *Id.* at 542.

141 *Id.* at 543.

142 Codifying the *Iqbal* interpretation of Rule 9(b)'s second sentence could be achieved by revising it to read as follows: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ by setting forth the circumstances from which the condition may be inferred." Codification might also be achieved by deleting the second sentence of Rule 9(b).

CONCLUSION

Revising promulgated federal rules through judicial decision making is a perilous[143] and illegitimate[144] business. After *Twombly* and *Iqbal*, one cannot know what Rule 8(a)(2)'s "short and plain statement of the claim showing entitlement to relief" is, nor can one know what Rule 9(b) means when it permits a party to allege conditions of the mind "generally," without consulting the judicial interpretation of those rules by courts, notwithstanding the divergence of the latter from the text of the former.[145] If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another,[146] then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation. Stated differently, given that the *Iqbal* interpretation of Rule 9(b) and that which it has spawned among lower courts is manifestly

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143 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting) ("The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.").

144 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity . . . 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation'" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))).

145 My view, as expressed extensively in previous work, is that the Court's interpretation of Rule 8(a)(2)—like its interpretation of Rule 9(b)—diverges from the meaning supported by all relevant textual and historical evidence. *See* Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7; Spencer, *Plausibility Pleading*, *supra* note 7. Restoring the intended meaning of Rule 8(a)(2) could be achieved by revising it as follows: "a short and plain statement of the claim ~~showing that~~ articulating the pleader's grounds ~~is entitled to~~ for relief . . . ." Other approaches have been put forward as well. *See, e.g.*, Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 979–83 (2012) (providing multiple suggestions for revising Rule 8(a)(2) to restore it to its pre-*Twombly* meaning). Unfortunately, it appears that ship has sailed. Hopefully, however, there remains the possibility that the misinterpretation of Rule 9(b) can be repaired.

146 *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80–81 (2006) ("[T]he rich context of common law procedural rules . . . function in conjunction with the 1938 Rules to determine the actual function of the federal district courts . . . . These Other Federal Rules of Civil Procedure . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.").

counter to the intended meaning of Rule 9(b) and to all available textual evidence, the rulemakers have a duty *to at least consider* whether the rule should be revised in a way that better tracks how courts interpret and apply the rule, or be revised to correct the errant construction. Doing nothing, though, should not be an option—unless we[147] want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice.[148] None of us should want that, although I fear that doing nothing is precisely the most likely thing that we will do.[149]

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147 I currently serve as a member of the Judicial Conference Advisory Committee on Civil Rules, which bears responsibility for considering proposals to amend the Federal Rules of Civil Procedure. The views expressed in this piece are my own and do not reflect the position of the Committee or its members.

148 *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369 (2010) ("[P]rocedure's central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure's overarching, unified goal is to facilitate and validate the substantive outcomes desired by society's dominant interests; procedure's veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social out-groups and ensure desired results.").

149 This sentiment arises from my experience as a member of the Rules Committee. Whether it be due to the prioritization that necessarily arises in the context of limited deliberative capacity and bandwidth, the institutional conservatism that comes from being a committee dominated by members of the judiciary, or the awkwardness associated with rebuffing the work of the Court (and the Chief Justice) under whose aegis we operate, the Rules Committee in modern times has shied away from undertaking liberalizing, access-promoting reforms in response to interpretive drift in a restrictive direction. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 927 (2020) ("The second theme—institutional actor timidity—demonstrates how the Committee is quite timid of its role in the Rules Enabling Act process. That process requires the work of other institutional actors, and one of the most fraught relationships is between the Supreme Court and the Committee. After all, the Committee's members are appointed by the Chief Justice, the work of the Committee is delegated from the Court to the Committee, and the Court is part of the process as its approval is required for an amendment to be adopted."). As Charles Clark pointed out long ago, it is not surprising that the judiciary will constantly turn back to restrictive pleading, but it is our job to periodically press for corrective measures that will maintain the access-facilitating ethos that the rules were originally intended to institutionalize. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1941, 1942, 1943) ("With the development of code pleading, from the Field Code first adopted in New York in 1848 to the present time, the emphasis was shifted from the detailed issue-pleading of the common law to a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case. Notwithstanding this history, however, courts recurrently turn back to the course of requiring details. Such a return, on the whole, is not surprising, for all rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment. Moreover, the pressure from one side to force admissions from the opponent and the court's desire to hurry up adjudication and avoid lengthy trials tend somewhat to push in this same direction. It is

necessary, however, always to bear in mind that nowadays we are not willing to enforce harsh rules or to sacrifice a party for his lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions.").

TAB 12

1159 ## 12. Report of Multidistrict Litigation Subcommittee

1160 The MDL Subcommittee has met and developed an additional approach to the issues it is
1161 addressing, and also has benefitted from input from the bench and bar, including the following
1162 events:

1163 Dec. 3, 2021 -- Lawyers for Civil Justice Membership meeting, Nashville, TN

1164 Feb. 13, 2022 -- American Association for Justice Convention, Palm Desert, CA

1165 March 7-10, 2022 -- Emory Law School Institute for Complex Litigation and Mass Claims
1166 Conference, Miami, FL

1167 On Nov. 2, 2021, the Subcommittee met by Teams. Notes of this online meeting are
1168 included in this agenda book.

1169 After the Nov. 2 online meeting, Prof. Marcus prepared a Reporter's Sketch of a reoriented
1170 rule-amendment approach to the issues presently under study, which focuses on early exchange of
1171 information about claims, appointment of leadership or liaison counsel to manage the action,
1172 sequence of decision of issues in the cases, and a schedule for pretrial conference to facilitate
1173 judicial oversight of the proceeding.

1174 Since the agenda book materials were due before the Subcommittee had the benefit of all
1175 three of the input-gathering events mentioned above, a report on what those events presented
1176 cannot be included in the agenda book. The Subcommittee hopes to hold an online meeting after
1177 the Emory conference in March and before the Committee's March 29 meeting. At the March 29
1178 meeting, it is hoped that a further report on reactions to the ongoing study can be provided to the
1179 full Committee, and members of the Subcommittee can discuss their current views.

1180 Accordingly, this report presents (in Part I) the Reporters' Sketch developed after the Nov.
1181 2 online meeting, which the Subcommittee has not yet had a chance to discuss. In Part II, the report
1182 presents the sketch that was before the Subcommittee during the Nov. 2 meeting. Part II also
1183 contains some very preliminary draft Committee Notes.

1184 Before turning to these sketches, it is important to emphasize that the question whether to
1185 propose any rule changes for MDL proceedings remains unresolved. And if rule amendments do
1186 move forward, there remain many open questions (as suggested partly by the many footnotes in
1187 this report). Without yet having received the input expected at the Miami conference identified
1188 above, it nevertheless seems useful to identify a number of topics that may call for further attention,
1189 including:

1190 (a) the role of the court in making interim designations of leadership/liaison counsel in
1191 advance of the Rule 26(f) conference (as part of the court's overall management of the
1192 proceeding);

1193 (b) the process for final selection of leadership/liaison counsel for the plaintiff and/or the
1194 defendant side (making clear that neither "side" has a role in selection of leadership for the
1195 other "side");

1196 (c) the process for creation of a common benefit fund, if any, to compensate
1197 leadership/liaison counsel for its work under the court's direction;

1198 (d) the role of early exchange of information (primarily as a management tool for the court
1199 in organizing the litigation, including perhaps in selection of leadership/liaison counsel);
1200 and

1201 (e) whether additional topics should be added for discussion during the Rule 26(f)
1202 conference and inclusion in the Rule 16(b) order (a partial list of examples includes waiver
1203 of formal service of process, possible direct filing in the transferee court and ancillary
1204 issues presented by such filing, possible tolling agreements or creation of an inactive
1205 docket or registry, and preservation of evidence).

1206 This listing of topics will evolve over time. It should be emphasized, however, that the main goal
1207 is to provide guidance while also preserving the transferee court's flexibility in managing these
1208 proceedings.

1209 Reactions from the full Committee are welcome.

1210 I. Post Nov. 2 Revised Approach
1211
1212 The following is a Reporter's Sketch of another possible rule-amendment approach.
1213 Building on discussion during the Nov. 2 online meeting, it takes a more aggressive approach to
1214 the Rule 26(f) topics, largely to provide the court with needed information about management of
1215 the MDL proceedings from the outset. Possible issues are addressed in footnotes.

1216 **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

1217 * * * * *

1218 **(f) Conference of the Parties; Planning for Discovery.**

1219 * * * * *

1220 **(3)** ***Discovery [<u>and Case Management</u>] Plan***.[1] A discovery [<u>and case</u>
1221 <u>management</u>] plan must state the parties' views and proposals on:

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[1] The title "case management" might be added here, but that may be overloading the great majority of cases in which Rule 26(f) requires only a discovery plan. On the other hand, it does seem that scheduling orders under Rule 16(b) go beyond purely discovery issues, including the time to join additional parties, amending pleadings, and hearing summary judgment motions. Rule 16(b)(3)(A) requires the court to limit the time for these activities, and in that sense is about scheduling, but these topics go beyond discovery. At least for MDL proceedings, hearing from the parties about additional topics seems useful.

1222 * * * * *

1223 1224 1225 **(F)** In actions transferred for coordinated pretrial proceedings under 28 U.S.C. § 1407 [a case management plan, including]:

1226 1227 1228 **(i)** whether the parties should be directed to exchange information about their claims and defenses at an early point in the proceedings;

1229 1230 1231 1232 1233 1234 1235 **(ii)** whether [leadership] {lead}[2] counsel for plaintiffs should be appointed [and whether liaison defense counsel should be appointed],[3] the process for such appointments, and the responsibilities of such appointed counsel, [and whether common benefit funds should be created to support the work of such appointed counsel];[4]

1236 1237 1238 1239 **(iii)** whether the court should adopt a schedule for sequencing discovery, deciding disputed legal issues, or any other order under Rule 16(c)(2)(A), (E), (F), (I), or (L);[5]

---

[2] During the Nov. 2 meeting, there was some discussion of whether a new term -- leadership counsel -- should be used in place of the familiar term lead counsel. One reason for a new term is that in the MDL setting it is often desirable for the court to adopt a specialized method of selecting counsel, appoint many lawyers to various positions, and (perhaps) enter a rather detailed order prescribing the responsibilities of designated counsel. In addition, it may be that "term limits" are sometimes a desirable feature of such orders. It is not clear that other lead counsel appointments involve comparable provisions.

[3] During the Nov. 2 meeting, there was no substantial discussion of the role of the court in appointing liaison counsel in multi-defendant MDL proceedings. Because such appointments may be important in some such proceedings, they could be noted here. If they might be in order, it would seem that the court could profit from hearing the parties' views on whether and how to make such appointments, and what authority/limitations might be included.

[4] The subcommittee has discussed some of the points made in Judge Chhabria's order in the Roundup MDL, but not the corresponding possibility that the court might enter an order providing reimbursement for expenses incurred by liaison counsel for the defendants. There is authority supporting such an order. See In re San Juan Dupont Plaza Hotel Fire Litigation, 93 F.3d 1 (1st Cir. 1996), described in a footnote to the notes of the Nov. 2 meeting.

[5] This is a first effort to call for discussion during the 26(f) meeting of a constellation of issues that the court might address early in MDL proceedings. It seemed useful to tie the description of possible issues to specific provisions of Rule 16(c)(2). If of use, the Rule 16(c)(2) provisions mentioned above are:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

1240 **(iv)** a schedule for pretrial conferences to enable the court
1241 to manage the proceedings [including possible
1242 resolution of some or all claims].[6] [7]

1243 **(G~~F~~)** any other orders that the court should issue under Rule 26(c)
1244 or under Rule 16(b) and (c).

1245 A Committee Note could elaborate on the many topics that it is valuable for the parties to
1246 call to the judge's attention. It may be that the sketch above includes unnecessary detail. Ideally,
1247 lawyers involved in MDL proceedings would be conversant enough with their management to
1248 make detailed direction unnecessary. On the other hand, to the extent there are "new entrants" into
1249 the field it may be useful to provide more detail.

1250 Revised Rule 16(b) approach

1251 **Rule 16. Pretrial Conferences; Scheduling; Management**

1252 * * * * *

1253 ***(b) Scheduling and Case Management.***

1254 * * * * *

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems.

It bears noting that one could consider (A) above somewhat related to the "vetting" idea that continues to be emphasized by some who favor rule amendments. In addition, it bears noting that reference to (I) may be premature at the 26(f) stage, but might also prompt useful attention to including provisions in an order appointing leadership counsel that provide some potential for court oversight.

[6] This final prompt may be unnecessary, but since it is likely often for the court to establish a schedule for pretrial conferences it may also be useful for the parties to offer their views on how those should be handled.

[7] The bracketed language introduces the possibility of judicial oversight, or at least reporting to the judge, about potential settlements. It may be premature to raise this possibility so early in the proceedings.

1255 **(3)** ***Contents of the Order.***

1256 * * * * *

1257 **(B)** *Permitted Contents.*

1258 * * * * *

1259 (vii) include an order under Rule 16(b)(5); and

1260 (viii) include other appropriate matters.

1261 * * * * *

1262 **(5)** ***Multidistrict Litigation***. In addition to complying with Rules
1263 16(b)(1) and 16(b)(3), a court managing actions transferred for
1264 coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407
1265 should consider [appointing interim plaintiffs' [leadership] {lead}
1266 counsel prior to the Rule 26(f) conference and][8] entering an order
1267 about the following at an early pretrial conference [after receiving
1268 the parties' Rule 26(f) case management plan][9]:

1269 **(A)** directing the parties to exchange information about their
1270 claims and defenses at an early point in the proceedings;

1271 **(B)** appointing plaintiffs' [leadership] {lead} counsel with
1272 appropriate[10] specifics including:[11]

1273 **(i)** the responsibilities and structure of [leadership] {lead}
1274 counsel;

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[8] On Nov. 2, there was some discussion of "free lancing" efforts among plaintiff counsel in advance of meeting with defense counsel and before the initial appearance before the court. That presents something of a chicken/egg problem -- who represents the plaintiffs at the initial Rule 26(f) event? The idea of interim leadership counsel here is different from interim class counsel under Rule 23(g), and the sole or main role here is to manage the expanded Rule 26(f) responsibilities for the plaintiff side. Presumably (as with interim class counsel appointments) the lawyers can find a way to approach the court about this issue. Judicial involvement may be preferable to a free-for-all effort by competing counsel.

[9] It would seem to go without saying that the court ought first receive the Rule 26(f) plan before entering the orders described below.

[10] The Style Consultants may object to this word as unnecessary, but it seems useful here.

[11] There has been considerable discussion of the desirability of relatively comprehensive and specific orders appointing lead or leadership counsel. The term "appropriate specifics" is designed to encourage courts to develop such orders up front.

1275 [**(ii)** [the duration of the appointment];[12]

1276 [**(iii)** any limitations on the activities of other plaintiff
1277 counsel];[13]

1278 **(iv)** methods for compensating plaintiffs' [leadership]
1279 {lead} counsel;

1280 **(v)** directing plaintiffs' [leadership] {lead] counsel to make
1281 regular reports to the court -- in case management
1282 conferences or otherwise -- about the progress and prospects
1283 for resolution[14] of the litigation;

1284 **[(C)** appointing liaison counsel for defendants, if appropriate, and
1285 addressing methods for compensating liaison counsel for
1286 expenses incurred in that role;][15]

1287 **(D)** adopting a case management order addressing:

1288 **(i)** sequencing of discovery;

1289 **(ii)** a schedule for deciding disputed legal issues; and

1290 **(iii)** any other order under Rule 16(c)(2), including Rule
1291 16(c)(2)(A), (E), (F), (I), or (L).[16]

1292 Because this is a new approach that the Subcommittee has not yet had a chance to discuss,
1293 no attempt has been made to draft Committee Notes that might accompany it. The following
1294 section presents what was before the Subcommittee on Nov. 2, which does include an initial
1295 attempt at Committee Notes.

[12] This bracketed phrase highlights the possibility of appointment for a fixed term rather than an open-ended appointment.

[13] It remains unclear whether this provision is useful.

[14] Is this reference to "resolution" sufficient to include the concept of reports about settlement possibilities? Note that Rule 16(c)(2)(I) refers to "settling the case."

[15] It remains unclear whether it is useful to raise this issue in the rule. One reason might be to provide authority also for the creation of a common fund for defense outlays.

[16] This provision largely reproduces the proposed addition to Rule 26(f). Given the prod in that rule, it may well be unnecessary to include a parallel provision here. On the other hand, for judges new to the MDL assignment it may be useful to replicate the 26(f) direction here. It should be clear that calling attention to these provisions in Rule 16(c) in no way limits the court's authority to enter orders addressing other matters discussed in Rule 16(c)(2).

1296 II. Materials for Nov. 2 Meeting

1297 The following presents the materials before the Subcommittee during its Nov. 2 meeting.
1298 It mainly tracks what was on pp. 168-72 of the agenda book for the Oct. 5 full Committee meeting
1299 regarding the "low impact" approach to including provisions regarding MDL proceedings in the
1300 Civil Rules. It also includes some rough draft Committee Note language that can be refined and
1301 supplemented as the draft rule provisions are refined.

1302 Rule 16(b) approach

1303 **Rule 16. Pretrial Conferences; Scheduling; Management**

1304 * * * * *

1305 **(b) Scheduling and Case Management.**

1306 * * * * *

1307 ***(3) Contents of the Order.***

1308 * * * * *

1309 **(B)** *Permitted Contents.*

1310 * * * * *

1311 (vii) include an order under Rule 16(b)(5); and

1312 (viii) include other appropriate matters.

1313 * * * * *

1314

1315 **(5)** ***Multidistrict Litigation***. In addition to complying with Rules
1316 16(b)(1) and 16(b)(3), a court managing actions[17] transferred for
1317 coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407
1318 should consider entering an order about the following at an early
1319 pretrial conference:

1320 **(A)** directing the parties to exchange basic information about
1321 their claims and defenses at an early point in the
1322 proceedings;[18]

[17] The draft before the Advisory Committee referred to "cases," but since § 1407(a) refers to "actions" it seems better to use that word.

1323 **(B)** appointing leadership counsel[19] who can fairly and
1324 adequately discharge their duties in representing plaintiffs'
1325 interests, and including specifics on the responsibilities of
1326 leadership counsel, [specifying that leadership counsel must
1327 throughout the litigation fairly and adequately discharge the
1328 responsibilities designated by the court],[20] [and stating any
1329 limitations on the activities of other plaintiff counsel;[21] [22]

1330 **(C)** addressing methods for compensating leadership counsel
1331 [for their efforts that provide common benefits to claimants
1332 in the litigation];[23]

---

[18] This provision refers to both claims and defenses because we have been informed 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.

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

[20] 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.

[21] This provision does not discuss appointment of lead or liaison counsel for defendants, though that may be vital in multi-defendant situations.

[22] 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.

[23] 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.

1333 **(D)** providing for leadership counsel to make regular reports to
1334 the court -- in case management conferences or otherwise --
1335 about the progress of the litigation;

1336 **[(E)** providing for reports to the court regarding any settlement of
1337 [multiple] {a substantial number of} [all] individual cases
1338 pending before the court;][24] and

1339 **[(F)** providing a method for the court to give notice of its
1340 assessment of the fairness of the process that led to any
1341 proposed settlement subject to Rule 16(b)(5)(E) to plaintiffs
1342 potentially affected by that settlement].[25]

1343 **Draft Committee Note**

1344 Rule 16(b) is amended to include provisions that often prove important in MDL
1345 proceedings. Since approximately 2000, MDL proceedings -- particularly those characterized as
1346 mass tort proceedings -- have come to include increasing volumes of actions. By some counts,
1347 actions subject to MDL transfer orders constitute one third or more of all civil actions in the federal

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[24] 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).

[25] (F) is retained in brackets. But 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.

1348 court system. Given this prominence, some recognition in the Civil Rules of the particular
1349 challenges of these proceedings is warranted.

1350 The *Manual for Complex Litigation* has for decades provided courts and lawyers with
1351 guidance on handling aggregate proceedings, including MDL proceedings. But the last edition of
1352 the *Manual* appeared in 2004, and there have been significant developments in this form of
1353 litigation since then. Meanwhile, in part due to the growing volume and importance MDL
1354 proceedings, there have been efforts to expand the number of judges and lawyers involved in such
1355 proceedings; guideposts in the rules themselves seem in order for judges and lawyers first
1356 encountering this form of litigation.

1357 Including reference to MDL proceedings in the rule may also serve to counteract concerns
1358 that these proceedings somehow exist "outside the rules." That is, of course, not correct. Instead,
1359 they operate according to the rules, but often MDL proceedings present significant challenges for
1360 judicial case management. Thus, Rule 16 appears the appropriate place to recognize and address
1361 the distinctive challenges of these proceedings in the rules because it authorizes adapting the
1362 ordinary procedures to extraordinary situations.

1363 More generally, Rule 16(b) has evolved beyond scheduling and come to include case
1364 management more generally. Accordingly, the amendment adds recognition of that more general
1365 activity to the title of this subdivision.

1366 **Subdivision (5).** This new subdivision is added to Rule 16(b) to focus on the particular
1367 needs of MDL proceedings. Though it is possible that some non-MDL proceedings will benefit
1368 from some of these methods, the subdivision calls for consideration of the specific methods only
1369 in actions transferred for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407.

1370 The amended rule directs that the court should consider the identified measures. It thus
1371 recognizes that various provisions appropriate in some MDL proceedings are not suitable to others;
1372 experienced transferee judges have emphasized the need for flexibility and creativity in crafting
1373 appropriate regimes for proceedings of various types and presenting different management
1374 challenges.

1375 The amended rule also directs that these measures be considered at "an early" pretrial
1376 conference. It may be that some are ripe for action at the first pretrial conference. But in many
1377 MDL proceedings courts schedule a series of pretrial conferences, and the best way to address
1378 certain matters may become clear only over time. The rule does not call for unduly abrupt action.

1379 *Subdivision (5)(A)* builds on experience with plaintiff fact sheets and defendant fact sheets
1380 and, more recently, census methods. These various methods are designed to achieve a number of
1381 objectives, including providing the parties and the court with significant details about plaintiffs'
1382 experiences with the products or services involved in the actions, and the information available
1383 from defendants' records about their products and sometimes whether and when specific plaintiffs
1384 received these products. Thus, the rule refers to "basic information" without attempting to be too
1385 precise about what information would be useful in a given MDL. It also recognizes that this

1386 information may bear on "claims and defenses," so that in given instances this early exchange
1387 could shed light promptly on some of the defenses raised.

1388 The specifics of such information exchange in any MDL depend on the circumstances of
1389 that MDL, and ordinarily are most effectively addressed in the first instance by counsel.
1390 Accordingly, Rule 26(f)(3) is also amended to add a new Rule 26(f)(3)(F) calling for counsel to
1391 address and report to the court its views on such early information exchange.

1392 *Subdivision (5)(B)* calls for the court to consider appointing leadership counsel on the
1393 plaintiff side at an early point. When only a small number of counsel are involved, such
1394 appointment will not be necessary, but often the number of counsel on the plaintiff side would
1395 make the litigation unwieldy.[26]

1396 The rule urges that the court consider including "specifics on the responsibilities" of
1397 leadership counsel in the initial appointment order. Some reports indicate that providing clear and
1398 detailed direction early in the proceedings can avoid problems that may arise later on. In some
1399 instances, it may be that courts that initially relied on general orders found them inadequate to
1400 address challenges that arose as the proceeding matured.

1401 The rule says that the court should select leadership counsel who can "fairly and adequately
1402 discharge" its duties under the court's order of appointment. On occasion, judges presiding over
1403 MDL proceedings have found the criteria for appointment of class counsel under Rule 23(g)(1)(A)
1404 to provide useful guidance in making appointment of leadership counsel. Unlike class actions,
1405 however, leadership counsel does not "represent" plaintiffs before the court who have their own
1406 retained counsel. But because it often happens that the actions of leadership counsel play a
1407 significant role in the disposition the claims of plaintiffs it does not directly represent -- particularly
1408 in regard to settlement -- early attention to the ability of leadership counsel to protect the interests
1409 of all plaintiffs is important.[27]

1410 [This point is driven home by the further focus on whether leadership counsel "fairly and
1411 adequately discharge the responsibilities designated by the court." Subdivision (5)(D) below calls
1412 for leadership counsel to provide the court with regular reports on the progress of the litigation.
1413 Those reports provide the court one method of supervising this feature of the litigation.]

1414 [Subdivision (5)(B) also calls the court's attention to the need often to place restrictions on
1415 the actions plaintiffs counsel not included in leadership may take for their clients. The reason for
1416 appointing leadership is that, without such an appointment, the proceedings may become unwieldy.
1417 But if all plaintiff counsel remain free to initiate discovery or file motions without regard to the
1418 plans of leadership counsel, those actions could frustrate the efforts of leadership counsel or derail
1419 the management plan of the court.]

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[26] The rule does not address the appointment of liaison counsel when there are many defendants. That does not seem the focus of this rulemaking effort. But it might be appropriate to say in the Note that this rule amendment is not somehow undercutting that longstanding practice when appropriate.

[27] Is this effort to address the issue of "representation" of plaintiffs who have their own retained counsel sufficient?

1420 *Subdivision 5(C)* calls attention to a topic often referred to as "common benefit funds."
1421 These funds are designed to provide a source of suitable compensation for leadership counsel for
1422 the additional responsibilities it undertakes under the court's appointment order. The authority to
1423 create such funds has long been recognized by case law. The court retains ultimate authority to
1424 determine the disposition of these funds.

1425 [In allocating payments from common benefit funds, a key consideration is the benefit
1426 leadership counsel conferred on plaintiffs in the proceeding. When the litigation activities of
1427 leadership counsel produce outstanding results for plaintiffs -- via settlement or judgment -- it
1428 deserves outstanding compensation. But on occasion it may appear that results obtained by
1429 plaintiffs -- particularly through settlement -- were not primarily based on the work of leadership
1430 counsel. One example of such a circumstance might be when there is parallel state-court litigation
1431 about the same subject matter (perhaps after aggregation before the state court), and the state-court
1432 litigation leads to judgments or settlement proposals that are the main source of benefits to
1433 plaintiffs in those cases, and perhaps also to plaintiffs in other states or the federal MDL
1434 proceedings. No general rule can define when such circumstances might exist.]

1435 *Subdivision 5(D)* endorses something that has often proved useful in complex litigation --
1436 providing the court regular reports about the progress of the litigation. These reports may be at
1437 regular pretrial conferences or handled in another manner. They enable the court to engage in
1438 appropriate case management, and also to monitor the performance of leadership counsel. In some
1439 cases, the court may provide in the initial appointment order that reappointment is required at
1440 regular intervals (perhaps annually), and the process of reappointment may provide a suitable
1441 moment for evaluating the actual performance of leadership counsel.

1442 [*Subdivision 5(E)* suggests that the reporting measures endorsed by Subdivision 5(C) be
1443 keyed particularly to prospects for settlement and actual settlement proposals. Settlement is often
1444 the outcome of MDL proceedings, and it is appropriate for the court to have a role in regard to this
1445 endgame of the litigation.]

1446 [*Subdivision 5(F)* carries the suggestion of Subdivision 5(E) farther by inviting a provision
1447 in the order appointing leadership counsel that permits the court to evaluate the fairness of the
1448 process used to achieve a proposed settlement. The court has no authority to "approve" or
1449 "disapprove" a proposed settlement, as in a class action, but due to its familiarity with the conduct
1450 of the litigation the court may be able to reach a conclusion about the process by which the
1451 settlement was reached. One method for giving effect to that conclusion would be for the court to
1452 communicate its views to plaintiffs considering the settlement. They would remain entirely free to
1453 accept or reject the settlement, but could benefit from the court's informed assessment of it.]

The Rule 26(f) corollary

Rule 26. Duty to Disclose; General Provisions Regarding Discovery

* * * * *

(f) Conference of the Parties; Planning for Discovery.

* * * * *

(3) ***Discovery Plan***. A discovery plan must state the parties' views and proposals on:

* * * * *

(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;

(G~~F~~) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

Draft Committee Note

Rule 26(f)(3) is amended to add a new subdivision (F) that is designed to provide the court with needed information to consider an order under new Rule 16(b)(5)(A) calling for early exchange of basic information about the claims and defenses in MDL proceedings. Because the specific arrangements in any MDL depend greatly on the specifics of the litigation, it is best that the discussion of these topics begin with counsel in order to provide the court with needed grounding to address the early exchange of information. Rue 26(f)(3)(F) requires the parties to discuss this possibility in every MDL, but it does not require that such information exchange occur in every MDL. The needs of any particular MDL should be determined with reference to the specific issues it presents.

As noted above, the Subcommittee hopes to be able to supplement this written report on March 29 with further information about the various conferences attended since the last full Committee meeting. Either during the March 29 Committee meeting or otherwise, the Subcommittee invites reactions.

Notes of Zoom meeting
MDL Subcommittee
Advisory Committee on Civil Rules
Nov. 2, 2021

On Nov. 2, 2021, the MDL Subcommittee on Civil Rules held a meeting via Zoom. Participating were Judge Robin Rosenberg (Subcommittee Chair). Judge Robert Dow (Advisory Committee Chair), Judge David Proctor, Joseph Sellers, Ariana Tadler, Helen Witt, and David Burman. Professor Richard Marcus participated as Reporter of the Subcommittee, and Julie Wilson represented the Administrative Office Rules Office.

The meeting was introduced as designed to delve into the proposed approach to amending Rules 16(b) and 26(f) that was included in the agenda book for the October Advisory Committee meeting. Professor Marcus had prepared a new version of that approach based on prior Subcommittee discussions, and one goal of the day was to review this proposal in detail and consider whether it held sufficient promise to warrant a further drafting effort.

Meanwhile, using the version of this approach already included in the public agenda book for the October meeting, the Subcommittee can begin to receive reactions from interested members of the bar. Already, Lawyers for Civil Justice has invited representatives of the Subcommittee to an event in Nashville, TN, in early December to hear its thoughts. The American Association for Justice is holding a convention in mid February and may be able to organize a session for Subcommittee members during that event. It is likely that LCJ and AAJ would present what might be called the "defense" and the "plaintiff" sides of these issues.

Discussions have also begun with Professor Jaime Dodge of Emory about the possibility of an Emory-organized conference that would include lawyers from both sides of the "v" and also judges. Ideally, if that conference can be organized it can occur before the Advisory Committee's meeting on March 29, 2022.

All of these events promise to provide invaluable information for the Subcommittee as it grapples with these issues. Among other things, this input will shed light on whether rule changes are warranted. No decision has been made on that question.

This discussion should sharpen the focus on whether rulemaking is warranted, however, by considering carefully what a rule amendment might look like. For this meeting, then, the approach would adhere closely to the redraft circulated by Prof. Marcus.

The discussion began with the title to Rule 16(b). In keeping with the introduction of an array of considerations that go beyond scheduling, the proposal to change the tag line of the rule to "Scheduling and Case Management" received consensus support.

An initial reaction to the overall orientation of the proposed 16(b)/26(f) approach was that the "heavy lifting" might fit better into Rule 26(f), to ensure that the lawyers carefully address these topics before their first pretrial conference with the court, and that they fully apprise the court of their views on the pertinent subjects right up front. So one might actually expand the Rule 26(f)

amendment proposal to include additional topics, such as appointment of leadership, creation of a common fund, sequencing of discovery and decision-making (including whether potentially dispositive issues like preemption should be slated for early resolution) and other like matter.

This idea prompted concern about whether it was appropriate to involve defense counsel in discussion of such things as appointment of leadership counsel for plaintiffs and common benefit fund arrangements for plaintiffs' leadership counsel. The reality presently is that sometimes jockeying among potential plaintiff leadership counsel can prompt outreach by some on the plaintiff side to defense counsel. So that in some senses it may happen sometimes that defense counsel is involved, though somewhat on the sidelines. Whether that activity should be encouraged, or mandated by rule, is debatable. One goal of prospective plaintiff leadership counsel who reaches out to defense counsel might be to get a leg up in the competition for appointment. Sticking to the Rule 16(b) approach emphasizes that the decision is for the judge. There may be slates of plaintiff counsel, but ultimately it is up to the judge to decide on the preferable structure. It is dubious for a rule to direct that defense counsel be involved in this activity.

A reaction was that, for the judge, it is highly important that counsel sort these things out before the court has to take them up. Experience does not indicate that defense counsel asks to be heard on the selection or appointment of leadership counsel for plaintiffs, so that may not be a significant worry. But ensuring that plaintiff counsel addresses these issues carefully up front is valuable to the judge. Among other things, it can reduce the risk that some people get left out.

Another point that may warrant attention is that appointment of leadership or liaison counsel may be important on the defense side. If there is a large cast of defendants, the action may be unmanageable (even with a well-organized plaintiff side) owing to cacophony on the defense side. This draft does not address that concern in any detail.

Another member reflected on the evolution of the Rule 16(b)/26(f) approach and recalled that it had first come to mind in early conferences with experienced counsel and judges, but later was moved to the sidelines by other issues. The basic point is that this is a specialized case management problem (of the sort Rule 16 addresses) in MDL proceedings. Of course, it's not necessary for every MDL, and may be important in litigation outside the MDL sphere.

A judge remarked that it is very important to get the parties' input at the outset, something that Rule 26(f) can provide. In terms of scheduling -- the current focus of Rule 16(b) -- one example of important input is whether certain central issues should be teed up for early resolution. Also important is whether there are some unique features to this MDL that need to be considered from the outset. There is a very significant scheduling aspect to these matters that looms much larger in some MDLs than in ordinary litigation.

Another thought was expressed: The draft Rule 26(f) amendment idea calls for discussion of information exchange. If some parties think there is a basic issue that should be resolved early, perhaps the defendant regarding something like preemption, won't that prompt them to raise the issue even if the rule does not say they are supposed to do so? Going forward, the idea was that the question how best to address these issues in the rules would remain before the Subcommittee.

Discussion turned to the details of the draft Rule 16(b)(5). An initial reaction was that it should be entitled "Multidistrict Litigation" rather than "MDL Cases." That received consensus support.

Regarding the content of the introductory paragraph, there was consensus support also for a rule that says the court "should consider" the measures identified at "an early pretrial conference." That does not require the court to do anything, and saying "an early pretrial conference" recognizes that it may be premature to act on some topics at the first pretrial conference.

Proposed (A) would call for exchange of "basic information" at "an early point." One thought was that perhaps this should say "a summary" instead of "basic information." A reaction to that idea was that the PFS and census practice we have heard about is a good deal more detailed than a summary. Indeed, it may include considerable detail about when plaintiffs took a pharmaceutical product and what medical conditions they have exhibited and when those come to the fore. With regard to defendants, information about what products defendants made, and when, and where they were distributed might be exchanged. This goes beyond summary.

A different concern came up -- what is "basic" information? Why not just say "information." Adding the word "basic" may invite unnecessary disputes. A consensus emerged to take out "basic."

It was again suggested that this rule amendment could be recast to emphasize other matters that should often be addressed early in the litigation. Including "sequencing of issues" in some manner would often be important. One way suggested was "timing and sequence of key issues." That drew the reaction that it would not fit in (A), which was about exchange of information. But in a sense it's a recognition that in MDL proceedings it may be important to move up some topics already listed as suitable for consideration in pretrial conferences in ordinary litigation -- "(A) formulating and simplifying the issues," "(E) determining the appropriateness and timing of summary adjudication," "(F) controlling and scheduling discovery," and "(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues." Some of those might be moved up to the outset in MDL proceedings.

Returning to (A), it was noted that "claims and defenses" may not be an ideal way to describe what is needed. For example, does that include information about what a plaintiff took and when, and the medical conditions that plaintiff exhibited? And do we mean all defenses? How about "I didn't manufacture that kind of product at that time"? This point drew the comment that we need to be careful about being too specific. Saying "exchange information about their claims and defenses" is suitably flexible. Trying to delve deeper is risky.

Turning to (B), an initial question was whether to speak of "leadership counsel." In the Manual for Complex Litigation and elsewhere, "lead counsel" is a familiar term. But discussion of MDL proceedings over the past few years has shown that there is a considerable diversity of arrangements.

A reaction was that it is actually better to use a new term. Another reaction was that saying only "lead counsel" may unduly limit the focus of this provision. A variety of issues -- such as funding and handling the costs of litigation, the existence of an "executive committee" or "steering committee," etc. -- make the new term more useful. Another point was that there are often layers of leadership. In the Zantac MDL, for example, an early court order provided with some specificity for the leadership structure on the plaintiff side.

Another question was whether the rule should call for a highly specific order. Some academic writing endorses the utility of highly specific appointment orders. It was noted that the draft Committee Note attempted to call attention to this sort of concern:

> The rule urges that the court consider including "specifics on the responsibilities" of leadership counsel in the initial appointment order. Some reports indicate that providing clear and detailed direction early in the proceedings can avoid problems that may arise later on. In some instances, it may be that courts that initially relied on general orders found them inadequate to address challenges that arose as the proceeding matured.

A reaction was that the process for making leadership appointments is a concern distinct from the specificity of an appointment order. (B) calls for considering "appointing leadership counsel" but does not address the process for doing that, or call attention to the structure of the leadership setup. And in addition, it will be important to recognize somewhere that this kind of elaborate structure is not needed in many MDLs. Indeed, "small" MDLs are more numerous than huge ones. All of this may mean that more needs to be built into (B).

At the same time, we must note that it is valuable to surface these issues up front somehow. A detailed organization under the supervision of the judge is an important feature to include in the rule. For example, at one conference the order Judge Dave Campbell adopted for the Bard MDL was an example of a well-thought-out and detailed road map for proceeding. But at least fairly recently there have been some others that might be regarded as one-liners. That is unlikely to do the job.

Another feature to have in mind is what some have called the "hidden hand." That means that the court can and does oversee important developments, but in what one might call a backstage role. One means of ensuring that is periodic review of appointments, perhaps annually, so that there is a method of checking the initial forecast against actual performance.

The draft included a bracketed provision that might partly address this consideration suggesting an appointment order:

> [specifying that leadership counsel must throughout the litigation fairly and adequately discharge the responsibilities designated by the court]

Whether this was necessary was unclear. The draft already says that the court should appoint leadership counsel who "can fairly and adequately discharge their duties in advancing plaintiffs' interests." And proposed (D) addresses regular reports to the court, which might be the place to include something about term limits.

Concerns were raised about this draft rule language, which seems to sound like Rule 23 -- "fair and adequate representation" is what courts look for in appointing class counsel. This appointment process may in some senses resemble that process, but adopting a rule that echoes the class action rule seems unwise. That view drew support -- we should consider a rule for MDLs, but keep it separate from Rule 23. A tentative consensus emerged to leave out the bracketed language.

Discussion shifted to the last bracketed material in (B):

> [and stating any limitations on the activities of other plaintiff counsel]

A starting observation was that, in the absence of such limits, Lone Ranger activities by non-leadership counsel could be very disruptive. But there was also a caution -- we must avoid unwarranted limits on these lawyers. This is not a class action, and these plaintiffs have chosen these lawyers to represent them. For a variety of reasons, the court may be justified in restricting their activities in some manner, but encouraging such limitations in the rule may lead to heavy-handed and unnecessary restrictions. It is important somehow to ensure that these lawyers are involved in the proceeding and apprised of developments. Perhaps that could be a feature of draft (D), but it should be in there somewhere. Alternatively, perhaps a method of ensuring a reasonable opportunity for non-leadership counsel to be heard or perhaps to participate might be included in the order appointing leadership counsel.

A reaction to that concern is that this is important to flag for the new transferee judge. In a way, this is a feature of a detailed organization of counsel on the plaintiff side. That not only says who is to do certain things, but also who is not authorized to take certain actions. At the same time, particularly as to settlement prospects, we need to alert the participants to the need for communication. It is accordingly troubling to speak of "limitations." But perhaps that is the only way to describe what is needed.

One suggestion was to include this thought in the Note rather than the rule. Perhaps the rule could enumerate allocation of responsibilities to leadership counsel and the Note could identify the need to address the responsibilities of counsel not selected for leadership positions. One possibility, in rule or Note language, might be to explain the goal:

> and stating any limitations on the activities of other plaintiff counsel <u>necessary to ensure the orderly conduct of the proceedings</u>

Another topic raised in a footnote is whether the rule should make any reference to the court's appointment of leadership for the defense side. That may be important to orderly conduct of the proceedings in MDLs with many, perhaps dozens of, defendants. Lone Ranger activity is not restricted to the plaintiff side. A footnote in the draft Committee Note raises the possibility of mentioning such appointments in the Note. There seems to be relatively wide appreciation of the authority to do so, however, so there would not be a need to do so in the rule itself.

Discussion turned to (C), on methods for compensating counsel. The 1977 Fifth Circuit case that first upheld such an arrangement also contemplated that leadership counsel might be subject to cross-examination regarding its fee applications. Do we really want to embrace that?

One question pointed up was the bracketed phrase in the rule sketch:

> [addressing methods for compensating leadership counsel [for its efforts that provide common benefits to claimants in the litigation]

Judge Chhabria's order in the Roundup MDL points up the difficulty and delicacy of a rule tying the compensation leadership receive to whether it provided "common benefits." Litigation activity by one lawyer may sometimes provide benefits to another, without an MDL overlay. And litigation efforts by lawyers not actively involved in the MDL may provide benefits to other lawyers, perhaps even those in the MDL. (In Roundup, two of the first three plaintiff verdicts came from the California state courts, not the federal MDL proceeding.) It seemed a consensus that including the bracketed material would be unwise, at least in the rule. Whether that might be mentioned as a factor in the Note could be addressed later.

At the same time, it may be also important that the rule specify that it is about plaintiffs' leadership counsel. But when the court appoints lead or liaison counsel for the defendant, it does not have a direct role in how much it is paid. That does not, however, mean that the court has no authority to direct sharing of expenses among defendants.[1]

A related issue may exist in the background -- judicial supervision of the fees for non-leadership plaintiff counsel. Some transferee judges have reduced contractual fee arrangements for such counsel. There are serious questions about introducing that into a rule, however. Nothing presently in the draft says judges may exercise that power (or that they may not).

Discussion turned to paragraph (D), about having leadership counsel make regular reports to the court about progress of the proceeding. One reaction is that this should be included as one of the duties in the order appointing leadership counsel. Indeed, it may be important for that appointment order to direct leadership to establish regular methods of communicating with other counsel who have clients involved in the MDL (sometimes called IRPAs -- individually represented plaintiff attorneys). Technology has provided many methods for providing information to these people.

[1] An example is provided by In re Three Additional Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 93 F.3d 1 (1st Cir. 1996). In that case, the district court entered a case management order appointing a Joint Discovery Committee and a Joint Document Depository, and "taxing" the parties to fund these efforts. Several insurers that were added as defendants late in the litigation argued that they preferred to "go it alone" and therefore should not have to contribute toward the common benefit fund. But the district court found that these defendants had benefitted from the joint efforts, which were provided as part of the court's case management efforts. Citing that finding, the court of appeals upheld the order as within "the trial judge's equitable discretion." The exact limits on that authority may be uncertain, but this decision suggests that there is room for judicial authority regarding sharing of defense costs as part of an overall case management effort.

A question was raised about how deeply the court should get into such internal matters on the plaintiff side. For example, should the court also include such a directive when it appoints liaison or lead counsel on the defense side if it appoints for multiple defendants? Is it the court's job then to make sure that the anointed defense counsel adequately apprises other defense counsel of developments in the case?

Regarding plaintiff leadership, another question emerged: Should the court's role going forward include reviewing ongoing attorney work? In some MDLs some plaintiff counsel are directed to submit time records to the court at regular intervals. Is the court expected to monitor those reports and caution counsel about spending too much time or too much money? If the court doesn't do that, is there a risk that if fee applications are reduced on the ground that counsel put too much time in, counsel would respond: "Why didn't you tell us that two years ago?" Saying too much or getting too deeply into management of plaintiffs' case could cause problems.

Another reaction was "I'm not sure we need (D) if we have a new (B) that includes an appointment order with reporting requirements." From a 2021 perspective, it's pretty likely that almost all judges take an active case management role in most or all their cases. When Rule 16 was rewritten to require such activity in 1983, case management was in many places a new thing. But by now it's part of the job description. A new (B) can subsume what's in current (D), and that is about something judges are already doing in all their litigation, not just MDLs.

Discussion turned to (E), which dealt with reporting to the court on settlement developments. A problem with a provision like this one that was recognized early on is to determine when that sort of reporting to the court ought to occur. Nobody is in favor of insisting that in a mass tort MDL the court be advised of every individual settlement discussion. And to the extent the court is not to have any role in "supervising" settlement on a larger scale (suggested by (F)), breaking this topic out from a more general prompt to include provisions in the order appointing leadership counsel (perhaps in a new (B)), it's not clear that having something like (E) is useful. It is in brackets to reflect the uneasiness it provoked already; that uneasiness remains.

The role of (E) seems linked to the role of (F), also in brackets. (F) suggests that the MDL court may "assess" the "fairness of the process" leading up to the settlement and notify plaintiffs of the court's view on that. One reaction was that this sort of settlement oversight role for the court might sometimes be appropriate, but at most as a feature of the authority recognized in a revised (B) to appoint leadership.

Strong misgivings were expressed about having the court announcing a judgment on whether the settlement process was fair. "How confident must the court be to make such a judgment?" In conferences members of the Subcommittee have attended, it seemed that plaintiff and defense counsel were not in favor of, or actively opposed to, such a rule. From the court's perspective, it could draw the judge into something uncomfortable.

Another view was that this is what some have called the role of the judge's "hidden hand." An active and involved judge can play an important role in the evolution of settlement discussions without some rule-based role like this about settlement. It might be linked up to a reappointment

provision (each year, for example), but that role is of the hidden hand variety, not an explicit outreach by the court to individual plaintiffs.

It was noted that the judge's general supervisory role in MDL proceedings can build confidence in the process, including a settlement if one emerges. Certainly the judge ought to be concerned about whether settlement was reached in a fair manner. But as we have heard in conferences with experienced lawyers (and as Judge Chhabria noted in his common fund memorandum order last summer), it is not unusual for clients of some lawyers to get what looks like a better deal than clients of other lawyers. Even without asking the judge to review the merits of those deals, there might seem a temptation for the court to regard a settlement process that produces results that seem strikingly disparate as "unfair." That attitude is out of synch with current MDL reality.

Another participant admitted that this discussion was creating nervousness. Some academics (Professor Burch, for example) urge with details that unfair deals have been reached behind closed doors. The subtitle of her 2019 Cambridge University book is "Backroom Bargaining in Multidistrict Litigation." But there seems little basis for this Subcommittee to conclude that there is a major problem of this sort that it should try to solve via a rule.

Another member voiced similar concerns about venturing into this area. A starting point is that the non-leadership lawyers (the IRPAs) are often disabled in large measure by the judge's appointment of leadership counsel to run the litigation. But in MDL proceedings, eventually settlement depends on assent from individual clients, and those clients are directly represented by the IRPAs. Is the judge's role in expressing a view on the "fairness of the process" leading to the settlement in a sense going behind the backs of the IRPAs? Is the judge telling the clients to accept or reject the deal even though that is not the advice of the lawyers they hired?

To contrast -- in general, the judge has no role in the terms or negotiation of settlement in ordinary cases. Consider a Title VII case that settles. The judge has no role in that. Under Rule 41(a), that often comes to the court's attention only as a stipulated dismissal because there is a settlement; nobody tells the judge what the settlement was or how it was reached. Under the FLSA, things are different because Congress built in a role for the court. But that is not the norm. MDL mass tort cases exist in large measure to take advantage of economies of scale, but one can legitimately say that the court ought not ordinarily intrude into individual attorney-client relations to achieve those economies.

This is not to say that -- in all litigation, not just MDLs -- the judge may have a role in settlement. Sometimes counsel tells the court something like, "We need a black robe to step in," and effective participation by the court can play a major role in achieving settlements. And there is no question that the court's role must stress fairness, in both process and substance. But perhaps that understanding is implicit in much of the new managerial role of judges in most litigation, not only MDLs.

The time for the meeting having elapsed, it was agreed that the next step for the Subcommittee would be for Professor Marcus to attempt a redraft of the materials used for the

meeting along the lines discussed. That redraft should include the materials for this meeting as an Appendix, so that Subcommittee members would have this starting point available for comparison.

Meanwhile, Subcommittee members can receive input from events like the LCJ and (possible) AAJ sessions, and eventually hopefully an event organized by Professor Dodge of Emory.

TAB 13

13. Discovery Subcommittee

The Discovery Subcommittee has received considerable input from various sectors of the bar about experience under Rule 26(b)(5)(A), which was added in 1993.[1] In mid 2021, after the subcommittee invited submissions about that experience, it received over 100 written comments. Summaries of those comments were included in the agenda book for the Advisory Committee's October 2021 meeting.

In addition, the Subcommittee has benefitted from online conferences arranged by a number of groups -- the National Employment Lawyers' Association, the Lawyers for Civil Justice, and the American Association for Justice. In September 2021, retired Magistrate Judge John Facciola and Jonathan Redgrave organized a two-day online conference for the Subcommittee to explore these issues. This conference included participation from counsel representing plaintiffs and defendants, and assisted the Subcommittee in focusing its views. In late November 2021, Judge Facciola and Mr. Redgrave submitted a further report -- 21-CV-Z -- which is included in this agenda book.

Drawing on this experience and input, the Subcommittee held an online meeting on Feb. 2, 2022, to consider how best to proceed. Notes of that meeting are in this agenda book. Based on all this input, the Subcommittee reached consensus that the most useful way forward would be to attempt to develop draft amendments to Rules 26(f)(3)(D) and 16(b)(3)(B)(iv), an idea presented to the Advisory Committee at its October 2021 meeting. Since Feb. 2, the Reporter has prepared an initial draft of Committee Notes for possible draft amendments that are presented below. The Subcommittee is not recommending that these possible amendments be forwarded to the Standing Committee this year. In part, that is due to the fact that attention to possible Committee Notes is just beginning, and in part that is due to the fact that the MDL Subcommittee is simultaneously discussing different amendments to these two rules. Considering these two sets of possible amendment ideas simultaneously seemed much preferable to handling them seriatim.

Accordingly, this report presents the Subcommittee's current thinking about draft rule amendment language below, along with the Reporter's sketch of possible Committee Notes. First, however, it seems useful to provide some background on the issues.

Advent and Implementation of Rule 26(b)(5)(A)

Before 1993, the rules did not say anything about disclosure by a producing party that it withheld requested materials from production. That year, Rule 26(b)(5)(A) was added, providing:

> **(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> > **(i)** expressly make the claim; and

[1] Still on the Subcommittee's agenda are issues relating to filing under seal, but it has deferred further attention to those issues pending completion of a broader AO project on sealed filings.

1517 **(ii)** describe the nature of the documents, communications, or tangible
1518 things not produced or disclosed -- and do so in a manner that,
1519 without revealing information itself privileged or protected, will
1520 enable other parties to assess the claim.

1521 As quoted in the draft Committee Note for Rule 26(f) below, the 1993 Committee Note
1522 emphasized that the exact method of complying with this new requirement should be keyed to the
1523 circumstances of given cases. But according to submissions to the Committee some requesting
1524 parties demanded, or some courts insisted upon, document-by-document listing even in cases
1525 involving large numbers of documents. Preparation of those lists reportedly sometimes involved
1526 great expense on top of the expense of reviewing materials to identify privileged materials.

1527 The digital revolution since 1993 has had a major impact on these concerns. The volume
1528 of material potentially subject to production, and therefore needing privilege review, has
1529 multiplied. And lawyer-client communications that formerly might have been handled in person
1530 or by telephone have increasingly been done instead by email, text, or other electronic means that
1531 could be the target of a Rule 34 request. (It appears that the principal area of concern is Rule 34
1532 production, not deposition or interrogatory discovery.)

1533 Burden is not the only difficulty reportedly encountered. For a variety of reasons, even
1534 laboriously developed listings of materials may prove delphic to the requesting party though the
1535 rule says that description should "enable other parties to assess the claim." To some extent, this
1536 difficulty may have resulted in "large document" cases from the use of identical "generic"
1537 descriptions for numerous withheld materials. To some extent, problems may have resulted from
1538 overly aggressive flagging of materials to be withheld. That tendency has been noted in reported
1539 court opinions, and attributed to junior lawyers' fears about overlooking a privileged item, and
1540 perhaps also their ignorance of the legal criteria for privilege claims. (An example proffered was
1541 an email about meeting for lunch at Legal Seafoods that was withheld because the word "legal"
1542 appeared.)

1543 It might be hoped that technology, having partly contributed to current problems, might
1544 also contribute to their solution. The Subcommittee has inquired about whether a "push the button"
1545 privilege log can now be done or will soon be possible. Despite some vendor claims that this should
1546 now or soon be possible, many lawyers told the Subcommittee that experience with such efforts
1547 in actual cases was at best mixed; sometimes initial efforts to use such methods must later be
1548 abandoned and a more "traditional" method substituted.

1549 A final background note: it does not appear that the adoption of Rule 26(b)(5)(A) caused
1550 most of the current problems. The Subcommittee is not aware of a reason to believe that before
1551 the rule was adopted producing parties were always punctilious in their claims of privilege
1552 protection; indeed, the fact the rule was adopted suggests the reverse. And the adoption of the rule
1553 had nothing to do with the explosion of digital materials that has occurred since 1993 and
1554 complicated contemporary efforts to comply with the rule.

1555 Proposed Solutions

1556 The initial proposals received by the Subcommittee focused on Rule 26(b)(5)(A) itself.
1557 One was that the rule be revised to say that a disclosure regarding "categories" of withheld
1558 materials should suffice. That would, of course, echo something said in the 1993 Committee Note,
1559 which mentioned the possibility that "the items can be described by categories." At least one state
1560 bar group, in contrast, submitted a comment urging that the rule be rewritten to say explicitly that
1561 it requires a document-by-document listing in every case.

1562 Another theme from some who commented and participated in conferences attended by
1563 Subcommittee representatives (mainly in what one might call the "requester" role) was that too
1564 many corporations seem routinely to cc in-house counsel on routine communications. In addition,
1565 some suggested that those reviewing documents before production should receive something akin
1566 to remedial education on what is actually covered by a privilege. Some emphasis also was placed
1567 on the variety of roles in-house counsel may have, including providing purely business advice, that
1568 do not implicate the attorney-client privilege.

1569 Some on what might be called the "requester" side urged that too often producing parties
1570 acknowledge that they have over-designated when their designations are challenged, and "cave"
1571 on the great majority of those privilege claims. It was urged that judges have been too reluctant to
1572 impose sanctions for making improper claims of privilege. Some suggested that a rule could
1573 prescribe a blanket waiver sanction for improper privilege claims.

1574 After deliberation, as reflected in the notes of the Feb. 2 meeting, the Subcommittee
1575 decided that amendments along the line presented to the full Committee during its October 2021
1576 meeting seemed preferable. Some explanation follows:

1577 Authorizing "categorical" listing or
1578 requiring document-by-document listing

1579 Present Rule 26(b)(5)(A) does not delve into the exact method of complying with its
1580 requirements. Many who commented to the Subcommittee say that judges nevertheless sometimes
1581 insist that it requires document-by-document listing, and some urge that the rule be rewritten to
1582 specify that method is always required.

1583 Requiring document-by-document listing in all cases seems inappropriate. But there are
1584 surely many cases that involve few enough documents so that such a listing is workable, though a
1585 few carefully designed categorical exclusions from the listing requirement may well add
1586 efficiencies in some of those cases. There are also cases in which the sheer quantity of material
1587 involved makes a rigid requirement that document-by-document listing is always required
1588 uninviting, however.

1589 Authorizing "categorical" listing across the board similarly seems risky unless tied to party
1590 negotiation about what the categories should be. Consider the following "category" -- "protected
1591 by an applicable privilege or as trial-preparation material." Comments responding to the
1592 Subcommittee's invitation for comment in mid 2021 illustrated the wide range of possible grounds

1593 for privilege claims that go far beyond the attorney-client and work-product concerns common in
1594 commercial litigation. In claims for injuries due to encounters with police officers, for example, a
1595 variety of other privileges including the internal review and informer's privilege may be
1596 applicable. In medical malpractice cases, issues may include peer review privileges and
1597 confidentiality issues with medical records.

1598 So requiring across-the-board categorical designations would likely produce undesirable
1599 effects in many cases. Yet tailored categories might well be desirable in specific cases. In some, it
1600 may be that communications between a party and outside litigation counsel could be exempted
1601 from the listing requirement. In some, it may be that documents dated before or after certain time
1602 periods could be excluded. Another suggestion has been to exclude any documents produced in
1603 redacted form, though the ground for withholding part of the document might not be apparent from
1604 the face of the redacted document. Other grounds for exclusion likely exist in many cases, and
1605 ideally creative counsel can identify and implement them.

1606 More aggressive responses to
1607 over-designation

1608 As noted above, some who spoke to the Subcommittee worry that judges too often give a
1609 "free pass" to producing parties who over-designate. As described, in some cases after many
1610 privilege designations are challenged, the producing party accedes with regard to the great majority
1611 (perhaps 90%) of the challenged documents. Even when that does not happen, it may be that a
1612 judge concludes that the great majority of the challenged documents were not properly withheld.

1613 It seems that the proposed remedy is for the rules to prescribe a negative consequence for
1614 designation of materials as privileged when they actually are not. In part, this idea reflects the view
1615 that producing parties sometimes seem to contrive to create plausible grounds for withholding
1616 materials, as by having routine communications routed through in-house counsel.

1617 Without approving contrivances to create seeming privilege protection, the Subcommittee
1618 recognizes that some privilege calls are actually difficult. Surely withholding documents based on
1619 privilege claims that are substantially justified is not a ground for sanctions. (Cf. Rule
1620 37(a)(5)(A)(ii), providing that the costs of a discovery motion not be imposed on the losing party
1621 if its position was "substantially justified.")

1622 Indeed, it seems the idea is that a finding that <u>some</u> materials were incorrectly withheld
1623 should lead to a ruling that <u>other</u> materials must be produced whether or not they were properly
1624 withheld. Even assuming that 90% of the challenged documents are ultimately found not to be
1625 privileged, that may say little about whether other withheld documents not challenged were
1626 improperly withheld. Indeed, one might assume that the challenges to the withholding of specific
1627 documents focused on those items because they looked to present dubious claims of privilege,
1628 perhaps suggesting that many, most, or all of the other documents do not.

1629 Having considered this possibility, the Subcommittee does not recommend pursuing the
1630 idea.

1631 The Approach Favored by the Subcommittee

1632 The rule-amendment approach below was presented to the full Committee in October 2021,
1633 and the Subcommittee has concluded that it offers the greatest promise. One option might be to do
1634 nothing and remove this topic from the agenda, but the reported current problems make that seem
1635 inadvisable. Instead, the promising route appears to be requiring the parties to deal with the best
1636 way to deal with these issues in the pending case and report about that to the court in their discovery
1637 plan, leaving it to the judge to address compliance with Rule 26(b)(5)(A) in the Rule 16(b) order.

1638 As noted above, below is an initial Reporter's sketch of a possible Committee Note. The
1639 Subcommittee has not yet had an opportunity to discuss it, but invites input from the full
1640 Committee on the rule amendment ideas and on the Committee Note sketch.

1641 **Rule 26. Duty to Disclose; General Provisions Governing Discovery**

1642 * * * * *

1643 **(f) Conference of the Parties; Planning for Discovery.**

1644 * * * * *

1645 **(3)** ***Discovery Plan.*** A discovery plan must state the parties' views and
1646 proposals on:

1647 * * * * *

1648 **(D)** any issues about claims of privilege or of protection as trial-
1649 preparation materials, including the [timing for and][2] method
1650 to be used to comply with Rule 26(b)(5)(A) and -- if the
1651 parties agree on a procedure to assert these claims after
1652 production -- whether to ask the court to include their
1653 agreement in an order under Federal Rule of Evidence 502;

1654 * * * * *

1655 **Draft Committee Note**

1656 Rule 26(f)(3)(D) is amended to address concerns about application of the requirement in
1657 Rule 26(b)(5)(A) that producing parties describe materials withheld on grounds of privilege or as
1658 trial-preparation materials. The Committee has been informed that compliance with Rule
1659 26(b)(5)(A) can involve very large costs, often including a document-by-document "privilege log."
1660 Frequently, however, those privilege logs do not actually provide the information needed to enable

[2] The bracketed language has not been discussed with the Subcommittee, but the Subcommittee has discussed the problems that can arise from belated service of a privilege log. Committee Note language below addresses the same point.

1661 other parties or the court to assess the justification for withholding the materials. And on occasion,
1662 despite the requirements of Rule 26(b)(5)(A), producing parties may over-designate and withhold
1663 materials [clearly] not entitled to protection from discovery.

1664 This amendment provides that the parties must address the question how they will comply
1665 with Rule 26(b)(5)(A) in their discovery plan, and report to the court about this topic. A companion
1666 amendment to Rule 16(b)(3)(B)(iv) seeks to prompt the court to include provisions about
1667 complying with Rule 26(b)(5)(A) in scheduling or case management orders.

1668 Requiring this discussion at the outset of litigation is important to avoid problems later on,
1669 particularly if objections to a party's compliance with Rule 26(b)(5)(A) might otherwise arise only
1670 at the end of the discovery period.

1671 This amendment also seeks to grant the parties maximum flexibility in designing an
1672 appropriate method for identifying the grounds for withheld materials, and to prompt creativity in
1673 designing methods that will work in a particular case. One matter that may often be valuable in
1674 that regard is candid discussion of what information the receiving party needs to evaluate the claim.
1675 Depending on the nature of the litigation, the nature of the materials sought through discovery, and
1676 the nature of the privilege or protection involved, what is needed in one case may not be necessary
1677 in another. No one-size-fits-all approach would actually be suitable in all cases.

1678 From the beginning, Rule 26(b)(5)(A) was intended to recognize the need for flexibility.
1679 The 1993 Committee Note explained:

1680 The rule does not attempt to define for each case what information must be provided
1681 when a party asserts a claim of privilege or work product protection. Details
1682 concerning time, persons, general subject matter, etc., may be appropriate if only a
1683 few items are withheld, but may be unduly burdensome when voluminous
1684 documents are claimed to be privileged or protected, particularly if the items can
1685 be described by categories.

1686 Despite this explanation, the Committee has been informed that in some cases the rule has not been
1687 applied in a flexible manner, sometimes imposing undue burdens. And the growing importance
1688 and volume of digital material sought through discovery have compounded these difficulties.

1689 But the Committee is also persuaded that the most effective way to solve these problems
1690 is for the parties to develop and report to the court on a practical method for complying with Rule
1691 26(b)(5)(A). Cases vary from one another, in the volume of material involved, the sorts of materials
1692 sought, and the range of pertinent privileges.

1693 In some cases, it may be suitable simply to have the producing party deliver a document-
1694 by-document listing with explanations of the grounds for withholding the listed materials.

1695 As suggested in the 1993 Committee Note, in some cases some sort of categorical approach
1696 might be effective to relieve the producing party of the need to list many withheld documents.
1697 Suggestions have been made about various such approaches. For example, it may be that

1698 communications between a party and outside litigation counsel could be excluded from the listing,
1699 and in some cases a date range might be a suitable method of excluding some materials from the
1700 listing requirement. Depending on the particulars of a given action, many such methods may
1701 enable creative counsel to reduce the burden and increase the effectiveness of complying with Rule
1702 26(b)(5)(A). But the use of categories calls for careful drafting and application keyed to the
1703 specifics of the action.

1704 In some cases, technology may facilitate both privilege review and preparation of the
1705 listing needed to comply with Rule 26(b)(5)(A), perhaps by preparation of what is sometimes
1706 called a "metadata log." One technique that the parties might discuss in this regard is whether some
1707 sort of listing of the identities of people who sent or received materials withheld should be
1708 supplied, to enable the recipient to appreciate how that bears on a claim of privilege.

1709 Requiring that this topic be taken up at the outset of litigation and that the court be advised
1710 of the parties' plans in this regard is a key purpose of this amendment. Belated production of a
1711 privilege log until near the close of the discovery period can create serious problems. Often it will
1712 be valuable to provide for "rolling" production of materials and an accompanying listing of
1713 withheld items. In that way, areas of potential dispute may be identified and, if the parties cannot
1714 resolve them, presented to the court for resolution. That resolution, then, can guide the parties in
1715 further discovery in the action.

1716 The Committee has also been informed that in some cases there appears to have been over-
1717 designation of materials as privileged. Though it is sometimes difficult to determine whether
1718 certain materials are properly withheld, the Committee has been informed that in some instances
1719 privilege claims are made without significant foundation. One problem may be overbroad
1720 designation by risk-averse reviewers. In addition, it may sometimes be that attorneys are routinely
1721 copied to bolster inappropriate claims of privilege. It is important to note that Rule 26(g)(1) applies
1722 to privilege claims. It is hoped that carefully designed methods of complying with Rule
1723 26(b)(5)(A) can avoid disputes about unjustified claims of privilege.

1724 **Rule 16. Pretrial Conferences; Scheduling; Management**

1725 * * * * *

1726 **(b) Scheduling <u>and Management</u>.**

1727 * * * * *

1728 **(3) *Contents of the Order.***

1729 * * * * *

1730 **(B)** *Permitted Contents.*

1731 * * * * *

(iv) include the [timing for and] 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.

Draft Committee Note

Rule 16(b) is amended in tandem with an amendment to Rule 26(f)(3)(D), which directs the parties to include discussion of the method to be used to comply with Rule 26(b)(5)(A) in the action, and to report to the court about that issue. In addition, two words -- “and management” -- are added to the title of this rule in recognition that it contemplates that the court will in many instances do more than establish a schedule in its Rule 16(b) order; the focus of this amendment is an illustration of such activity.

The amendment to Rule 26(f)(3)(D) directs the parties to discuss and include in their discovery plan a method for complying with the requirements in Rule 26(b)(5)(A) regarding providing information about materials withheld from production on grounds that the withheld items are privileged or subject to trial-preparation protection.

The Committee has been informed that early attention to the particulars on this subject can often avoid problems later in the litigation that can be avoided by establishing case-specific procedures up front, thus serving scheduling purposes as well. It may be desirable for the Rule 16(b) order to provide for “rolling” production that may identify possible disputes about whether certain withheld materials are indeed protected. If the parties are unable to resolve those disputes between themselves, it is often desirable to have them resolved at an early stage by the court, in part so that the parties can apply the court’s resolution of the issues in further discovery in the case.

Because the specific method of complying with Rule 26(b)(5)(A) depends greatly on the specifics of a given case -- type of materials being produced, volume of materials being produced, type of privilege or protection being invoked, and other specifics pertinent to a given case -- there is no overarching standard for all cases. For some cases involving a limited number of withheld items, a simple document-by-document listing may be the best choice. In some instances, it may be that certain categories of materials may be deemed exempt from the listing requirement, or listed by category. In the first instance, the parties themselves should discuss these specifics during their Rule 26(f) conference; these amendments to Rule 16(b) permit the court to provide constructive involvement early in the case. Though the court ordinarily will give much weight to the parties’ preferences, the court’s order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.

Notes of Teams meeting
Discovery Subcommittee
Advisory Committee on Civil Rules
Feb. 2, 2022

The Discovery subcommittee held a meeting via Teams on Feb. 2, 2022. Participants included Judge David Godbey (Chair, Discovery Subcommittee), Judge Robert Dow (Chair, Advisory Committee), Judge Jennifer Boal, Ariana Tadler, Joseph Sellers, Helen Witt, David Burman, and Carmelita Shinn (Clerk Liaison), Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Discovery Subcommittee).

The meeting began with the thought that the Subcommittee had received substantial input from a variety of sources with a variety of perspectives. Throughout, it appeared that there is a considerable divide between what might be called the "requester" and the "responder" parties from whom the Subcommittee has heard.

Many on the "requester" side urge that detailed and specific privilege logs are key to enabling an effective check on over-designation. To some extent, it may be that this over-designation is a result of heightened worries about waiver of privilege. To some extent, it may also result from inadequate appreciation of when privilege or work product protections actually apply. And to some extent it may result from assignment of the initial screening function to inexperienced and little-trained "contract attorneys."

Those on the "responder" side emphasize the often very high cost of document-by-document logging, and also the many judicial statements that current privilege log practice often fails to achieve the goal of Rule 26(b)(5)(A) -- making clear the ground for the claim of privilege. Meanwhile, the cost of preparing these documents -- even using "contract attorneys" -- can be very high.

One thing that does stand out is that there seems to be little coalescence on specifics between the two "sides." It is not clear that gathering further information will meaningfully assist the Subcommittee in weighing possible rule amendments. Instead, it seems that there are essentially several courses of action it could pursue:

(1) Doing nothing, and concluding that there is not such a problem with privilege log practice as to justify pursuing a rule amendment;

(2) Pursuing the Rule 26(f)/16(b) approach it has explored for some time, thereby prodding the parties to address compliance with Rule 26(b)(5)(A) as part of their discovery plan, and encouraging the court to include specifics about that (ideally based on the parties' agreement) in the scheduling or other case management order under Rule 16(b);

(3) Amending Rule 26(b)(5)(A) either to authorize "categorical" logging practices, or to mandate document-by-document logging, absent an order to the contrary;

(4) Developing amendments that would impose costs, perhaps waiver consequences, for over-designation of materials not properly withheld on grounds of privilege.

The question on the floor, then, is which course the Subcommittee would favor going forward.

The first member to speak worried that there might be a "risk of chaos" if an aggressive rule change is pursued. The bar has been operating under the current rule for nearly 30 years. Surely there have been problems, but "categorical" logging is not likely to be a solution to the problems that would likely result if that concept were sanctioned in the rule. Some mention of this possibility -- likely tailored to the specifics of the given case -- might well be appropriate in a Committee Note, but putting it into the rule would invite trouble.

At the same time, it is not absolutely clear that there is a pervasive judicial view that document-by-document logging is always required. Weighing in one way or another on that question might complicate things rather than produce benefits.

Given the myriad issues that arise in individual cases, this member thinks that the best solution is making the parties address these issues early on, ideally with the ultimate participation of the court, so that all are on the same page. Many of the greatest difficulties arise when the privilege log is deferred until the end of the discovery period.

A second member expressed general agreement. One thing that might deserve attention is the question of "sanctions" for over-designation. But that might often go too far. Some propose what one might call the "nuclear option" -- broad waiver consequences for unjustified designation of nonprivileged materials as protected. Consider what that might produce in the national security arena. And more generally, consider that in a large document production there will almost always be some mistaken claim of privilege.

Instead, this member would favor a rule change ensuring that the parties address these issues, (or more particularly how they should be applied in the pending case) early and resolve them up front, ideally with some specificity. A Committee Note could then refer to the options that might be considered in a given case. The range of "categorical" logging practices is quite large, and suitable categories might be designed for a given case. Among those mentioned during the various conferences and discussions, for example, are excusing logging of all communications with outside litigation counsel (at least if dated after the filing of the suit), excusing logging of redacted documents produced in redacted form, etc. The range of "categories" that creative counsel could design is quite large. Trying to fashion them in advance in a rule is not promising.

Another member agreed that the most promising approach is the Rule 26/16 approach. These problems are best handled on a case-by-case basis. Indeed, putting a directive into scheduling orders that the parties address these issues has already proven useful. The Note then can address methods to simplify logging, and mention rolling production as well.

Another member agreed with the views already expressed. An informative Note could acquaint lawyers (and perhaps, some judges) with the many types of specifics that can simplify the task of complying with Rule 26(b)(5)(A) and making it more effective. And lots of specifics

could be included in a Committee Note. For example, it would often be useful to attend to disclosure about those who are copied on materials withheld on grounds of privilege. Some reliable method of identifying them would often be useful, lest they become "mystery recipients." Another recurrent problem is to distinguish the varying roles lawyers may play – i.e., not always providing legal advice. And, perhaps, added as cc recipients of messages on which they are not actually providing advice at all. Surely there are other possible simplifications.

At the same time, it is important to recognize that making privilege calls is often not easy. In a recent case, for example, various reviewers at the member's law firm reached different conclusions about which documents were entitled to protection. Then the judge appointed a special master to review the designations and the special master made different determinations, which the judge then reviewed and changed. Particularly given the massive volume of document review nowadays, it is not surprising that there may be some wrong calls; it would instead be very surprising to find that there are no wrong calls. Perhaps the Note to an amendment could even provide some guidance on what is and is not entitled to protection.

Another member observed that there is no persuasive argument for adopting either the third or fourth course outlined at the beginning of the meeting. There is a great risk of pursuing something that goes too far, perhaps either favoring the "requesters" or the "producers" too much. So the Rule 26/16 approach seems the safest. In addition, with the focus on Rule 16, it may be wise to consider shortening that rule, which has become quite lengthy.

Another member agreed -- fostering flexibility is a good idea. It is certainly better to talk candidly about these problems early rather than only at the end of the discovery period. That prompted another member to agree that this flexibility encourages the best lawyers to come up with creative solutions for a given case.

A consensus emerged in favor of the Rule 26/16 approach. Discussion shifted to timing. There is presently no draft Committee Note, and this discussion shows that there may be much to include in such a Note. It might be possible to draft one and obtain Subcommittee review of the rule in time for inclusion in the agenda book with a proposal at the March full Committee meeting to recommend that the Standing Committee publish the proposed amendment for public comment this August.

But a caution was raised. Separately, the MDL Subcommittee is actively considering recommending amendments to these same rules for special issues in MDL proceedings. That process is yet mid-stream, and will not be completed by March. There is much to be said for these two possible sets of amendments to be integrated into a single package. Integrating them in separate "generations" of amendments could prove difficult; if this package moved forward this year and the MDL package the following year, it would then be uncertain whether the privilege log package would be adopted while the MDL package was under active consideration; the timeline for amendment approval is a long one.

In addition, there was a suggestion during this meeting that, in tandem with adding new things to these rules, it might be prudent also to consider "pruning" existing Rule 16. That probably

would best be done in a single package with all new additions. And this Subcommittee has not yet considered how that might be done.

Finally, there was mention of the “fatigue syndrome” that may affect those we hope to hear from during a public comment period. Many in the bar worry that the rules are amended too often. To have successive amendment packages directed to the same rules one year after another would tax the patience of the bar.

The consensus was to report the Subcommittee’s decision on the route to take in addressing privilege log issues to the full Advisory Committee for the March meeting, and perhaps present an initial sketch of a possible Note, but not to press for publication presently.

21-CV-Z

Hon. John M. Facciola (ret.)
Jonathan M. Redgrave

November 24, 2021

***VIA* EMAIL**

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Administrative Office of the United States Courts
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Washington, D.C. 20544

Re: Facciola – Redgrave Personal Submission to Advisory Committee on Civil Rules Regarding Potential Rulemaking Regarding Privilege Logs

The undersigned assembled in September 2021, by invitation only, skilled and experienced practitioners and judges for a two-day virtual symposium on the current state of the modern privilege log. During our time together, we facilitated a discussion on whether the Advisory Committee on Civil Rules should consider amendments to the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") to ease the burden and expense of asserting privilege claims in discovery as well as improve the output of the process. After taking time to reflect on the dialogue, and considering the open question of whether there is continued merit in pursuing rules changes to address privilege logging requirements and expectations, we are writing to provide the Advisory Committee (and its Discovery Subcommittee (some members and reporters of which were present for parts of our virtual symposium)) our *personal* observations regarding the symposium and the question of rulemaking regarding privilege logs.[1]

In our own subjective views, consensus emerged on some issues that would support two potential amendments that we will discuss shortly, but we want to preface our personal views as to consensus with a brief introduction.[2]

[1] The symposium invoked the "Chatham House" rules, and thus there is no attribution of comments or observation to any particular attendee. Further, the views and thoughts expressed in this correspondence are those solely of the authors, and it does not necessarily reflect the views, opinions, or thoughts of any participant, firm, or organization.
[2] While we note that there seems to be adversity on the question of adequate privilege logs (and appropriate privilege logging requirements) between "traditional plaintiffs" and "traditional defendants," our experience prior to the symposium was consistent with the discussions we observed during the symposium – both sides of the aisle have substantial frustration with the status quo. Thus, we respectfully submit that there are areas to find common ground to improve the process for all parties in cases of all sizes and the courts that address privilege logs issues. We also respectfully submit that further investigation of this common ground is warranted as the challenges we have

Introduction: The Problem Presented

The burden and expense of asserting privilege claims have grown dramatically. First, the world is producing data at rates that are hard to believe. It is estimated that human beings produce 2.5 quintillion bytes of data every day. Ninety percent of the data was produced in the past two years. Second, it is also much cheaper to keep data. A four terabyte drive costs about $150, and cloud storage by subscription costs less. Demands are therefore testing the present rule designed for a world of paper that it cannot satisfy. Participants in the conference generally agreed on these observations, although there were concerns raised as to whether these changes impacted all cases, equally or proportionally, such that change in the rule would be trans-substantive.

Our conference also corroborated that, while artificial intelligence is increasing the capability and efficiency of finding *potentially* privileged documents, litigants cannot use it alone to assert their privilege claims in accordance with the present rule, Fed. R. Civ. P. 26(5)(A)(ii). Instead, the participants at our conference indicated that creating the document claiming the privilege, the so-called privilege log, is still often a manual process, delegated in the first instance to junior members of the law firm review teams or contract reviewers. When in doubt as to whether a document is privileged, those individuals will almost always default to claiming it as privileged because of the negative implications of inadvertent productions – notwithstanding the availability of Fed. R. Evid. 502(d) non-waiver orders. This action, in turn, increases the burden of creating the log, the frequent inadequacy of the log, and subsequent serial proceedings challenging the log (regardless of whether the underlying document itself will truly “matter” for the case in the end even if it is not privileged).

Our participants also told us that they had encountered judges who, in our view, mistakenly superimpose their own requirements on agreements the parties have reached pursuant to Fed. R. Evid. 502(e) to effectuate more efficient processes. Thus, even if the parties have agreed absolutely that a certain behavior or failing is not a waiver (and asked for that agreement to be memorialized in a Fed. R. Evid. 502(d) order), a court may nevertheless hold that it is. These rulings create uncertainty and complicate the environment in which logs are generated.

Our Personal Suggested Amendments for Consideration[3]

Despite the complexity of the issue and the good faith disagreements among the participants regarding potential solutions, we perceived a broad (but not universal) consensus that

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catalogued will become more complex over time with the continued evolution of new technologies where privileged communications and information will exist in ever-increasing volumes.

[3] The suggested amendments discussed herein were not drafted or discussed during the symposium, much less vetted or approved by any participant. Rather, these potential amendments reflect our personal suggestions based on our experience that has been supplemented by the recent dialogue at the symposium and thereafter. Indeed, based on the discussions at the symposium, we expect that a number of participants would have varying reactions to our personal analysis and suggestions, and we are not suggesting or implying in any way that there would be agreement regarding our personal suggestion of potential amendments. Further, we expressly recommended and encouraged that each participant become involved (if they are not already) in the rulemaking process to express their personal views.

amendments to the privilege rule, Fed. R. Civ. P. 26(b)(5)(A)(ii), and the meet and confer rule, Fed. R. Civ. P. 26(f)(3)(D) *could* be beneficial and, as such, we think they should be explored further.

Many participants explained that they encounter judges who insist that the rule requires that a party must log each privileged document individually. It was also mentioned that some judges even hold that the rule rigidly requires a separate log entry for each email in a chain of emails, regardless of circumstances.

These holdings are not correct. Nothing in the present rule justifies a bright line requirement that every claim of privilege must be individually logged. The undersigned are hard-pressed to understand why courts should not permit a less burdensome means of claiming privilege if it is either acceptable to the parties or reasonable and proportional in the circumstances. We, therefore, respectfully propose that the following language (in red text below) be added to the end of the present Fed. R. Civ. P. 26(b)(5)(A)(ii) to reflect that the intent of the 1993 Amendment (as reflected in the 1993 Advisory Committee Note) is pulled into the text to make it operative – the manner of "logging" should be flexible to the circumstances:

"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 privilege or protected, will enable other parties to assess the claim. The description may be by category or by a separate description for each withheld item, unless otherwise agreed upon or ordered by the Court."

We would also suggest that an accompanying Advisory Committee Note reiterate that the rule never required an axiomatic item-by-item log in the first place, and we also submit that Note could reflect that the Court should ordinarily defer to the agreement of the parties, or, if there is no agreement, the manner chosen by the producing party unless the Court orders otherwise. The Note could also reflect that parties should consider agreements to exclude types or categories of documents from any logging requirements in certain cases, based on considerations such as date range (e.g., after the date of the complaint) and source (emails to/from outside and in-house litigation attorneys involved in the matter). We also respectfully suggest that the Note reflect the fact that the manner of the identification or logging in any given matter should be proportional to the needs of the matter in the same manner as any aspect of discovery that is governed by the standard set forth in Rule 26(b). Finally, we note that to the extent that there is incorporation of a "category" approach into the rule (as we suggest), the Advisory Committee Note should also reflect that while narrowly defined categories can permit generalized findings (e.g., whether a specific third party to privileged communications waives in all factual circumstances) caution should be applied to any sampling of withheld documents in a category such that the results, in

the first instance, should be used to refine claims or challenges and not result in immediate loss of privilege as to documents in a category that have not been reviewed.[4]

Our second proposed amendment language (also in red text below) meets the concern of many participants that the present rule does not require counsel to discuss how they will make their privilege claims in their meet and confer. We, therefore, suggest that the following be added to the conclusion of Fed. R. Civ. P. 26(f)(3)(D):

"(D) any issues about claims of privilege or of protection as trial-preparation materials, including—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 and how the parties intend to comply with Fed. R. Civ. P. 26(5)(A)(ii);"[5]

Reasons for the Amendments

We believe that these targeted amendments are neutral and should not be subject to the often-bruising battle between counsel for the demanding and the responding parties regarding other privilege issues or other matters brought forward to the Advisory Committee for potential amendments to the Federal Rules of Civil Procedure.

First, the amendment to the meet and confer rule only adds a more precise topic as important as the other topics that the parties must discuss at the Rule 26(f) conference.

Second, the amendment to the logging rule would not be necessary if a number of courts had not mistakenly imposed a logging obligation on counsel that is not there. Free of that misinterpretation of the rule, lawyers can engage in negotiations that can relieve their clients from paying fortunes for logging that neither party to a lawsuit want or will benefit from. For example, they could agree that certain documents are so obviously privileged that they need not be logged or the exact converse. Their agreement that any privilege as to documents provided voluntarily to a government agency has been waived and these documents are not to be logged would be another example of a responsible agreement. There are certainly others. A misapprehension of the rule or fear of its misapplication should not stifle counsel's creativity in reducing the number of documents to be logged or relieving unnecessary burdens provided that the necessary disclosure requirements are met. Our proposed amendment, which clarifies that item-by-item logging is not a fixed mandate, would free counsel to cooperate and reduce the logging burden while focusing the efforts of all parties on the documents and privilege claims

[4] We respectfully submit that our proposed language presents a potential rule change akin to the 2015 amendment to Rule 26(b)(1) regarding proportionality – principally repackaging concepts already embodied in the existing rules and comments so that there can be better adoption of the proper standards while dissuading parties (and courts) from misinterpreting and misapplying the existing rule language as we have observed.

[5] In this respect, we respectfully suggest that the Advisory Committee Note to such an amendment could encourage the parties to discuss, in the context of each matter, what would be required to "enable other parties to assess the claim" in each case so that they can reach agreement or, if necessary, bring any disagreement to the Court's attention early in the case management process.

that truly matter in a case. It also expressly recognizes the Court's powers to order a manner of logging if the parties are unable to agree or if there is a need to vary from the manner chosen by the producing party.

Other Issues

While the discussion at the conference did not yield consensus suggestions for proposed amendments, it did explore other issues that may be of interest to the Advisory Committee. We address them here briefly.

Categorical Logging

A number of participants insisted that separating the privileged documents into categories and dealing with them as categories was counterproductive. These individuals believed that the wrangling of the definition of a category was taking more time than it was worth. Others reflected that using categories to either exclude logging of certain types of documents or group others was beneficial to cases.

As the authors of the article that endorsed and promoted categorical logging more than a decade ago, we ask to be heard before we are sentenced. Our thesis was that lawyers should be able to identify categories of documents that are either so clearly privileged or not and then agree that counsel need not log them. Other categories, we suggested, could be identified in bulk and addressed in a more summary fashion with respect to providing the identification of the privilege. We appreciate that the use of categories requires careful drafting and negotiation. That said, we still believe that it is time well spent in many cases, and we believe the rule (and the Advisory Committee Note) should continue to enable such practices as parties may elect. Indeed, given the continued rise in the sheer volumes of data and documents where privilege claims may be raised in matters, we think the need for express recognition and authorization of categorical logging options will become critical over the next decade.

Attestation

As we explained, too much privilege review and logging decisions are done in the first (and many times only) instance by very junior members of the review team. They default to claiming privilege when there is any doubt as to the proper classification of a document. However, there was little enthusiasm for requiring counsel to make an attestation such as the following in the hopes that it will lead to more useful supervision: "I certify that I supervised that process which was done by lawyers and other persons employed to prepare this log. I certify that, based on my review of their work, that the documents listed on the log are properly identified as privileged." Some participants feared that a near-absolute attestation or certification would create satellite litigation, and it was asking too much of the lawyers who were forced to supervise an admittedly

arduous and challenging process.[6] We concur that an unqualified certification process could lead to unnecessary collateral challenges that would not necessarily advance better logging or help the litigation move forward more generally.

Challenge Procedure

There was universal agreement that privilege issues should be promptly addressed and not left to the conclusion of discovery, although some participants were concerned that advancing challenges to the front of the discovery period could yield premature or needless disputes. There was a discussion of shortening the time within which a party challenging the log must make that challenge or answer that challenge. Also, there was dialogue as to whether the length of the submissions regarding privilege disputes could be truncated. However, there was a concern that lessening the time for submission had to be a function of how many entries were in dispute. Furthermore, there was concurrent concern that artificially limiting the space allotted to provide the context for privilege claims could fundamentally impair the invocation of legitimate privilege rights.

However, there appeared to be broad agreement regarding the potential value of the referral of substantial privilege controversies to a magistrate judge or special master during the discovery period, with the requirement that the parties meet with that person and attempt to resolve their differences in the first instance.

Metadata Log

One of our participants referenced the use of a "carrot and stick approach." In short, the parties agree to exchange metadata-only logs of documents claimed to be privileged that reflect objective data (e.g., sender, recipient, date, etc.) about each document. This log can be produced mechanically. The validity of the assertion of privilege is then tested by looking at a sample drawn from these documents. If they all "pass" the test of being, in fact, privileged, the producing party gets the carrot - the other party agrees that the metadata log is sufficient, and there the matter ends. If they "flunk," the producing party gets the stick. The logging party may have to pay costs, do additional and more detailed logging, or, in an extreme case, lose the privilege as to all the documents on the metadata log. Of course, this approach has pros and cons, and participants had mixed views on its feasibility, utility, and defensibility.[7] Personally,

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[6] Another problem that tends to get overlooked in the privilege review process is that the substantive law of privilege (including federal common law of privilege), particularly with respect to the scope of the privilege for entities sued in multiple jurisdictions, is unsettled, jurisdictionally variable, and dynamic. In addition, corporations (and other entities) are generally outsourcing functions more, using consultants for traditional employee functions, using contract employees, and even independent non-contract "gig" economy providers. These substantial challenges and uncertainties regarding the application of law to the facts are a significant impediment to a certification process, and to asserting privilege claims in the first instance.

[7] Metadata logs may be agreed to by the parties as an initial protocol with options for more detailed logging for subsets or categories of claims. For example, metadata-only logs may be sufficient for communications between

we are concerned that any approach that jeopardizes legitimate privilege claims based on a "sampling" process could lead to significant due process challenges that could then lead to substantial collateral proceedings.

Conclusion

Thanks to the superb professionalism of our participants, we accomplished more than we thought we would despite the challenges of a virtual symposium in the context of COVID-19. We are indebted to their contributions to our understanding of the issues, and we are hopeful that they will each lend their own voice to the process to best inform the Advisory Committee's deliberations. We also note that robust dialogue continues in the legal community regarding the exploration of potential privilege logging rule changes, and we respectfully submit that while getting to a "better" rule may be very difficult work, there are substantial potential benefits, and we urge the Advisory Committee to continue its exploration in this area.

Thank you for the opportunity to respectfully submit our personal observations and suggested amendments.

/s/

John M. Facciola

/s/

Jonathan M. Redgrave

legal counsel only, but more detailed logs may be required where an entity's employees are included in the communication.

TAB 14

1766 **14. Report of Joint Subcommittee on Appeal Finality after Consolidation**

1767 The FJC has nearly completed a second study of the effects of the clear rule adopted nearly
1768 four years ago to measure the effects of consolidating initially separate actions on appeal finality.
1769 A report will soon be available for Subcommittee consideration, perhaps as early as April. The
1770 Subcommittee will then resume its deliberations. For now, there is nothing new to report. The
1771 following paragraphs from the October agenda materials serve as a reminder of ongoing work:

1772 The Joint Civil-Appellate Subcommittee was appointed to study the effects of the final
1773 judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S.Ct. 1118 (2018). Implicitly
1774 choosing among the four approaches that had been taken by the courts of appeals, the Court ruled
1775 that complete disposition of all claims among all parties to what began as a separate action is a
1776 final judgment no matter that other parties and claims asserted in originally independent actions
1777 remain undecided. The Court also suggested that if this rule creates problems, solutions may be
1778 found in the Rules Enabling Act process.

1779 Subcommittee work began with an extensive and elaborate Federal Judicial Center study
1780 of appeals in consolidated actions filed in 2015, 2016, and 2017 that was described in the report to
1781 the October 2020 meeting. That work was followed by an informal effort that asked judges in the
1782 Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about experience with *Hall*
1783 *v. Hall*. Each circuit routinely screens incoming appeals for timeliness. No occasion to dismiss
1784 appeals as untimely under the *Hall v. Hall* rule was recalled in the Third, Seventh, Ninth, or
1785 Eleventh Circuits, either on staff screening or on motion to dismiss. The Second Circuit did find
1786 occasion to dismiss appeals in *McCullough v. World Wrestling Ent., Inc.*, 827 F.Appx. 3 (2d Cir.
1787 2020). The setting was complicated, as described in the Subcommittee's April report. No general
1788 lessons can be drawn from this example.

1789 The Subcommittee last met in June 2021. The FJC has launched another study, using a
1790 different and less burdensome approach. After that work is completed, the Subcommittee will
1791 consider any lessons it may yield. Even if the results do not suggest any problems in practice, the
1792 Subcommittee will turn to the question whether it would be wise to consider rules revisions that
1793 extend the valuable partial-final-judgment provisions of Rule 54(b) to better align the interests of
1794 the district court, the court of appeals, and the parties with final-judgment appeal doctrine. It may
1795 be that it is better to treat an action formed by consolidating initially separate actions under Rule
1796 54(b), just as it would be if the same action had been formed from the beginning as a single action.

TAB 15

1797 **15. End of Last Day for Filing: Progress Notes**

1798 Rule 6(a)(4)(A), and parallel Appellate, Bankruptcy, and Criminal Rules, define the end of
1799 the last day for electronic filing as "midnight in the court's time zone." This definition can be
1800 changed by statute, local rule, or order.

1801 Concerns that permission to file by midnight will impose undue burdens on lawyers,
1802 perhaps younger lawyers in particular, led to a suggestion to reconsider this definition. After some
1803 discussion an FJC project was launched to measure a wide range of questions about the possible
1804 good and not-so-good uses and effects of the opportunity for midnight filing. The progress of the
1805 study has been delayed by more pressing projects during the Covid-19 pandemic. The several
1806 advisory committees will resume consideration of this question after the FJC study is completed.

TAB 16

16. Rules 38, 39, 81(c)(3)(A): 15-CV-A, 16-CV-F

This topic is presented for renewed but preliminary discussion of related proposals that were carried forward for research in 2017 but that have languished since. The first question will be whether Committee members have any practical experience with difficulties in the rules for demanding jury trial, either in removed actions or in actions initially filed in federal court. The next question will be to identify the most promising topics for initial research. The choice of topics will shape the balance between book research and possible empirical projects. It is too early to decide whether the lengthy period of neglect reflects a lack of serious problems.

This work began with 15-CV-A, addressed to jury demands in actions removed from state court. Rule 81(c)(1) provides generally that federal procedure applies after removal. Demands for jury trial are governed by Rule 81(c)(3)(A), shown with the change made by the 2007 Style Rules:

> **(A)** *As Affected by State Law.* A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

The proposal focused on a single question, illustrated by a Nevada procedure that allows a demand for jury trial to be made "not later than the time of the entry of the order first setting the case for trial." The proposal was made by a lawyer in an action removed from a Nevada court, who lost an argument that because a demand was not required to be made in the Nevada action by the time of removal, a demand need not be made. At the time of removal, he argued, state law "did" not require a demand. The argument was rejected because the Style Project was not intended to change meaning, and "does" not excuse a demand only if state law does not require a demand at any point.

Initial discussion led the Committee to conclude that it should not address the single question whether to undo the Style change. More complicated questions were identified. In April 2016, the Committee decided to undertake study of a simplified Rule 81 that would require a jury demand under Rule 38 after removal unless a demand had been made in state court before removal.

The determination to study Rule 81 was reported to the June 2016 meeting of the Standing Committee. Immediately after the meeting, Standing Committee members Judges Gorsuch and Graber presented 2016-CV-F to this Committee. They proposed that Rule 38 be amended to make jury trial the "default." Apparently a case would be tried to a jury on all claims and issues unless all parties waive a jury as to a claim or issue. They urged that this approach would generate more jury trials and honor the Seventh Amendment more fully. The present system can be a trap for the unwary, particularly in removed cases. "[S]implicity is a virtue." Several states do not require a specific demand, and "we do not know of negative experiences in those jurisdictions."

The agenda for the November 2016 Committee meeting suggested that the Rule 38 proposal raises complex questions, both conceptual and empirical, and adds this: “The Rules Committee Support Office has undertaken to organize the first stage of research,” to include “case law, anecdotal reports, academic analysis, and available empirical evidence.”

The agenda for the April 25, 2017 meeting of this Committee included a series of elaborate drafts of revised Rules 38 and 39 that were prepared to illustrate different approaches that could be taken to relax or abolish the demand procedure. The potential need for a conforming amendment in Rule 79(a)(3) was noted. The agenda and Minutes reflect many of the questions: Why was the demand procedure incorporated, with a deadline early in the action, in 1938? How often does a party lose a desired right to jury trial for failure to make a demand? When a party requests permission to make a tardy demand, how often is the request granted? How important is it to know early in a case whether it will be tried to a jury? What is the experience in states that have no demand requirement, or that allow a demand as late as the start of trial?

No results have been reported for any research that has been undertaken.

Many lament “the vanishing jury trial.” The disruption of judicial proceedings caused by the Covid-19 pandemic, and the particular challenges for jury trials, make these questions more pressing, and likely more complicated, than they were in 2016.

From: Mark Wray <mwray@markwraylaw.com>
To: "Rules_Support@ao.uscourts.gov" <Rules_Support@ao.uscourts.gov>
Date: 01/17/2015 06:51 PM
Subject: Change to Rule 81

As for the body of people that apparently is meeting April 9-10 in Wash., D.C., to discuss the civil rules, please consider the following:

I propose that Fed. R. Civ. P. 81 be amended by adding words to clarify that in a case removed from state to federal court, if the state law requires a jury demand to be filed, and one was not required to be filed before the removal under the applicable state law, a jury demand does not have to be filed following removal until the federal judge orders it to be filed.

I actually think the rule already reads the way I stated it in the previous sentence, but in the Ninth Circuit, relying on an old case that predates the 2007 rule changes, the judges have uniformly denied jury demands for allegedly being untimely, using an interpretation of the rule that frankly is contrary to the way the rule actually reads. I have attached a brief and a court order to prove my point. I am not alone on this issue. There are dozens of cases from across the country that have dealt with it.

One would think that of all the things that should be protected by a simple rule, it is the ability to have a jury trial. Under Rule 81, however, that fundamental right is easily lost, due to the botched “style” changes of 2007.

As my reason for this rule change, I submit that Rule 81 as amended by this Committee in 2007 during the so-called “style” changes has created a trap for the unwary by changing the present tense to the past tense, and yet courts continue interpreting the rule in the present tense, to make jury demands untimely, as occurred in my case. If what I just said is unclear, please read the attached brief, which I hope will make the problem clearer. In short, the rule itself needs to be clarified, so that the courts will apply it according to the way it is actually written.

Many of the contributors to the process of the 2007 “style” changes objected repeatedly that the “style” changes would lead to costs to parties that were not acceptable. They included the group from the Eastern District of New York and others. I don’t know why their cogent and compelling input was ignored, but it was ignored.

Somehow, some sub-committee of persons operating under the auspices of the full committee (the administrative office of the courts repelled my efforts to get the actual records to find out who, and why, and where, and how) approved Rule 81 language that changed the present tense to past tense, and the overall rules committee then pronounced that draft acceptable.

The big committee has minutes stating that the big committee felt that whatever “costs” may be borne by those of us subject to the substantive and unintended consequences of “style” changes, those costs are “acceptable”.

I respectfully disagree. Enough people, like my client, have paid the “costs”, and the “costs” are unacceptable. This is an unfairly tricky rule that can be easily clarified, and needs to be fixed. Please do so. Thanks.

Regards,

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MEMORANDUM

TO: Judges Jeffrey Sutton, David Campbell, and John D. Bates

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

We write to suggest that the Advisory Committee on the Rules of Civil Procedure consider a significant revision to the rules concerning demands for a jury trial. This proposal would affect, at a minimum, Rules 38, 39, and 81. We have not drafted proposed text; our suggestion is conceptual, though we would be happy to work on this issue further.

The idea is simple: As is true for criminal cases, a jury trial would be the default in civil cases. That is, if a party is entitled to a jury trial on a claim (whether under the Seventh Amendment, a statute, or otherwise), that claim will be tried by a jury unless the party waives a jury, in writing, as to that claim or any subsidiary issue.

Several reasons animate our proposal. First, we should be encouraging jury trials, and we think that this change would result in more jury trials. Second, simplicity is a virtue. The present system, especially with regard to removed cases, can be a trap for the unwary. Third, such a rule would produce greater certainty. Fourth, a jury-trial default honors the Seventh Amendment more fully.

Finally, many states do not require a specific demand. Although we have not looked for empirical studies, we do not know of negative experiences in those jurisdictions.

We recognize that this would be a huge change, and we also recognize that problems could result, especially in pro se cases. Nevertheless, we encourage the advisory committee to discuss our idea. Thank you.

TAB 17

17. Rule 41: Dismiss Part of "Action": 21-CV-O

Rule 41(a)(1) and (2) provide for voluntary dismissal of "an action." Most of the cases that find either plain meaning or uncertainty in "action" arise under (a)(1)(A)(i), allowing a plaintiff to dismiss an action without a court order and without prejudice by a notice filed before an answer or a motion for summary judgment. Three simple categories suffice to renew discussion of the topic. Far greater detail is provided in the research memorandum prepared by the Rules Law Clerk, Burton S. DeWitt, attached below.

The simplest example of the first category involves a plaintiff that wants to dismiss a claim against a defendant, leaving other claims to continue. Most courts say Rule 41(a) does not permit this because it does not involve dismissal of an "action." Some, however, permit this act.

A similar example of the second category involves one plaintiff that wants to dismiss all claims against one defendant, leaving the action to continue as to other defendants. Most courts say Rule 41(a) permits this act. A plausible distinction may be that dismissing all claims between a pair of opposing parties is close enough to count as dismissal of an "action," even though the self-same action continues as to other defendants.

A third category involves voluntary dismissal of all claims against all of one or more defendants by one plaintiff, leaving other plaintiffs to continue the action against the same defendants. The research memorandum reports that there is limited case law, but the courts that have considered this question "have been unanimous in applying the same law to plaintiffs and claimants as they do to voluntary dismissal of a defendant."

An added wrinkle is added by Rule 15(a). A number of the cases described in the research memorandum observe that dismissal of a claim or a party can be accomplished by amending the complaint, a procedure that is available as a matter of course within the confines of Rule 15(a)(1). Leave of court is required outside Rule 15(a)(1). So too, there is a possibility that the court may order that a party be added or dropped under Rule 21, "on just terms," which apparently may be without prejudice.

This question was brought to the Committee by Judge Jesse Furman, a member of the Standing Committee, in 21-CV-O. The discussion at the October meeting is reported in the Draft Minutes at pages 21-24. The discussion concluded with the observation that judges are not uniform in applying the rule: "On its face, we may be able to do better." Work is to proceed.

Further work could pursue relatively modest or rather ambitious goals. The simplest project would be to redraft the rule text to make uniform the approach now taken in a majority of cases. A more complex approach would be to reexamine the answers given for the three categories described above, attempting to determine what is the better answer. The majority approaches might well prevail after this examination, but might not. The questions are more complex than might appear. A still more complex approach would examine Rule 41(a) more broadly, addressing questions that appear on the face of the rule text. Some of these questions also turn on the meaning of "action" in the rule text. Others do not.

1900 The present question is whether to pursue a simple project or to take on more elaborate
1901 issues. The agenda materials for the October meeting describe a range of possible approaches. The
1902 following pages are a slightly modified version of the October materials:

1903 October 2021 Agenda Materials

1904 Rule 41(a)(1) governs voluntary dismissals without court order:

1905 **Rule 41. Dismissal of Actions**

1906 **(a) Voluntary Dismissal.**

1907 **(1) *By the Plaintiff.***

1908 **(A)** *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2,
1909 and 66 and any applicable federal statute, the plaintiff may
1910 dismiss an action without a court order by filing:

1911 (i) a notice of dismissal before the opposing party serves
1912 either an answer or a motion for summary judgment;
1913 or

1914 (ii) a stipulation of dismissal signed by all parties who
1915 have appeared.

1916 **(B)** *Effect.* Unless the notice or stipulation states otherwise, the
1917 dismissal is without prejudice. But if the plaintiff previously
1918 dismissed any federal- or state-court action based on or
1919 including the same claim, a notice of dismissal operates as
1920 an adjudication on the merits.

1921 Rule 41(a)(2) governs dismissal at the plaintiff's request by court order. Proposal 21-CV-
1922 O raises a question as to Rule 41(a)(1) only. Related questions under Rule 41(a) may be considered
1923 as well. But there is no apparent reason for taking on Rule 41(a)(2).

1924 21-CV-O was submitted by Judge Jesse Furman, a member of the Standing Committee. It
1925 points to the disagreement in the cases over a single word in Rule 41(a)(1)(A), which provides for
1926 dismissal of an "action." Different answers are given to the question whether the unrestricted right
1927 to dismiss without prejudice conferred by Rule 41(a)(1)(A) allows dismissal of some part, but not
1928 all, of an action. The part may be a "claim," or a party. At least for the most part, the decisions
1929 turn on the familiar "plain meaning" principle. Should the rule be read to reflect a judgment that a
1930 plaintiff should have a right, even in the early stages of an action, to dismiss only if nothing is to
1931 remain? Or may there be reasons to allow early dismissal without prejudice of a claim or party,
1932 retaining the rest of the action, when the initial joinder choice comes to seem undesirable?

1933 Some guidance may be found in the origins of Rule 41. Before 1938 the Conformity Act
1934 directed federal courts to adhere to local state practice. State practices varied, but the opportunity
1935 to dismiss without prejudice might persist far into the action as it progressed toward judgment. See
1936 9 Wright & Miller, Federal Practice & Procedure Civil 4th, § 2362. Establishing discretionary
1937 court control relatively early in the action, as Rule 41(a)(2) does, is attractive. But (a)(1) reflects
1938 sympathy for a plaintiff who has second thoughts before the court and defendant have invested
1939 much in the action.

1940 Beyond that starting point, the central feature of Rule 41(a)(1) is that it provides for
1941 dismissal without prejudice. Filing the action and then dismissing it leave the plaintiff free to bring
1942 the same action, or an action somehow related to it, without penalty for imposing whatever burdens
1943 have been imposed on the court and defendant up to the moment of dismissal. The questions are
1944 not at all the same as support the right to a voluntary dismissal with prejudice that establishes
1945 preclusion to the same extent as a judgment on the merits in the same action.

1946 The question whether the right to early voluntary dismissal without prejudice should extend
1947 to only part of an action includes the prospect that changes might instead be made by amending a
1948 complaint under Rule 15 or seeking an order dropping a party under Rule 21. Those alternatives
1949 are commonly invoked in the cases that limit Rule 41(a)(1)(A) to dismissal of an entire action.
1950 Since Rule 41 cuts off the plaintiff's right to unilateral dismissal with an answer, Rule 15(a)(1)
1951 would allow amendment once as a matter of course only for 21 days after serving the complaint;
1952 after that an amendment to drop a claim or party would require the court's leave. That is an
1953 advantage if reason can be found for distinguishing partial dismissals from complete dismissals.
1954 Rule 21 seems to require a court order, with the same potential advantage. And neither Rule 15
1955 nor Rule 21 expressly address the "prejudice" question.

1956 Whatever the better rule is, the long-continued division of opinion in the lower courts may
1957 be reason enough to consider a clarifying amendment. Drafting would be a bit trickier if the
1958 decision is that Rule 41(a)(1)(A) dismissal should be limited to an entire action, since several
1959 courts find this to be the clear present meaning. But drafting can be done.

1960 Any reasons for distinguishing between complete and partial early dismissals must be
1961 found in experience. Rule 41 reflects sympathy for a plaintiff who comes to believe that it is better
1962 to abandon the action entirely, for whatever miscalculation of preparedness, choice of court, and
1963 aggregation of claims and parties. Experience may show that this sympathy is well deserved. But
1964 is it less deserved when the plaintiff comes to regret only part of the decision to sue? And are the
1965 defendant's countervailing interests weightier when only part of the action is dismissed?

1966 A plaintiff may have second thoughts before an answer or a motion for summary judgment
1967 without any prompting from the defendant. Filing the action, and service sooner or later, may occur
1968 in the middle of developing fact information, framing the information as evidence, and further
1969 learning in the law in the abstract or as applied to the apparent facts. Improved knowledge may
1970 show that more work is needed to determine whether the action should be pursued at all, or that
1971 the needs of proof or even choice of law are better handled in a different court. Perhaps some
1972 deference is due even to the interest in abandoning a particular court when preliminary clues
1973 suggest it may not be as favorable as another court. In some ways, there may be greater reason to

1974 support dismissal in reaction to these concerns when the new knowledge about the choice of time
1975 and forum affects only part of the case, whether claim or choice of defendants. A fraud claim
1976 joined with a breach of contract claim, for example, may require difficult proof of different aspects
1977 of the same transaction and facts that may not even bear on the breach claim.

1978 Balanced against these interests of the plaintiff are the interests of the court and the
1979 defendant. Dismissal without prejudice leaves them subject to the risk of duplicative effort and,
1980 for the defendant, continuing anxiety and perhaps preparation for litigation that may never ensue.
1981 The litigation may be revived on terms less favorable as to court, time, claims, and other parties.
1982 These costs may increase with dismissal of only part of the present action, requiring court and
1983 defendant to continue to litigate and offering no protection against extended and duplicative effort
1984 in a later action. On the other hand, the dismissed parts of the first action may never be revived,
1985 reducing the burden of present litigation and saving the costs -- if not the fear -- of renewed
1986 litigation. And claim preclusion may bar the dismissed parts after judgment on the parts that
1987 remain.

1988 A least two additional concerns are relevant. One is that limiting the right to voluntary
1989 dismissal without prejudice to dismissing all of an action may encourage greater care in decisions
1990 about when and where to bring the action, what parties to join, and what claims to pursue.

1991 A further wrinkle is raised by Rule 41(a)(1)(A)(ii). It authorizes dismissal without
1992 prejudice by a stipulation signed by all parties who have appeared. Should dismissal by stipulation
1993 of all parties be made available for parts of an action, even if not for unilateral dismissal by the
1994 plaintiff?

1995 A second concern is often tangential to the central joinder concerns. A party that is
1996 disappointed by a ruling in the action may seek to generate a final appealable judgment by a
1997 voluntary dismissal of what remains. This opportunity is likely to require court permission under
1998 Rule 41(a)(2) because an answer or motion for summary judgment has been filed, but might arise
1999 under (a)(1), most likely on a ruling on a motion made before an answer is filed. Courts of appeals
2000 generally refuse to allow appeal finality to be manufactured by a voluntary dismissal without
2001 prejudice. This concern probably should not shape consideration of the questions raised by the
2002 proposal.
2003

2004 The direct question whether to include partial dismissals in the plaintiff's voluntary right
2005 ties directly to the events that cut off the right. As the rule stands, an answer or a motion for
2006 summary judgment terminate the right. A motion to dismiss does not. Vast energies may be
2007 devoted to litigating a motion to dismiss, including discovery, conferences with the court,
2008 extensive briefing, and so on. Long ago, the Second Circuit ruled that an extensive hearing leading
2009 to denial of a preliminary injunction, finding a low probability of success on the merits, cut off the
2010 right to dismiss by notice even though no answer or motion for summary judgment had been
2011 served. The court noted that Rule 41 was amended in 1946 to add the cutoff by motion for summary
2012 judgment. The 1946 Committee Note explained that "such a motion may require even more
2013 research and preparation than the answer itself." So literal application of the rule "would not be in
2014 accord with its essential purpose of preventing arbitrary dismissals after an advanced stage of a
2015 suit has been reached." *Harvey Aluminum, Inc. v. American Cyanamid Co.,* 203 F.3d 105, 108 (2d

2016 Cir. 1953). The plain language of the rule, however, has deterred most courts from adopting this
2017 extra-, and apparently counter-textual, view. See 9 Wright & Miller, § 2363, pp. 501-510.

2018 Other questions may be raised as well, although there is no apparent perturbation in the
2019 cases. Rule 41 addresses only voluntary dismissal by a "plaintiff." But, perhaps confusingly, it
2020 speaks of dismissing before "the opposing party" answers or moves for summary judgment: does
2021 that imply that "plaintiff" means any party making a claim? Should the text expressly include any
2022 claimant? A defendant may think better of a counterclaim, a crossclaim, or a third-party claim. If
2023 the right to dismiss extends to fewer than all parts of an action, why not extend the right to other
2024 claims, recognizing that dismissal of a compulsory counterclaim may extinguish the claim under
2025 Rule 13(a), and that an exception must be made for a claimant in an interpleader action? It could
2026 be urged that a defendant has a stronger claim for freedom to dismiss claims from an action in
2027 which it did not choose the court, time, or combination of claims and parties. A defendant may
2028 deserve special sympathy when seeking to withdraw all claims made by that defendant against all
2029 other parties. Amending the answer might work to withdraw a counterclaim or crossclaim, but can
2030 a third-party complaint be withdrawn by a self-styled amendment? It may be better to let these
2031 question lie.

2032 Draft rule language can be sketched to illustrate some of the possibilities for amendment.

2033 Dismiss Part of Action: (a)(1)(A)

2034 * * * the plaintiff may dismiss an action <u>or a claim or party from the action</u> * * *

2035 A more ambitious variation might be:

2036 * * * <u>a party asserting a claim</u> may dismiss an action <u>or a claim or party from the</u>
2037 <u>action</u> * * *

2038 Various issues could be addressed in the Committee Note. Likely it would be useful to
2039 suggest that the definition of "claim" for this purpose reflects Rule 18(a), without attempting to
2040 venture into the world of claim preclusion. If the rule is intended to allow voluntary dismissal of
2041 all claims by one of plural plaintiffs, that could be made clear; if not, the opposite should be stated.
2042 Probably it would be wise to avoid any commentary on the meaning of "without prejudice."

2043 If greater freedom is to be allowed for dismissal by stipulation of all parties, the rule should
2044 be restructured to change the relationship between items (i) and (ii):

2045 (i) the plaintiff may dismiss an action without a court order by filing a notice
2046 of dismissal before the opposing party serves either an answer or a motion
2047 for summary judgment; or

2048 (ii) all parties who have appeared may sign and file a stipulation of dismissal.[1]

[1] This could be expanded: "a stipulation dismissing a claim or party from the action."

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~~ <u>a motion under Rule 12(b), (e), or (f),</u> an answer<u>,</u> or a motion for summary judgment; * * *

MEMORANDUM

TO: Professors Ed Cooper and Rick Marcus
Reporters, Advisory Committee on Civil Rules

FROM: Burton S. DeWitt
Rules Law Clerk

DATE: February 28, 2022

RE: **Suggestion 21-CV-O:** Proposed Amendment to Rule 41(a) (Voluntary Dismissal of an Action)

This memo relates to a suggestion submitted by Judge Jesse M. Furman and Judge Philip M. Halpern that Rule 41(a) be amended to clarify what constitutes an "action" pursuant to the rule. You asked me to survey how courts have interpreted the term under a wide variety of situations, specifically including (but not limited to) when a plaintiff attempts to dismiss all claims against fewer than all defendants, and when a plaintiff attempts to dismiss fewer than all claims against any given defendant. In researching the two specific situations that you asked me to look into, I also found a handful of cases addressing "action" in other situations, which I address briefly later in this memorandum. My research involved reading Judge Furman's suggestion and the cases referenced therein, as well as reviewing the leading treatises and cases, and running citing searches from these cases. Because the treatises provided a very helpful starting point—although my research did show they reached somewhat incomplete conclusions—and because nearly every case cited a very small handful of leading cases in each circuit, I did not rely on any keyword searches.

As a threshold matter, although the initial research project was limited to Rule 41(a)(1), preliminary research indicated that courts treat the definition of "an action" under Rule 41(a)(1) and Rule 41(a)(2) substantially identically.[1] Therefore, and subsequent to an email exchange between me and you, the research was expanded to include both subdivisions of the Rule.

In Section I of this memorandum, I discuss Judge Furman and Judge Halpern's suggestion. In Section II, I address the most common issue I found in the caselaw: plaintiffs attempted dismissal of all claims against fewer than all defendants. Circuits are split on whether a plaintiff may properly use Rule 41(a) to effect such a dismissal. In Section III, I briefly address the similar issue of cases with multiple plaintiffs or multiple claimants in which fewer than all plaintiffs or claimants seek to dismiss all their claims against all defendants. In Section IV, I survey cases where plaintiffs seek to dismiss fewer than all claims against any given defendant. This issue is almost as common as that in Section II, and no circuit has explicitly permitted Rule 41(a) to be used in

[1] To the extent there is a relevant difference, in cases where the Rule 41(a)(2) dismissal will only dismiss some parties from the suit, it is that in exercising discretion under Rule 41(a)(2), the court should consider whether there will be any prejudice to the remaining parties in granting dismissal of other parties. *See, e.g.*, Tycom Corp. v. Redactron Corp., Civ. No. 74-65, 1977 WL 23174, at *1 (D. Del. Aug 17, 1977) (citing cases).

such a way. However, a handful of intra-circuit splits have developed or are developing. In Section V, I note two cases that permitted plaintiffs to dismiss class allegations pre-certification under Rule 41(a). Finally, in Section VI, I recommend that the committee consider resolving the circuit split discussed in Section II by amending the rule to explicitly adopt the majority approach. I also recommend that the committee consider clarifying that plaintiffs may not use Rule 41(a) to dismiss fewer than all claims against any single defendant.

I. Judge Furman and Judge Halpern's suggestion

Judge Furman and Judge Halpern requested that the committee review whether Rule 41(a) allowed a court to dismiss anything less than all claims in an action. Rule 41(a)(1) provides that subject to a few irrelevant (for purposes of this review) rules and statutes, a plaintiff "may dismiss an action without a court order by filing" either (i) a notice of dismissal before the opposing party answers the complaint or moves for summary judgment, or (ii) a stipulation of dismissal signed by all parties. Rule 41(a)(2) allows the plaintiff to request a court order dismissing its "action" in situations not covered by Rule 41(a)(1). However, neither subdivision of Rule 41(a) defines "action," leaving it to courts to determine whether either subdivision applies when the plaintiff seeks to dismiss fewer than all claims or parties to a suit.

The two judges suggest that the committee conduct a "comprehensive survey" of the caselaw to see how courts have interpreted the provision. The suggestion specifically notes Judge Furman's "impression" that "most, if not all" courts permit a plaintiff to dismiss all claims against less than all defendants in a suit. Judge Furman also noted a split of authority on whether a plaintiff may dismiss anything less than all claims against any given defendant. Judge Furman cited his decision in *Alix v. McKinsey & Co.*, where he briefly addressed the issue before resolving the pending motion on other grounds.[2]

In their suggestion, Judge Furman and Judge Halpern do not take a position on how "action" should currently be interpreted under the rule, nor do they suggest any particular way the rule can or should be amended to change or improve practice under the rule. Rather, they just note the apparent inconsistent interpretation within the Second Circuit and potentially nationwide.

II. There is a longstanding circuit split regarding whether Rule 41(a) can be used to effect dismissal of all claims against fewer than all defendants

A distinct 6-3 circuit split has developed regarding whether Rule 41(a) can be used to dismiss all claims against fewer than all defendants. While district courts have had differing interpretations of "action" since shortly after the Rules first came into effect, by the 1960s appellate decisions from the Second and Sixth Circuits on the one hand and the Fifth Circuit on the other materialized a nationwide split. More than half a century later, the split has widened, and now all but three of the twelve[3] circuits have weighed in.

[2] 470 F. Supp. 3d 310 (S.D.N.Y. 2020).

[3] I have excluded the Federal Circuit from this count. As the voluntary dismissal of parties or claims is not a procedural issue "pertaining to patent law," the Federal Circuit applies to Rule 41(a) issues the law of the circuit in which the district court sat. *See, e.g.*, Wordtech Sys., Inc. v.

The majority approach, which has been adopted by the First, Third, Fifth, Eighth, Ninth, and Eleventh (through old-Fifth Circuit authority) Circuits, allows a plaintiff to dismiss all claims against some but not all defendants via Rule 41(a).[4] These cases reject the literal wording of Rule 41(a) and cite policy considerations to allow plaintiffs to voluntarily dismiss defendants from the suit. Conversely, the Second, Sixth, and Seventh Circuits have read "action" to mean all claims against all parties, and note the distinction to Rule 41(b), which uses "claims" instead.[5] Courts following these cases therefore require a plaintiff seeking to dismiss fewer than all defendants to amend its complaint under Rule 15. The Fourth, Tenth, and D.C. Circuits have not addressed the

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Integrated Networks Sols., Inc. 609 F.3d 1308, 1318–19 (Fed. Cir. 2010). While the Federal Circuit also hears cases on appeal from the Court of Federal Claims, those courts use a separate (although nearly identical) ruleset. I have not reviewed how the Federal Circuit interprets Court of Federal Claims Rule 41(a).

Of note, and as discussed later in this memorandum, the Federal Circuit issued one of the leading decisions on the issue of whether a plaintiff can dismiss fewer than all claims against a given defendant. *See* Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 517–18 (Fed. Cir. 1987). In that case, the Federal Circuit did not address which circuit's law it was applying to Rule 41(a) issues. However, because nothing under Rule 41(a) is an issue "pertaining to patent law," I assume the court applied its understanding of Eighth Circuit law (the applicable circuit) in that appeal.

[4] Cabrera v. Mun. of Bayamon, 622 F.2d 4, 6 (1st Cir. 1980); Young v. Wilkie Carrier Corp., 150 F.2d 764, 764 (3d Cir. 1945); Plains Growers, Inc. v. Ickes-Braun Glasshouses, Inc., 474 F.2d 250 (5th Cir. 1973); State *ex rel.* Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102, 1105–06 (8th Cir. 1999); Wilson v. City of San Jose, 111 F.3d 688 (9th Cir. 1997).

In dicta, the Eleventh Circuit evidenced that it still follows old Fifth Circuit precedent. *See* Klay v. United HealthGroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004) ("Put simply, Rule 41 allows a plaintiff to dismiss all of his claims against a particular defendant . . . ."). More recent dicta hints otherwise. *See* Perry v. Schumacher Grp., 891 F.3d 954, 958 (11th Cir. 2018). I will discuss the Eleventh Circuit in more detail later in this Section.

The Fifth Circuit itself still follows its old precedent, but it nearly changed course. Less than two years ago, the court reconsidered the issue *en banc*, with four of its judges dissenting in favor of explicitly overturning the leading case in the Circuit. *See* Williams v. Seidenbach, 958 F.3d 341, 360–63 (5th Cir. 2020) (en banc) (Oldham, J, dissenting).

Outside the Eleventh Circuit, the odd district court decision from majority-approach circuits may hold otherwise, but these can be ignored as decisions that are overtly incorrect under applicable circuit law. *See, e.g.*, Close v. Acct. Resol. Servs., Civ. No. 20-11871-MLW, -- F. Supp. 3d ---, 2021 WL 3684066, at *1 n.2 (D. Mass. Aug. 19, 2021) (quoting a district court case dealing with attempts to dismiss fewer than all claims against a given defendant to express doubt whether Rule 41(a) permits stipulated voluntary dismissal of all claims against a given defendant, but ruling that Rule 41(a) was inapplicable because not all defendants had signed the stipulation of dismissal).

[5] Harvey Aluminum, Inc. v. Am. Cyanamid Co., 203 F.2d 105, 108 (2d Cir. 1953); Philip Carey Mfg. Co. v. Taylor, 286 F.2d 782, 785–86 (6th Cir. 1961); Taylor v. Brown, 787 F.3d 851, 857–58 (7th Cir. 2015). As will be discussed later in this Section, the use of the present perfect tense is intentional, as both the Second and Seventh Circuits have to varying degrees walked back their literal readings of Rule 41(a).

issue, and an intra-circuit split has developed in both the Fourth and Tenth Circuits.[6] In the remainder of this Section, I address in detail the three minority approach circuits, the three circuits not to have decided the issue, and the Eleventh Circuit.

Second and Seventh Circuits. Although the minority approach circuits all based their view on a literal reading of the rule, subsequent decisions hint that at least two of the circuits may join (or already de facto are part of) the majority in the future. The Second Circuit has questioned the wisdom of its leading case.[7] As evidenced by Judge Furman's opinion that prompted his suggestion, courts within the Second Circuit have therefore felt free to eschew precedent and follow the majority approach.[8] And while the Seventh Circuit only weighed in with a panel decision in the middle of the last decade,[9] a similar resistance is developing,[10] supported no doubt by undermining dicta just last year from the Seventh Circuit itself.[11]

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[6] Discussion and citation of relevant cases from districts in the Fourth, Tenth, and D.C. Circuits follow later in this Section.

[7] The Second Circuit has avoided fully overruling *Harvey Aluminum* by stating that the standard a district court should employ in determining whether to allow a party to amend its complaint to drop a claim under Rule 15 is the same as a withdrawal under Rule 41(a). *See* Wakefield v. N. Telecomm. Inc., 769 F.2d 109, 114 n.4 (2d Cir. 1985). This often renders irrelevant which rule should be used to effect the termination of a party to the suit.

[8] In fact, the majority approach may in fact be the majority approach for district courts within the Second Circuit. *See, e.g.*, Frank v. Trilegiant Corp., No. 10 CV 5211(DRH)(ARL), 2012 WL 214100, at *3 (E.D.N.Y. Jan. 24, 2012); Cent. N.Y. Laborers' Health & Welfare Fund v. Fahs Constr. Grp., Inc., 170 F. Supp. 3d 337, 343–44 (N.D.N.Y. 2016); ICICI Bank Ltd. v. Doshi, No. 19-CV-11788 (RA), 2021 WL 6052117, at *1–2 (S.D.N.Y. Dec. 21, 2021); Greenwood Grp., LLC v. Brooklands, Inc., No. 1:15-CV-00851 EAW, 2016 WL 3828685, at *1–2 (W.D.N.Y. July 12, 2016); *see also* Mut. Beneficial Life Ins. Co. in Rehab. v. Carol Mgmt. Corp., No. 93 Civ. 7991 (LAP), 1994 WL 570154, at *1 (S.D.N.Y. Oct. 13, 1994) (noting that even the Second Circuit has "criticized and rejected" *Harvey Aluminum*, and that "[i]t is no longer persuasive authority on the issue" of dismissal of parties under Rule 41).

[9] *Taylor*, 787 F.3d at 857–58.

[10] *See, e.g.*, Manuel v. Nalley, No. 15-CV-783-SMY-RJD, 2017 WL 6593703, at *1 (S.D. Ill. Dec. 26, 2017) (noting *Taylor*, but allowing a stipulated dismissal with prejudice against two of four defendants "in the interest of judicial economy"); Hanusek v. FCA US LLC, No. 18-CV-509-NJR-GCS, 2019 WL 1239265, at *1 n.2 (S.D. Ill. Mar. 18, 2019) (noting *Taylor*, but allowing dismissal of all claims by one plaintiff under Rule 41(a) "in the interest of judicial economy").

[11] *See* Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare [sic] Servs., Inc., 7 F.4th 555, 559 n.4 (7th Cir. 2021). In *Meinders*, the Seventh Circuit affirmed the stipulated dismissal of all claims against seven UnitedHealth entities. The court noted that this dismissed "the 'entire action' as it related to the United entities." However, it admonished that "Rule 15(a) is the better course for voluntarily dismissing individual parties or claims in the future." Although the company name is UnitedHealthcare Services, the reporter incorrectly placed a space between United and Healthcare in the case name.

Sixth Circuit. The Sixth Circuit is open and committed to being an "outlier."[12] The court has recognized that due to one inconsistent decision, its "interpretation of Rule 41 is unclear."[13] However, the near-unanimous weight of authority in the circuit is that "Rule 41(a)(1)(A)(i) can only be used to dismiss all claims against all defendants, not individual claims or parties."[14]

Tenth Circuit. The Tenth Circuit has not expressly addressed the issue. In dicta in *Gobbo Farms & Orchards v. Poole Chemical Co.,* the court implied that it approved of a literal reading of Rule 41.[15] And following *Gobbo*, some courts have treated Rule 41(a) notices of dismissal of a defendant as Rule 15 motions to amend the complaint.[16] However, following the District of Utah's decision in *Van Leeuwen v. Bank of America, N.A.* in 2015, the majority of courts in the Tenth Circuit have allowed plaintiffs to dismiss one or more of multiple defendants via Rule 41, distinguishing *Gobbo* as limited to where a plaintiff sought to dismiss only some claims against one defendant.[17]

Fourth Circuit. The Fourth Circuit likewise has not addressed the issue, and an intra-circuit split has developed. Similar to the Tenth Circuit, dicta from a case where a plaintiff tried to dismiss certain claims, as opposed to all claims against a defendant, has led some courts to strike Rule 41

Prior to the Seventh Circuit's *Taylor* decision, courts in the Seventh Circuit permitted dismissal of claims against one defendant under Rule 41(a). *See, e.g.*, Futch v. AIG, Inc., Civ. No. 07-402-GPM, 2007 WL 1752200, at *1 (S.D. Ill. June 15, 2007) (citing cases).

[12] *See, e.g.*, Barton v. Lockwood, Andrews & Newnam, P.C., No. 17-cv-11392, 2018 WL 8608300, at *1 (E.D. Mich. May 23, 2018).

[13] Letherer v. Alger Grp., L.L.C., 328 F.3d 262, 265–66 (6th Cir. 2003), overruled on other grounds by Blackburn v. Oaktree Capital Management, LLC, 511 F.3d 633 (6th Cir. 2008) (refusing, when plaintiff attempted to voluntarily dismiss a defendant pursuant to Rule 41, to definitely decide the issue, but holding that the court dismissed the defendant pursuant to Rule 21, not Rule 41).

[14] EQT Gathering, LLC v. A Tract of Property Situated in Knott Cnty., Ky., No. 12-58-ART, 2012 WL 3644968, at *1 (E.D. Ky. Aug. 24, 2012). *But see* Banque de Depots v. Nat'l Bank of Detroit, 491 F.2d 753 (6th Cir. 1974) (noting reservations but holding the district court did not abuse its discretion under Rule 41(a)(2) by dismissing one defendant).

[15] *See* 81 F.3d 122, 123 (10th Cir. 1996).

[16] *See, e.g.*, Ashford v. Neb. Furniture Mart, Inc., No .17-2097-DDC-GLR, 2017 WL 1332706, at *1 (D. Kan. Apr. 11, 2017) (Crabtree, J).

[17] 304 F.R.D. 691, 696–97 (D. Utah 2015); *see also* City of Scranton v. Orr Wyatt Streetscapes, No. 18-4035-DDC-TJJ, 2018 WL 4222414, at *1 (D. Kan. July 16, 2018) (approving of *Van Leeuwen* and explicitly rejecting the court's prior holding in *Ashford*) (Crabtree, J); Grim v. FedEx Ground Package Sys., Inc., No. CV 19-10 MV/GBW, 2020 WL 587846, at *3 (D.N.M. Feb. 6, 2020). Interestingly, due to its extensive analysis of the circuit split, *Van Leeuwen* has been frequently cited by courts in the Sixth Circuit to note that Circuit's status as an outlier— according to Westlaw, 28 of the 41 cases to cite it are from Sixth Circuit courts. *See, e.g.*, U.S. *ex rel* Doe v. Preferred Care, Inc., 326 F.R.D. 462, 464 (E.D. Ky. 2018).

motions to dismiss a defendant.[18] Most courts, however, have taken the "sounder view" and adopted the majority approach.[19]

D.C. Circuit. Courts in the D.C. Circuit appear to have been unanimous in reading Rule 41 as not prohibiting voluntary dismissal of some, but not all, defendants.[20]

Eleventh Circuit. The Eleventh Circuit follows the majority approach through binding pre-split Fifth Circuit precedent.[21] But in *Perry v. The Schumacher Group*, the Eleventh Circuit took a textual approach, reading Rule 41(a) as only allowing dismissal of the entire case and not "a portion of a plaintiff's lawsuit . . . while leaving a different part of the lawsuit pending before the trial court."[22] However, that case concerned an attempted stipulated dismissal of fewer than all claims against a defendant, not all claims against fewer than all defendants.[23] A few district courts have seized on this dicta and read *Perry* as overruling old Fifth Circuit precedent.[24] But a majority of courts so far have reconciled *Perry* with the prior precedent and still permit a plaintiff to use

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[18] *See, e.g.*, Volvo Trademark Holding Aktiebolaget v. AIS Constr. Equip. Corp., 162 F. Supp. 2d 465, 467 & n.3 (W.D.N.C. 2001) (citing Skinner v. First Am. Bank of Va., 64 F.3d 659 (table), 1995 WL 507264 (4th Cir. 1995)) (adopting magistrate recommendation to strike Rule 41 notice of dismissal against individual defendant and to proceed instead as a motion to amend complaint). *But cf.* Miller v. Terramite Corp., 114 F. App'x 536, 540 (4th Cir. 2004) ("Because Rule 41(a)(2) provides for the dismissal of 'actions' rather than claims, it can be argued that Rule 15 is technically the proper vehicle to accomplish a partial dismissal of a single claim, but similar standard govern the exercise of discretion under either rule."); Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir. 1971) ("[Rule 41(a)(1)(i)] is designed to permit a disengagement of the parties at the behest of the plaintiff only in the early stages of a suit . . . .").

[19] *E.g.*, Duke Progress Energy LLC v. 3M Co., No. 5:08-CV-460-FL, 2015 WL 5603344, at *2 (E.D.N.C. Sept. 22, 2015) (citing cases from three different districts in the circuit that have followed the majority approach); *see also* Ownby v. Cohen, No. 3:02CV00034, 2002 WL 1877519, at *3 n.1 (W.D. Va. Aug. 15, 2002). Other courts have noted the intra-circuit split, but avoided ruling on the issue. *See, e.g.*, Hedrick v. E.I. du Pont de Nemours & Co., Civ. No. 2:12-06135, 2013 WL 2422661, at *4 n.1 (S.D. W. Va. June 3, 2013).

[20] *See, e.g.*, Reetz v. Jackson, 176 F.R.D. 412, 413 & n.2 (D.D.C. 1997); Detroit Int'l Bridge Co. v. Canada, Civ. No. 10-476 (RMC), 2011 WL 6010230, at *2 (D.D.C. Dec. 1, 2011).

[21] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209–10 (11th Cir. 1981) (en banc); *see also* Klay v. United HealthGroup, Inc., 376 F.3d 1092, 1106 (11th Cir. 2004) ("Put simply, Rule 41 allows a plaintiff to dismiss all of his claims against a particular defendant . . . .").

[22] 891 F.3d 954, 958 (11th Cir. 2018).

[23] *See id.* 956–57.

[24] *See, e.g.*, West v. Zacharzewski, No. 2:18-CV-14155-Rosenberg/Maynard, 2019 WL 3426321, at *1 n.1 (S.D. Fla. Apr. 18, 2019) (Rosenberg, J) (reading *Perry* as prohibiting use of Rule 41(a) to dismiss all claims against fewer than all defendants, and sua sponte, in a footnote, without analysis interpreting a Rule 41(a) stipulated dismissal of all claims against a defendant "as a request to dismiss [defendant] from the consolidated cases with prejudice"); *see also* Walker v. Trans Union, LLC, No. 2:19cv85-MHT, 2019 WL 1283440, at *1 n.* (M.D. Ala. Mar. 20, 2019) (Thompson, J) (expressing doubt whether post-*Perry* Rule 41(a) can still be used to permit dismissal of all claims against a given defendant).

Rule 41(a) to dismiss all claims against a given defendant.[25] It is too soon to say whether a true intra-circuit split will develop, especially in light of even stronger language from an August 2021 Eleventh Circuit decision that may further question the state of the law in the Eleventh Circuit.[26]

I note, however, that regardless what language the Eleventh Circuit uses, a panel of the Eleventh Circuit (like that in the two cases referenced in the previous paragraph) cannot overturn pre-split Fifth Circuit precedent within the circuit: Only the court *en banc* may.[27]

One tangential issue is whether, in courts that permit a plaintiff to voluntarily dismiss all claims against fewer than all defendants under Rule 41(a), that right is terminated if *other* defendants answer the complaint or file a summary judgment motion. I have not specifically researched this issue, but all courts I have encountered that have addressed it have permitted the dismissal so long as that specific defendant had not yet answered the complaint or motioned for summary judgment.[28]

III. Courts appear to apply Rule 41(a) similarly to dismissal of claimants or plaintiffs as they do to defendants

There is very limited caselaw addressing voluntary dismissal of all claims by one plaintiff or by one claimant. However, those courts have been unanimous in applying the same law to plaintiffs[29] and claimants[30] as they do to voluntary dismissal of a defendant. Therefore, although there is not sufficient caselaw to show a circuit split and no circuit court seems to have directly addressed the issue,[31] it would appear the split discussed above in Section II of this memorandum would likely also manifest here.

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[25] *See* Walker v. Home Point Fin. Corp., No. 8:21-cv-1916-KKM-AAS, -- F. Supp. 3d ---, 2021 WL 5368863, at *2 (M.D. Fla. Nov. 18, 2021) (collecting cases).

[26] *See* Estate of West v. Smith, 9 F.4th 1361, 1367 (11th Cir. 2021) ("[W]e now apply Rule 41(a)(1)(A)(ii) to the facts of this case. The stipulation of dismissal was signed by all the parties who had appeared at that time . . . . And the stipulation clearly dismissed all claims that were alleged against all named defendants . . . . Accordingly, by the terms of Rule 41(a)(1)(A)(ii), which means precisely what it says, the action itself—not specific claims and not specific defendants—was dismissed.").

[27] *See Bonner*, 661 F.2d at 1209–10.

[28] *See, e.g.*, United Sur. & Indem. Co. v. Yabucoa Volunteers of Am. Elderly Hous., Inc., 306 F.R.D. 88, 90 (D.P.R. 2015).

[29] Miller v. Stewart, 43 F.R.D. 409, 412–13 (E.D. Ill. 1967) (dismissal of certain plaintiffs according to same standard as dismissal of one defendant); *Tycom Corp.*, 1977 WL 23174, at *1 & n.5 (discussing standard for dismissal of parties); Kingsburg Apple Packers, Inc. v. Ballantine Produce Co., No. 1:09-CV-00901-AWI-JLT, 2010 WL 1027813, at *1 (E.D. Cal. Mar. 17, 2010) (dismissing intervenor plaintiff according to same standard as dismissal of one defendant).

[30] United States v. Julius Baer & Co., 307 F.R.D. 249, 252 (D.D.C. 2014) (dismissal of one claimant according to same standard as dismissal of one defendant); United States v. $448,840.92 in U.S. Currency, No. 4:21-CV-00202, 2021 WL 5578847, at *2 (E.D. Tex. Nov. 29, 2021) (same).

[31] In *Bailey v. Shell Western E&P, Inc.*, the Fifth Circuit may have implicitly stated that one plaintiff could dismiss all his claims against all defendants. 609 F.3d 710 (5th Cir. 2010). In

IV. Nearly all courts do not allow voluntary dismissal of fewer than all claims against a defendant, although the law is unsettled in the Second, Fourth, and Eighth Circuits

The general consensus, as expressed in the leading treatises[32] and nearly all reported cases, is that a plaintiff may not use Rule 41(a) to voluntarily dismiss fewer than all claims against a given defendant. The policies behind reading "action" broadly to permit dismissal of all claims against a given defendant do not hold true when that defendant would still be subject to the suit on some claims regardless. Conversely, and as noted by multiple circuit courts, whether Rule 41(a) permits voluntary dismissal of claims has practical implications as to both district court[33] and, sometimes, circuit court subject matter jurisdiction.[34] Perhaps for this reason, I have found no circuit court decision explicitly holding that Rule 41(a) can be used to dismiss fewer than all claims against a given defendant. And decisions from the Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits have explicitly held to the contrary.[35] Furthermore, while the First,[36] Third,[37]

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that case, two plaintiffs brought suit alleging both individual and False Claim Act causes of action. *Id.* at 717. At some point in a long and convoluted procedural history, one of the two plaintiffs filed a notice of voluntary dismissal of just his individual claims. *Id.* at 720. The court seemed to find no fault in just one plaintiff seeking to voluntarily dismiss his claims, but held that Rule 41(a) was improper for the reason that this one plaintiff was only dismissing some of his claims. *See id.*

[32] *E.g.*, Wright & Miller, *Federal Practice & Procedure* § 2362 (4th ed. 2021).

[33] For instance, if Rule 15, as opposed to Rule 41, is used to remove only federal claims, the "amendment of the complaint . . . [leaves] no federal claims to which the state claims may be appended" and therefore no ability for the court to exercise supplemental jurisdiction. Mgmt. Invs. v. United Mine Workers of Am., 610 F.2d 384, 395 (6th Cir. 1979).

[34] For example, as the Federal Circuit noted, if Rule 41 allowed a plaintiff to voluntarily dismiss the only patent claim in a multi-claim action, appellate jurisdiction would still rest in the Federal Circuit despite the absence of any patent issues on appeal. *See* Gronholz v. Sears, Roebuck & Co., 836 F.2d 515, 517–18 (Fed. Cir. 1987) (granting motion to transfer to the Eighth Circuit because plaintiff's voluntary dismissal of patent claim was actually a Rule 15 motion to amend, since Rule 41 only allows voluntary dismissal of an action).

[35] *Bailey*, 609 F.3d at 720 (Fifth Circuit); *Mgmt. Invs.*, 610 F.2d at 395 (Sixth Circuit); *Taylor*, 787 F.3d at 857–58 (Seventh Circuit); ECASH Techs., Inc. v. Guagliardo, 35 F. App'x 498, 499 (9th Cir. 2002); *Gobbo*, 81 F.3d at 123 (Tenth Circuit); Campbell v. Altec Indus., Inc. 605 F.3d 839, 841 n.1 (11th Cir. 2010); *see also Gronholz*, 836 F.2d at 517–18 (Federal Circuit presumably applying its interpretation of Eighth Circuit law in holding that Rule 41(a) does not permit a plaintiff to dismiss only some claims against a defendant).

[36] Addamax Corp. v. Open Software Found., Inc., 149 F.R.D. 3, 5 (D. Mass. 1993); Hanson v. Corr. Health Partners, LLC, No. 1:19-cv-00393-JDL, 2020 WL 974868, at *2 (D. Me. Feb. 28, 2020); Santiago-Ramos v. Autoridad de Energia Electrica de P.R., Civ. No. 11-1987(JAG/SCC), 2015 WL 846750, at *7 (D.P.R. Feb. 26, 2015).

[37] Courts in at least four of the five districts within the circuit have addressed the issue, ruling consistently with the majority approach. New W. Urban Renewal Co. v. Viacom, Inc., 230 F. Supp. 2d 568, 571 n.2 (D.N.J. 2002); Otto v. Williams, Civ. No 15-3217, 2016 WL 3136923, at *1–2 (E.D. Pa. June 6, 2016); Greens at Greencastle Ltd. P'ship v. Greencastle GIBG LLC, No. 1:06-CV-1708, 2007 WL 328718, at *1 (M.D. Pa. Jan. 31, 2007); Rosario v. Strawn, No. 2:19-cv-

and D.C. Circuits[38] have not addressed the issue, district courts in those circuits appear unanimous in not permitting a plaintiff to dismiss fewer than all claims against a given defendant.

However, as will be discussed later in this Section, the story is more complicated in a few circuits. The Fourth Circuit held that it followed the majority approach in an unpublished opinion[39] after previously implying the same in a published decision,[40] although a recent decision from the court implied otherwise.[41] Moreover, the law is unsettled in both the Second and Eighth Circuits. And despite binding authority directing courts in the Ninth Circuit, some courts in the Ninth Circuit have incorrectly permitted plaintiffs to voluntarily dismiss fewer than all claims against a defendant due to dicta from another Ninth Circuit case. I will address each of these circuits in turn.

Fourth Circuit. While district courts within the Fourth Circuit have consistently followed the majority approach when addressing the issue, the Fourth Circuit itself has not. The Fourth Circuit first addressed the issue in an unpublished opinion in 1995, squarely holding that a plaintiff may not use Rule 41(a) to dismiss fewer than all claims against any given defendant.[42] This followed a published decision in which the court had implied as much, stating that when some claims were dismissed by order under Rule 12(b)(6) and plaintiff thereafter attempted to notice a dismissal of the remaining claims under Rule 41(a), that notice was effective because the remaining claims "comprised the entire action for Rule 41(a)(1)(i) purposes."[43] In 2004, the court noted the issue was still open, but refused to resolve it because whether Rule 15 or Rule 41(a) was the appropriate vehicle, the district court did not abuse its discretion in denying plaintiff's request to either dismiss or amend under the facts of the case.[44] However, a 2020 decision in *Affinity Living Group, LLC v. StarStone Speciality Insurance Co.* implied that a plaintiff could dismiss fewer than all claims against a defendant under rule 41(a), as the majority accepted without analysis that such

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01040, 2020 WL 5810009, at *3–4 (W.D. Pa. Sept. 30, 2020). Prior to any circuit court considering the issue, a decision from the Eastern District of Pennsylvania was the leading opinion nationwide. *See* Smith, Kline & French Labs. V. A. H. Robins Co., 61 F.R.D. 24, 27–30 (E.D. Pa. 1973).

[38] Featherston v. District of Columbia, 910 F. Supp. 2d 1, 11 (D.D.C. 2012).

[39] Skinner v. First Am. Bank of Va., 64 F.3d 659 (Table), 1995 WL 507264, at *2 (4th Cir. 1995).

[40] *See* Wilson-Cook Med., Inc. v. Wilson, 942 F.2d 247, 251 (4th Cir. 1991) (holding that when a district court granted a partial Rule 12(b)(6) motion to dismiss, those claims were no longer part of the suit and therefore a Rule 41(a)(1)(i) notice of dismissal of the remaining claims "comprised the entire action for Rule 41(a)(1)(i) purposes").

[41] *See* Affinity Living Grp., LLC v. StarStone Specialty Ins. Co., 959 F.3d 634, 643 n.1 (4th Cir. 2020) (King, J, dissenting) ("By accepting the stipulated dismissal as effective, my good colleagues in the majority must assume that Rule 41(a) can be utilized to dismiss specific claims against one defendant . . . . Without staking my dissent on the issue, I simply observe that some of our sister circuits disagree.").

[42] *Skinner*, 64 F.3d 659 (Table), 1995 WL 507264, at *2.

[43] *See Wilson-Cook Medical*, 942 F.2d at 251.

[44] *See* Miller v. Terramite Corp., 114 F. App'x 536, 539–40 (4th Cir. 2004) ("Under either [Rule 15 or Rule 41(a)], the district court did not abuse its discretion in concluding that Miller's attempt to dismiss the ERISA claim was untimely and would waste judicial resources.").

a stipulated dismissal was effective.[45] Judge King explicitly called out this implication in his dissent.[46]

No court has yet cited this case in relation to Rule 41(a), leaving its impact unclear. Prior to *Affinity Living Group*, courts in the Fourth Circuit were near-unanimous in not permitting a plaintiff to voluntarily dismiss fewer than all claims against any given defendant.[47] However, as *Affinity Living Group* itself shows by being an appeal where no party raised the issue of whether the district court *could* permit plaintiff to voluntarily dismiss fewer than all claims against a defendant, district courts may not always have addressed the issue, leaving the potential—a potential that exists nationwide[48]—that courts have been permitting such dismissals without addressing the issue in a written opinion.

Second Circuit. As Judge Furman noted, some courts in the Second Circuit—and a fairly significant number in the Southern District of New York[49]—have likewise allowed dismissal of only some claims under Rule 41(a).[50] As stated by one court in the District of Connecticut, while

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[45] *See Affinity Living Grp.*, 959 F.3d at 636.

[46] *See id.* at 643 n.1 (King, J, dissenting).

[47] *See, e.g.*, Iraheta v. United of Omaha Life Ins. Co., 353 F. Supp. 2d 592, 595 (D. Md. 2005); McGill v. Crown Cork & Seal Co., Civ. No. 7:08-2888-HFF-BHH, 2009 WL 3380619, at *2 (D.S.C. Oct. 20, 2009); Cox v. Cawley, No. 3:11CV557-HEH, 2011 WL 4828890, at *3 (E.D. Va. Oct. 11, 2011); Martin v. MCAP Christiansburg, LLC, No. 7:14cv464, 2015 WL 540183, at *2–3 (W.D. Va. Feb. 10, 2015).

[48] For example, a court in the Southern District of New York permitted plaintiffs to dismiss with prejudice under Rule 41(a) their federal law claims, keeping only state law claims against defendants. *See* Seidman v. Chobani, LLC, No. 14 Civ. 4050 (PGG), 2016 WL 1271066, at *1, 5 (S.D.N.Y. Mar. 29, 2016). However, in that case, defendants did not contest whether Rule 41(a) could be used to effect such a dismissal, objecting instead on grounds that they would be unfairly prejudiced if the court permitted the dismissal. *See* Defs.' Joint Opp'n to Pls.' Mot. to Voluntarily Dismiss Their Federal Law Claims, Seidman v. Chobani, LLC, No. 14 Civ. 4050 (PGG), 2015 WL 10549950 (S.D.N.Y. Aug. 7, 2015).

[49] *See, e.g.*, Azkour v. Haouzi, No. 11 Civ. 5780(RJS)(KNF), 2013 WL 3972462, at *3–4 (S.D.N.Y. Aug. 1, 2013) (overruling the magistrate's recommendation and permitting plaintiff to voluntarily dismiss without prejudice all claims against one defendant and fewer than all claims against another defendant under Rule 41(a)1(A)); HOV Servs., Inc. v. ASG Techs. Grp., Inc., No. 18-cv-9780 (PKC), 2021 WL 355670, at *2 (S.D.N.Y. Feb. 2, 2021) (granting voluntary dismissal with prejudice of plaintiff's federal law claims); Nix v. Off. of Comm'r of Baseball, No. 17-cv-1241 (RJS), 2017 WL 2889503, at *2–3 & n.2 (S.D.N.Y. July 6, 2017) (granting plaintiffs' stipulated voluntary dismissal of one claim under Rule 41(a)).

[50] In addition to the Southern District of New York, I have found cases from three districts that have permitted plaintiffs to dismiss fewer than all claims against a given defendant. *See, e.g.*, Cent. N.Y. Laborers' Health & Welfare Fund v. Fahs Constr. Grp., Inc., 170 F. Supp. 3d 337, 343–44 (N.D.N.Y. 2016) (permitting voluntarily dismissal under Rule 41(a) of all of plaintiff's claims against one defendant and fewer than all against another defendant); Gordon v. Kaleida Health, No. 08-CV-378S, 2009 WL 4042929, at *6 (W.D.N.Y. Nov. 19, 2009); Doody v. Bank of Am.,

"a plaintiff wishing to eliminate some but not all claims or issues from the action *should* amend the complaint under [Rule 15(a)]," which rule the plaintiff chooses is "immaterial" and therefore Rule 41(a) is a permissible vehicle.[51] Conversely, other cases have held that Rule 41(a) may not be used to effect such dismissal,[52] or have noted the issue but ruled on other grounds.[53]

As such, the law within the Second Circuit is unsettled, and an intra-circuit split has developed.[54] My sense (without counting cases) is that, with exceptions, the Southern District of New York tends to permit a plaintiff to dismiss fewer than all claims against a defendant, while the Eastern District of New York prohibits it. Courts in the District of Connecticut are split. I have found an insufficient number of cases from the other three districts to draw any conclusions regarding them at this time.

Eighth Circuit. The Eighth Circuit has refused to address the issue, and noted in an opinion by then-Judge Blackmun that "it may not be material whether the court acts under Rule 15(a) which relates to amendments . . . or Rule 41(a)[]."[55] Nonetheless, district courts in the Eighth Circuit have predominantly followed the majority rule,[56] although a few have seized on Judge Blackmun's language to permit Rule 41(a) dismissal of fewer than all claims against a defendant,[57]

N.A., No. 3:19-cv-1191 (RNC), 2021 WL 4554056, at *2 n.1 (D. Conn. Oct. 5, 2021) ("Rule 41(a)(1)(A)(i) allows a plaintiff to voluntarily dismiss an action, or part of an action . . . .").

[51] Vogel v. Am. Kiosk Mgmt., 371 F. Supp. 2d 122, 129–30 (D. Conn. 2005).

[52] *See, e.g.*, Robbins v. City of New York, 254 F. Supp. 3d 434, 436–37 (E.D.N.Y. 2017); Puccino v. SNET Info. Servs., Inc., No. 3:09-cv-1551 (CFD) 2011 WL 13237585, at *1–2 (D. Conn. Nov. 14, 2011).

[53] *See, e.g.*, Century Sur. Co. v. Vas & Sons Corp., No. 17-CV-5392 (DLI) (RLM), 2018 WL 4804656, at *2 (E.D.N.Y. Sept. 30, 2018); *Alix*, 470 F. Supp. 3d at 315.

[54] I note that *Harvey Aluminum*'s holding would cover this issue and is technically binding precedent, but as noted above in Section II, the Second Circuit does not appear to still follow the case, and district courts in the circuit universally ignore it and limit it to its facts.

[55] Johnston v. Cartwright, 355 F.2d 32, 39 (8th Cir. 1966) (Blackmun, J); *accord* Wilson v. Crouse-Hinds Co., 556 F.2d 870, 873 (8th Cir. 1977).

[56] Courts in at least seven of the ten districts within the Eighth Circuit have so held. *See, e.g.*, Brown v. Mortg. Elec. Registration Sys., Inc., No. 6:11-CV-06070, 2012 WL 12919480, at *3 (W.D. Ark. July 26, 2012); Env't Dynamics, Inc. v. Robert Tyer & Assocs., 929 F. Supp. 1212, 1224–26 (N.D. Iowa 1996); Cross v. City of Liscomb, No. 4:03-CV-30172, 2004 WL 840274, at *3 (S.D. Iowa Mar. 2, 2004); Tucker v. City of Duluth, Civ. No. 13-3074 (MJD/LIB), 2014 WL 5307608, at *3 (D. Minn. Oct. 16, 2014); Paglin v. Saztec Int'l, Inc., 934 F. Supp. 1184, 1189 (W.D. Mo. 1993); Fry v. Doane Univ., No. 4:18CV3145, 2019 WL 454098, at *1 (D. Neb. Feb. 5, 2019); Planned Parenthood Minn., N.D. v. Daugaard, 946 F. Supp. 2d 913, 917–18 (D.S.D. 2013).

[57] *See, e.g.*, Graco, Inc. v. Techtronic Indus. N.A., Inc., Civil No. 09-1757 (JRT/RLE), 2010 WL 915213, at *2–4 (D. Minn. Mar. 9, 2010) (noting that most courts have not allowed dismissal of fewer than all claims against a defendant under Rule 41(a), but proceeding under Rule 41(a) as opposed to Rule 15 "in order to clearly reflect that [claims being dismissed with prejudice] may not be reasserted"); Hardee's Food Sys., Inc. v. Hallbeck, No. 4:09CV00664 AGF, 2010 WL 4968180, at *2 (E.D. Mo. Nov. 24, 2010) (similar).

or have thus refused to resolve the issue and instead proceeded without determining whether the court was acting under Rule 15 or Rule 41(a).[58] Hence, like in the Second Circuit, the law is unsettled in the Eighth Circuit, albeit with a clear majority position.

Ninth Circuit. While a significant majority of Ninth Circuit courts do not allow parties to dismiss fewer than all claims against a defendant via Rule 41(a), Ninth Circuit dicta has led a few district courts astray. In *Wilson v. City of San Jose*, the Ninth Circuit stated that a plaintiff "may dismiss some or all of the defendants, or some or all of his claims, through a Rule 41(a)(1) notice."[59] However, that case did not involve a plaintiff trying to dismiss only some of the claims against a defendant, and other cases from the Ninth Circuit in which the issue was squarely before the court explicitly prohibit the use of Rule 41 to dismiss anything less than all the claims against any given defendant.[60] Nonetheless, because of this dicta, a few courts within the Ninth Circuit have allowed parties to dismiss fewer than all claims against a defendant through Rule 41(a).[61] But because these decisions go against binding Ninth Circuit precedent, they are incorrect (within the circuit) and do not demonstrate an intra-circuit split or that the law is unsettled.

V. Class Action Allegations

Voluntary dismissal under Rule 41(a) of class allegations raises unique issues. Rule 41(a) "[s]ubject[s]" Rule 41(a)'s requirements to Rule 23(e), which in turns limits the ability to voluntarily dismiss class allegations by requiring court permission.[62] However, Rule 23(e) only comes into relevance after the court has already certified a class, or when a class is proposed to be certified for purposes of settlement.[63]

While other issues likely abound, of note is whether pre-certification a plaintiff may dismiss class allegations under Rule 41(a) without dismissing his individual claims. At least one court in the District of Columbia has allowed the named plaintiff and opt-in class members to

[58] *See, e.g.*, Stratasys, Inc. v. Microboards Tech., LLC, Civ. No. 13-3228 (DWF/TNL), 2015 WL 12778849, at *2, 5 (D. Minn. Mar. 25, 2015).

[59] 111 F.3d 688, 692 (9th Cir. 1997).

[60] *See, e.g.*, Ethridge v. Harbor House Rest., 861 F.2d 1389, 1392 (9th Cir. 1988); *see also* Kennedy v. Full Tilt Poker, No. CV 09-07964 MMM (AGRx), 2010 WL 3984749, at *2 n.16 (C.D. Cal. Oct. 12, 2010) ("Certain Ninth Circuit cases have suggested that a plaintiff can dismiss 'some or all of his claims' by filing a notice of dismissal under Rule 41(a)(1). [These cases] concerned the dismissal of claims against fewer than all defendants. [These] also concerned actions in which plaintiffs sought to dismiss the entire action. Consequently, the actions did not specifically address the dismissal of single claims, as did *Ethridge* and *Hells Canyon*, and the court concludes that the cases directly addressing that issue are the precedent that should be followed." (citations and parenthetical notations omitted)).

[61] *See, e.g.*, Moore v. Garnand, No. CV-19-00290-TUC-RM (LAB), 2019 WL 13108478, at *1–2 (D. Ariz. Oct. 30, 2019); Lambert v. Weller, No. C20-1558-JLR-MAT, 2021 WL 1393066, at *2 (W.D. Wash. Mar. 16, 2021); Bridgham-Morrison v. Nat'l Gen. Assurance Co., No. C15-927RAJ, 2016 WL 2739452, at *3 (W.D. Wash. May 11, 2016).

[62] *See* Fed. R. Civ. P. 23(e); *id.* R. 41(a).

[63] *See id.* R. 23(e).

dismiss class allegations under Rule 41(a)(1) without dismissing their individual claims.[64] In reliance on that case, a court in the District of Massachusetts acted similarly.[65] However, I have not found other cases to address this issue. That said, it likely is an issue that percolates more often than the reported cases suggest.

VI. Conclusions

The circuit split discussed in Section II of this memorandum may be something for the committee to consider resolving. The circuit split is long-standing, and three-quarters of the circuits have weighed in one way or another. This split is exacerbated by the intra-circuit splits in two of the three circuits to never have addressed the issue.

Additionally, although there does not appear to be a circuit split regarding use of Rule 41(a) to voluntarily dismiss fewer than all claims against a given defendant, recent Fourth Circuit caselaw shows that one might soon develop. Thus, if the committee does consider revisions to address dismissal of all claims against fewer than all defendants, the committee may want to also consider whether a plaintiff should be permitted to dismiss fewer than all claims against any given defendant.

Finally, to the extent the committee does consider amending Rule 41(a) to address the issue of a plaintiff dismissing fewer than all claims against a given defendant, it may likewise need to consider the issue discussed in Section V regarding pre-certification dismissal of class allegations.

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[64] Jackson v. Innovative Sec. Servs., LLC, 283 F.R.D. 13, 15 (D.D.C. 2012).

[65] *See* Botero v. Commonwealth Limousine Serv. Inc., Civ. No. 12-10428-NMG, 2014 WL 6634848, at *1–2 (D. Mass. Nov. 21, 2014).

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
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New York, NY 10007
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*****PLEASE CONSIDER THE ENVIRONMENT BEFORE PRINTING THIS E-MAIL*****

TAB 18

2062 **18. Rule 55: Clerk's Duties**

2063 Rule 55(a) directs that the clerk "must" enter a default in defined circumstances. Rule 55(b)
2064 directs that the clerk "must" enter a default judgment in much more narrowly defined
2065 circumstances.

2066 Judges of courts that deviate from the apparent force of the rule raised the question whether
2067 it should be revised. Many courts do not allow entry of any default judgment by the clerk. At least
2068 some courts limit or reject the clerk's duty to enter a default.

2069 These deviations from the rule in practice lead naturally to the question whether experience
2070 has shown good reasons to restrict the clerk's Rule 55 duties. Questions that appear on the face of
2071 the rule further support the need for information about actual practices in all courts, including
2072 courts that give full rein to the clerk's duties. It is not always easy for the clerk to determine
2073 whether a defendant has been served -- for example, not all lawyers are diligent to file certificates
2074 of service. And a failure "to otherwise defend" may not be apparent, since such events as pre-
2075 answer settlement negotiations or a request for an extension of time to answer often do not appear
2076 in the record. So the duty to enter a default judgment against a defendant who has been defaulted
2077 for not appearing depends on finding that the claim is "for a sum certain or a sum that can be made
2078 certain by calculation" may turn on uncertain questions of law or fact.

2079 At the October meeting the Committee decided to ask the FJC to undertake an empirical
2080 examination of these questions, and also the question whether clerks at times actively audit the
2081 files for cases that seem to be in default, or whether they wait for a party's request for a default or
2082 default judgment. The FJC has agreed to pursue these questions.

TAB 19

2083 **19. Rule 63: Successor Judges: 21-CV-R**

2084 Rule 63 addresses situations in which a judge conducting a hearing or trial is unable to
2085 proceed. The agenda topic focuses on the second sentence, which directs that for a hearing or a
2086 nonjury trial, "[T]he successor judge must, at a party's request, recall any witness whose testimony
2087 is material and disputed and who is available to testify again without undue burden."

2088 The agenda proposal was prompted by a nonprecential decision of the Federal Circuit
2089 applying the identical rule of the United States Claims Court. The case did not involve a video
2090 transcript, but the suggestion was that the rule be amended to state that the availability of a video
2091 transcript bears on the need to recall the witness. Committee discussion suggested that the
2092 availability of a video transcript will be readily considered, particularly with experience in practice
2093 to adjust for disruptions during the Covid-19 pandemic. But some members expressed concern that
2094 Rule 63 may be interpreted too narrowly. Research into available case law is ongoing. The
2095 questions will be carried forward for the fall meeting.

TAB 20

2096 **20. Amicus Briefs: 21-CV-F**

2097 The question whether to adopt a new rule governing amicus curiae briefs in the district
2098 courts was discussed briefly at the October meeting. The draft Minutes reflect a summary
2099 restatement of the questions addressed in the agenda materials, followed by questions whether a
2100 rule is needed in light of the apparent infrequency of amicus briefs in the district courts. One way
2101 to consider the frequency is that if the estimate of 300 briefs filed annually in all districts is correct,
2102 the average is 3 or 4 briefs per district. The estimate of 1,000 briefs filed annually in all circuits
2103 suggests an average of approximately 70 per circuit. That difference may suggest one reason why
2104 Appellate Rule 29 provides an elaborate regulation of amicus practice. A related reason may be
2105 that the impact of a reported appellate decision on the law is quite different from the impact of a
2106 district court decision. However that may be, Appellate Rule 29 is a well-developed model that
2107 can provide helpful guidance in drafting any rule that might be pursued. But current work in the
2108 Appellate Rules Committee, described briefly below, suggests that a civil rule should not simply
2109 copy Rule 29.

2110 The October discussion suggested that if a national rule is to be adopted, two good starting
2111 points may be found in the draft provided by 21-CV-F and in the District for the District of
2112 Columbia LCvR 7(o), attached below. It also was asked whether the D.D.C. rule reflects a docket
2113 that includes a greater frequency of amicus briefs than most other districts.

2114 The topic was carried forward with the suggestion that "[t]he first task will be to determine
2115 how frequently amicus briefs are tendered in courts outside the District of Columbia." Competition
2116 for empirical research support has not yet presented an opportunity to develop this question.

2117 The question presented for discussion at this meeting is whether committee members'
2118 experience can help determine whether a new rule should be explored further.

2119 The lack of time for focused discussion last October makes it appropriate to initiate the
2120 topic by copying the October agenda materials:

2121 October Agenda

2122 This proposal urges adoption of a new rule to govern briefs amicus curiae. It includes a
2123 draft inspired by D.D.C. Local Rule 7(o) and Appellate Rule 29. The draft would be a good
2124 foundation for creating a model local rule. The provisions are summarized below with a few
2125 comments. Rather than attempt to prepare a detailed draft of a model national rule, however, the
2126 proposal is presented for general consideration of the need for a national rule.

2127 The central question is whether the role played by amicus briefs in the district courts is
2128 sufficiently similar to practice on appeal as to make any rule appropriate, and whether the
2129 provisions that work for the courts of appeals can be adapted readily to courts of original
2130 jurisdiction.

2131 One difference is clear. The submission reports that amicus briefs are filed in 1% to 2% of
2132 cases on appeal, but only 0.1% -- one in a thousand -- of cases in the district courts, about 300

2133 cases per year. This difference suggests further questions: are the circumstances of amicus practice
2134 in trial courts so variable among the rare cases that attract them that any explicit rule is
2135 unnecessary, or risks an inappropriate measure of uniformity? May it be that practice in the District
2136 Court for the District of Columbia attracts a sufficient share of amicus briefs to support and justify
2137 a local rule, while other courts encounter fewer amicus briefs and are better served by an ad hoc
2138 process, or perhaps local rules that vary according to local circumstances?

2139 The relative scarcity of amicus briefs in present practice suggests a related question: would
2140 an express national rule encourage more filings? Or, conceivably, might it impose limits that
2141 discourage filings? Would either effect be a good thing?

2142 The distinction between appeals and trial court procedure goes to a more important
2143 question as well. The nature of party responsibilities in a trial court is far more complex, and in
2144 many ways more important, than the much more confined responsibilities and opportunities
2145 encountered on appeal. Intruding an amicus may run a greater -- and perhaps a far greater -- risk
2146 of interference with the parties' needs for control. Party control, moreover, is increasingly shared
2147 by the court in many of the more complex actions. The court can protect its own interests, however,
2148 if it is given absolute control over the decision whether to permit an amicus brief.[1]

2149 The difference between the role of trials and appeals can be viewed from another
2150 perspective as well. Working through the means of gathering, presenting, focusing, and finding
2151 disputed facts is central to the trial court's function. Appeals focus primarily on the law. Amicus
2152 arguments may be valuable as a means of ensuring full presentation of all interests in developing
2153 the law and of all arguments for shaping the law to common interests. Nonparties, including the
2154 public at large, often have interests even more important than the perhaps parochial interests of the

[1] These concerns were expressed in parallel terms in the Civil Rules Committee Report to the Standing Committee:

It is important to keep in mind the different roles of trial courts and appellate courts. Most questions of law presented on appeal are anchored in a completed trial record. The amicus brief takes the record as it was shaped by the parties. In the district court, however, the parties are responsible for developing the record, and do so by seeking maximum adversary advantage. The Civil Rules are shaped by a tradition of party responsibility. Any amicus practice should be designed in ways that preserve a large measure of independent party control. The need for care may be reflected by this passage in the submission:

> 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 * * *.

Focusing on materials or issues "not addressed in detail" by the parties may be important for the district court, and for the court on appeal, even if it impinges on party control of the record. A true friend may advance the courts' ability to reach a better determination of difficult, complex, or contentious legal issues by improving the record that supports the determination. Some sacrifice of party autonomy that supports the judicial task may be a desirable incident of a system that, if shaped by purely adversary interests, may not advance the public interest. And the district court may be in a good position to distinguish between true friends and those who seek to pursue narrow private interests, perhaps at the expense of the public interest.

2155 parties themselves. One question is whether a court rule should attempt to confine amicus briefs
2156 to arguments of law, as shaped by the facts of the case, or whether it would be better to leave any
2157 such limit to the court's discretion.

2158 A different possible limit might be considered. Should amicus briefs be permitted in class
2159 actions and MDL proceedings? Means of presenting divergent views are established for such
2160 cases, including the formal role of objectors in class actions. It seems likely that amicus briefs
2161 should be permitted nonetheless, but the question deserves consideration. Parties to parallel state-
2162 court proceedings, for example, may have strong reasons for presenting their interests to a federal
2163 class-action or MDL court.

2164 The basic structure of the proposal may be summarized against these background
2165 questions, noting that it has been prepared by lawyers who "frequently serve as amicus counsel to
2166 a diverse range of corporations and organizations in federal district courts across the United
2167 States." The draft provides a good beginning if the project is to be taken up.

2168 The most fundamental question is the standard for participation as an amicus. The proposal
2169 provides several standards: The United States or its officer or agency, or a state may file without
2170 consent of the parties or leave of court. Others may file with the consent of all parties, or on leave
2171 of court -- but the court may prohibit filing, or strike a brief that would result in disqualifying the
2172 judge "or for such other reasons as the court determines in the interests of justice." It would be
2173 possible to adopt a rule that says no more than this. But another vital element is added in paragraph
2174 (2) -- (B) in standard rule designations: "Amicus participation should be permitted whenever
2175 deemed helpful, in the sound discretion of the district court, to the resolution of the issues
2176 presented."

2177 The proposed procedure for seeking leave, when leave is required and not accorded by the
2178 court on its own, is by a motion that addresses many issues: the nature of the movant's interest;
2179 the party or parties supported, if any; the reasons why the brief would be helpful to the court in
2180 disposing of the case; the reasons why the movant's position or expertise is not adequately
2181 represented by a party; and the position of each party as to the filing of the brief. The proposed
2182 brief must accompany the motion. Although presented as elements of the procedure for seeking
2183 leave, these elements embellish the standard for permitting filing. One of them raises an interesting
2184 question: why does it matter whether the "position" of a would-be amicus is "adequately
2185 represented by a party"? Intervention under Rule 24 seems a more secure procedure for securing
2186 representation of interests that may be irrelevant or even hostile to all parties' interests.

2187 The rest of the proposed rule addresses purely procedural details of timing the motion for
2188 leave, time for submitting the brief (although it is also to be attached to the motion for leave),
2189 length of the brief, and permission to file a reply brief or participate in oral argument. Such details
2190 may compete with local practices in many ways. The risk of misfit with local rules, standing orders,
2191 or individual judge practices seems real. Apart from that, such matters are seldom addressed in the
2192 national rules, and the case for addressing them for the relatively marginal amicus practice seems
2193 weak. The length question, however, is adroitly finessed by establishing a limit at "no more than
2194 one-half the maximum length authorized by these rules." That would fit perfectly with a local rule

2195 that actually does set maximum brief lengths. And it might fit a new national rule if it were revised
2196 to one-half the length permitted by the court's rules.

2197 Appellate Rule 29 Study

2198 Appellate Rule 29 includes details integrating amicus brief procedure with other appellate
2199 rules that might be adapted, but not copied, into a new civil rule. The Appellate Rules Committee
2200 is currently struggling with the question whether to expand the Appellate Rule 29(a)(4)(E)
2201 provisions designed to disclose involvement of parties or nonparties in preparing an amicus brief:

2202 (E) unless the amicus curiae is [the United States or its officer or agency or a
2203 state], a statement that indicates whether:

2204 (i) a party's counsel authored the brief in whole or in part;

2205 (ii) a party or a party's counsel contributed money that was intended to
2206 fund preparing or submitting the brief; and

2207 (iii) a person -- other than the amicus curiae, its members, or its counsel
2208 -- contributed money that was intended to fund preparing or
2209 submitting the brief and, if so, identifies such person * * *.

2210 The appellate rules project was prompted by introduction of legislation that would require
2211 entities that repeatedly file amicus briefs in the Supreme Court and courts of appeals to register
2212 with the Administrative Office. It seems likely that the main concern is with the flurry of amicus
2213 briefs filed in many Supreme Court cases; the Appellate Rules Committee has not decided whether
2214 there are parallel problems that may justify expanding the party or nonparty disclosure provisions
2215 in Rule 29(a)(4)(E). The potential concerns focus on parties who seek to evade length limits on
2216 briefs and, more generally, on identifying the actual sponsor. The identity of the sponsor can affect
2217 the weight accorded an amicus brief as an independent source of information about independent
2218 interests. Briefs by a dozen seemingly independent organizations, funded by a single ultimate
2219 sponsor, for example, may be less persuasive than a dozen truly independent submissions.
2220 Membership organizations present one special difficulty with pursuing real identity, given First
2221 Amendment protections that surround individual member identification. More particular
2222 difficulties arise from attempts to distinguish between truly general contributions to an amicus as
2223 an organization and contributions that are understood to be made to support an amicus brief.

2224 Discussion of the appellate rule questions in the Standing Committee was interwoven with
2225 observations about a possible civil rule. A practicing lawyer suggested there is "an uptick" in
2226 amicus briefs in the district courts, especially in class actions and MDL proceedings. Another
2227 suggested that amicus briefs serve an important function, often "to get it together." They are
2228 important in district courts as well as on appeal. And it is important in all courts to deflect the risk
2229 that participation by an amicus may force recusal of a judge. It also was noted that at least in appeal
2230 practice, a party may encourage an amicus to file while coordinating in ways that do not make the
2231 party a drafter of the brief.

2232 Discussion in the Standing Committee then turned to the prospect of a new amicus
2233 provision in the civil rules. In rough outline, these thoughts were offered:

2234 The first question was whether amicus briefs are largely centered in D.D.C., S.D.N.Y, and
2235 E.D.N.Y. Other courts do receive them, but not often.

2236 A possible difference between district court practice and appellate practice was pointed
2237 out, reflecting the agenda report. The trial court is where the record is made, and the record is made
2238 by the parties. They shape it for adversary advantage, and focus evidence on the issues they wish
2239 to present for decision. On appeal, the trial court record is set, and there is nothing an amicus can
2240 do about it. But is there a risk that, by raising new issues or by clandestine efforts to add to the
2241 record in the district court, an amicus may pressure the parties to address issues and present
2242 evidence they would prefer to avoid? A judge responded that an amicus may have an effect in
2243 shaping the issues, but can do little to develop the record. A pure illustration of the limits on an
2244 amicus arises in actions that seek review on a closed administrative record.

2245 Another judge was skeptical about framing an amicus provision in the Civil Rules. "It's
2246 complicated because the parties need an opportunity to respond to late-filed" amicus briefs. And
2247 there is no general provision in the Civil Rules addressing briefs or briefing.

2248 The first judge suggested that most amicus briefs are filed in four or five districts around
2249 the country. D.D.C. has a local rule. It seems better to leave the matter to local practices in the
2250 courts that most frequently encounter amicus briefs, at least for now.

2251 A different judge observed that in a recent redistricting case an amicus brief attempted to
2252 expand the record. "We figured it out."

2253 A practicing lawyer noted that amicus briefs are encountered in N.D. Cal. and in various
2254 courts managing large MDLs. That is not to say that we need a Civil Rule. "But it would be useful
2255 if Appellate Rule 29 could be framed in a way that offers guidance" to district courts. "I have seen
2256 attempts to add to the record by requests for judicial notice." The district court level is different
2257 from the appellate level.

2258 The Reporter for the Appellate Rules Committee suggested that attempts to use amicus
2259 briefs to force recusal of the trial judge is a much greater potential problem than it is on appeal.

2260 Another practicing lawyer thought it would be a big mistake to have a national rule. Judges
2261 can read amicus briefs, or not read them. In the Supreme Court there is an industry devoted to
2262 amicus briefs, but it is hard to be sure how many Justices, or even law clerks, read all of them.

2263 This discussion may have been informed by the Civil Rules Committee Report to the
2264 Standing Committee, which raised many of the issues that were discussed.

2265 If a civil rule is to be pursued, it will be important to consult with the Appellate Rules
2266 Committee.

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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
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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).

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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

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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.

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(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.

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Respectfully,

<u>/s/ Akiva Shapiro</u>	*<u>/s/ Lee R. Crain</u>*	*<u>/s/ Amanda L. LeSavage</u>*
Akiva Shapiro	Lee R. Crain	Amanda L. LeSavage
Partner	Associate Attorney	Associate Attorney

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.

TAB 21

2267 **21. Uniform i.f.p. Standards: 21-CV-C**

2268 The many problems with in forma pauperis practice have been explored at four earlier
2269 meetings -- October 2019, April 2020, briefly in October 2020, and most recently in October 2021.
2270 A capsule reminder is provided below, but there is no proposal for present action. The proponents
2271 of acting through the Rules Enabling Act Process continue to work to frame potential rules
2272 proposals. The topic will continue on the agenda at least until next fall to see whether there is a
2273 sufficiently promising proposal to warrant further work.

2274 The basic problems are clear. The case for reform is compelling. Different courts, and
2275 indeed different judges within a single court, apply different, often dramatically different,
2276 standards to qualify to proceed without prepayment of fees because a person is unable to pay such
2277 fees. The information demanded to support application of the standards also varies widely. Many
2278 courts use one of the two forms provided by the Administrative Office, but the forms seem
2279 ambiguous to many who use them. It is not clear what information is sought by many of the form
2280 questions. Important information may not be sought, and irrelevant information may be demanded.
2281 It may be important to reconsider potentially substantive questions whether it is proper to demand
2282 extensive information about assets available to a nonparty, such as a spouse. The very processes
2283 for reviewing the information also vary widely, involving pro se clerks, magistrate judges, or
2284 district judges in different combinations and sequences.

2285 Many of these questions call for answers that are not well suited to resolution in the Rules
2286 Enabling Act process. It may well be that absolute standards should vary with the cost of living in
2287 different districts. It seems inevitable that absolute standards will need regular adjustment. The
2288 nature and depth of the information to be considered requires experience and information quite
2289 different from the issues that ordinarily arise in considering uniform national rules of procedure.
2290 Forging a new rule of civil procedure may fairly be regarded as a last resort, and may well prove
2291 a mirage. Any project to draft a rule, moreover, would require coordination with other advisory
2292 committees.

2293 The Appellate Rules Committee is actively considering Appellate Rules Form 4, the
2294 Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis. A simpler form
2295 may emerge from this work. It will be important to continue to consider this work, whether or not
2296 it comes to a point that will encourage either a new civil rule or restoration of the recently
2297 abandoned practice of adding forms to the civil rules.

2298 There is some hope that some other bodies may take up the task. The Administrative Office
2299 has a working group regarding i.f.p. status. It may be that the Court Administration and Case
2300 Management Committee will provide guidance. But a decision to remove the topic from the agenda
2301 cannot rely on the prospect that answers will be found elsewhere.

TAB 22

2302 **22. Rule 4 Methods of Service**

2303 Possible expansions of Rule 4 methods of service have been advanced by many suggestions
2304 over the years. The suggestions cover a broad range. A modest change could be made in Rule
2305 4(d)(1)(A) to permit a request to waive service to be made by electronic means. A somewhat less
2306 modest suggestion is to reduce the Rule 4(i) requirement to serve multiple persons and entities in
2307 actions against the United States or United States agencies, officers, and employees.

2308 A more adventuresome question arose during CARES Act Subcommittee consideration of
2309 proposed Rule 87(c)(1), which authorizes a court to order service by a method reasonably
2310 calculated to give notice during a civil rules emergency declared by the Judicial Conference of the
2311 United States. The Subcommittee considered the possibility of adding the Emergency Rules 4
2312 provisions to the corresponding regular rules, but concluded that this possibility should be deferred
2313 to any general study of Rule 4 that may be undertaken.

2314 The time will surely come when Rule 4 must be reconsidered to take account of the still
2315 expanding reliance on electronic means of communication. A small beginning can be found in
2316 Rule 3 of the pending supplemental rules for individual social security review actions. Rule 3
2317 displaces service on the Social Security Administration and other government officials by directing
2318 the court to send a notice of electronic filing to the appropriate Social Security Administration
2319 office and to the local United States Attorney. This model might be expanded to at least some other
2320 actions against the government. Further expansions might be contemplated with, or after, that, to
2321 include some means of electronic service on defendants that consent.

2322 The question to be considered now is whether to begin a present study of possible
2323 expansions of Rule 4, or whether to defer yet awhile. One factor will be that the project will require
2324 appointment of a Subcommittee, a further commitment of Committee resources that requires
2325 careful consideration.

TAB 23

2326 **23. Rule 5(d)(3): Pro Se E-Filing**

2327 Rule 5(d)(3)(B) provides that "a person not represented by an attorney (i) may file
2328 electronically only if allowed by court order or by local rule."

2329 Many suggestions have been made that pro se litigants should have greater access to
2330 electronic filing, reviving issues discussed when this provision was added in 2018. Pro se litigants
2331 who can navigate the court's system can enjoy important advantages as compared to the costs,
2332 delays, and perhaps physical burdens of filing paper.

2333 A group of the reporters for all the advisory committees is deliberating this topic.
2334 Recommendations may be ready in time for the fall committee meetings.

2335 A recent submission, 22-CV-C, revives and repeats an urgent plea, 20-CV-J, for expanded
2336 e-filing access for pro se litigants. Great emphasis is placed on the difficulties and health hazards
2337 that attend paper filing during the Covid-19 pandemic. It is among the suggestions being
2338 considered.

TAB 24

2339 It is recommended that each of these items be removed from the agenda:

2340 **<u>24. Dismissal of unfounded actions: 20-CV-G</u>:** This proposal by Sai, president of Fiat Fiendum,
2341 Inc., suggests that the court-review provisions in the forma pauperis statute, 28 U.S.C. §
2342 1915(e)(2), be generalized to all civil actions by way of adding a new Rule 11(e). The suggestion
2343 also recommends adoption of a new Appellate Rule 25.1 that would apply Civil Rule 11 to all
2344 proceedings under the Appellate Rules. The Appellate Rules Committee has considered and
2345 rejected the Rule 25.1 suggestion.

2346 Proposed Rule 11(e):
2347 (e) Meritless cases.
2348 (1) Notwithstanding:
2349 (a) any filing fee, or any portion thereof, that may have been paid;
2350 (b) the status of service, if any; or
2351 (c) a party's failure to appear, plead, or otherwise defend --
2352 (2) if the court determines that the action:
2353 (a) is frivolous or malicious,
2354 (b) fails to state a claim on which relief may be granted, or
2355 (c) seeks monetary relief against a defendant who is immune from such
2356 relief,[1]
2357 (3) the court shall, at any time, pursuant to FRCP 11(c)(3) or 56(f):
2358 (a) dismiss the case, with or without prejudice;
2359 (b) order that summons not be issued until the matter is resolved,
2360 (c) issue a show-cause order,
2361 (d) declare the plaintiff or attorney a vexatious litigant, or
2362 (e) issue any other appropriate order.
2363 (4) A court may have a rule, policy, or procedure subjecting filings to review
2364 for frivolousness, if and only if:
2365 (a) a party's pro se or IFP status is not a factor for whether review is
2366 conducted (although the standard "nature of suit" code may be
2367 used), and
2368 (b) the rule, policy, or procedure is published as required by
2369 28 U.S. Code §§ 332(d)(1),[2] 2071(b, d), or 2077(a).

2370 The purpose of the proposal is to provide pre-filing review of all actions, fee-paid or not.
2371 Two justifications are advanced: "It is unconstitutional to apply a different substantive due process
2372 standard to poor people than to non-poor people. Indeed, non-poor vexatious litigants can easily
2373 cause far more harm; extract coercive settlements that are not justified by the law; etc."

2374 It is not clear whether the proposed Rule 11(e) text, as drafted, would accomplish the
2375 intended purposes. But revised drafting might well do the job.

[1] These categories are taken verbatim from § 1915(e)(2)(B).

[2] § 332(d)(1) calls for public notice of a Circuit Council "general order relating to practice and procedure."

2376 The question is whether courts should be called upon to review all actions when filed, at
2377 least at times before service of process. The potential for delay, and for poorly informed decisions,
2378 weighs heavily against pursuing this project.

From: Sai
Sent: Wednesday, May 20, 2020 6:38 AM
To: RulesCommittee Secretary
Subject: Proposal for dismissal of meritless cases under FRCvP & FRAP; FRAP adoption of FRCP 11; and vexatious-attorney sanctions

Dear Appellate and Civil Rules Committees —

A. Dismissal of meritless cases

28 USC 1915(e)(2) subjects poor litigants to the sanction of dismissal if *either* (a) the claim of poverty is untrue, *or* (b) the action is meritless.

It is unconstitutional to apply a different substantive due process standard to poor people than to non-poor people. Indeed, non-poor vexatious litigants can easily cause far more harm; extract coercive settlements that are not justified by the law; etc.

I therefore propose a straightforward fix: apply this to everyone.
I.e. under both the civil & appellate rules, *all* cases should be subject to 1915(e)(2)-style scrutiny, and IFP or pro se status explicitly disallowed as a category by which courts may apply internal review. *

It is only fair to subject all cases to the same review for frivolousness — or at least, all cases in whatever nature-of-suit areas the court wishes to scrutinize. Whether someone has paid or not has very little (if anything) to do with whether their claims have merit; it only speaks to their wealth. $400 is nothing to wealthy individuals or corporations, and litigation by intimidation is a serious problem. Courts should not allow a meritless suit to proceed — thereby imposing very significant costs on others, who often will not be able to recoup those costs even if their defense is both obvious and successful — merely because it came with a filing fee payment.

This is obviously within the courts' authority without a statutory change, e.g. in the nature of a sanction, sua sponte MSJ, or fundamental authority to regulate its own docket.

* Note: this does permit "nature of suit" to be a category used — just not a party's pro se / IFP status itself.

I request that the FJC conduct a survey of meritless litigation and propose which NOS categories have the highest proportions and/or severities thereof, which should be the NOSs for which court attorneys should be assigned to pre-screen cases for potential early dismissal.

I expect that this will likely include the ever-popular 500-series "prisoner petitions" and 440 "other civil rights" NOS categories. I suggest that NOS 820 (copyright) should also be included, as a Federal judiciary parallel to anti-SLAPP laws (whose very existence demonstrates that meritless copyright litigation is a problem).

Proposed FRCP 11(e) [see below re FRAP]

(e) Meritless cases.

1. Notwithstanding:
(a) any filing fee, or any portion thereof, that may have been paid;
(b) the status of service, if any; or
(c) a party's failure to appear, plead, or otherwise defend —

2. if the court determines that the action:
(a) is frivolous or malicious,
(b) fails to state a claim on which relief may be granted, or

(c) seeks monetary relief against a defendant who is immune from such relief;

3. the court shall, at any time, pursuant to FRCP 11(c)(3) or 56(f):
(a) dismiss the case, with or without prejudice,
(b) order that summons not be issued until the matter is resolved,
(c) issue a show-cause order,
(d) declare the plaintiff or attorney a vexatious litigant, or
(e) issue any other appropriate order.

4. A court may have a rule, policy, or procedure subjecting filings to review for frivolousness, if and only if:
(a) a party's pro se or IFP status is not a factor for whether review is conducted (although the standard "nature of suit" code may be used), and
(b) the rule, policy, or procedure is published, as required by 28 U.S. Code §§ 332(d)(1), 2071(b, d), or 2077(a).

B. FRAP adoption of FRCP 11

Currently, the appellate rules lack a rule requiring that representations to the court be truthful, reasonable, non-vexatious, well-founded, etc. To the best of my knowledge, it is (formally
speaking) currently backed only by bar rules regarding candor to the tribunal.

FRCP 11 is extremely well developed, understood by both the bar and bench, and well-tailored. To my understanding, most appellate courts already use it in a sort of informal, implicit way. This should be formalized.

This can and should be solved easily: by the wholesale adoption of FRCP 11 into FRAP, by reference.

Because
a) this is also the ideal place to insert the above meritless-case rule,
b) I believe it is best to avoid duplication across the Rules except when some difference needs to be stated (see e.g. FRBP 7025), and
c) the language of FRCP 11 already applies just fine to appellate proceedings, I have not provided a separate proposed FRAP to parallel the proposed FRCP 11(e) above.

Instead, I propose to solve both problems at once, in the simplest possible way, namely:

Proposed FRAP 25.1

F. R. Civ. P. Rule 11 applies in all proceedings under these Rules.

C. Vexatious attorney declarations

In some categories of meritless litigation — copyright, medical malpractice, proposed class action, etc. — the common factor is not a persistently vexatious litigant, but rather the attorney (or firm).

Therefore, in the proposed FRCP 11(e)(3)(d) above, I have included the clause "or attorney", in order to prompt judges to consider whether the attorney is the person actually responsible for promoting meritless litigation — and if so, to consider vexatious-litigant penalties.

This is already present to some degree in FRCP 11(c)(1) (which provides for sanctions against an attorney or firm and not the party).

However, the nature of a vexatious-litigant sanction — typically, an order forbidding case initiation unless case-by-case leave is first granted after initial screening — may well be more appropriate or effective than monetary penalties, especially for legal "trolling"
schemes.

See e.g. the multi-district saga of Prenda Law as an extreme example.

Pre-filing review could have dramatically reduced the harm to a vast number of hapless defendants, for whom the cost of settlement was priced just below the cost of defense, and being in court at all would mean already having effectively lost.

Pre-screening of meritless cases is precisely the tool for this, and it should be applied regardless of fee payment. If an attorney demonstrates a propensity to repeatedly file meritless cases, a "no filing without permission" vexatious-litigant order is precisely the right solution for an immediate way to staunch the damage to innocents (in parallel with the longer-term solution of referral to the bar for suspension proceedings).

If the Committees feel differently about this part of my proposal, "or attorney" — or (e)(3)(d) entirely — can easily be struck out, so as to not impede the adoption of the above.

As always, I request to be notified by email of any developments arising from my proposals, and allowed the opportunity to present (and observe), via videoconference or teleconference, in any hearing that discusses them.

Sincerely,
Sai
President, Fiat Fiendum, Inc., a 501(c)(3)

PS Non-gendered pronouns please. I'm a US citizen.

TAB 25

2379 **25. Rule 7.1 20-CV-CC:** The first part of this submission by Judge Barksdale suggests elimination
2380 of the direction to file "two copies" of a disclosure statement. The requirement was dropped by
2381 the proposed amendment of Rule 7.1 now pending in the Supreme Court.

From: Patty Barksdale
To: RulesCommittee Secretary
Cc: Julie Wilson
Subject: RE: Suggested Corrections to Fed. R. Civ. P. 7.1 and 73(b)(1)
Date: Tuesday, October 06, 2020 4:45:55 PM

Hello Ms. Wilson.

In revising our court's local rules, I noticed a few other changes for your consideration.

Fed. R. Civ. P. 7.1, on disclosure statements, provides that a nongovernmental entity must file "2 copies of a disclosure statement." This requirement should be reconsidered. No party complies, and copies are unnecessary in the age of CM/ECF.

Fed. R. Civ. P. 73(b)(1), on consent to a magistrate judge, provides, "A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral." The statement should be reconsidered. Parties respond to the clerk's notice through CM/ECF regardless of whether all parties have consented to the referral, and the judges automatically see the response in CM/ECF.

Thank you for your consideration.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

TAB 26

2382 **26. Rule 73(b)(1): 20-CV-CC:** The second part of this submission suggests that the CM/ECF
2383 system works in a way that thwarts the mandate of Rule 73(b)(1) that "A district judge or
2384 magistrate judge may be informed of a party's response to the clerk's notice [of the opportunity to
2385 consent to proceed before a magistrate judge] only if all parties have consented to the referral."
2386 This rule implements the direction of 28 U.S.C. § 636(c)(2): "Rules of court for the reference of
2387 civil matters to magistrate judges shall include procedures to protect the voluntariness of the
2388 parties' consent."

2389 The problem is stated in this way: "Parties respond to the clerk's notice through CM/ECF
2390 regardless of whether all parties have consented to the referral, and the judges automatically see
2391 the response in CM/ECF."

2392 This problem is a function of the ECF system, not Rule 73(b)(1). Revising the ECF system
2393 by court rule is an unlikely undertaking. If the problem cannot be fixed by manipulating the ECF
2394 system, those responsible for the system should fix it.

From: Patty Barksdale
To: RulesCommittee Secretary
Cc: Julie Wilson
Subject: RE: Suggested Corrections to Fed. R. Civ. P. 7.1 and 73(b)(1)
Date: Tuesday, October 06, 2020 4:45:55 PM

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Thank you for your consideration.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

TAB 27

2395 **27. Knowledge, not Service: Rule 4: 21-CV-K:** Sai submitted this proposal, inspired by the 19-
2396 CV-W proposal to address "snap removal" by a complicated waiver of service amendment in a
2397 new Rule 4(d)(6). That proposal was removed from the agenda at the October 29, 2019 meeting,
2398 with the observation that the problem of snap removal has been taken on by the Federal-State
2399 Jurisdiction Committee.

2400 Sai's proposal goes far beyond snap removal, and indeed would address snap removal only
2401 indirectly. Instead, it would dispense with any need to make service under Rule 4 on a party that
2402 has actual knowledge of the action by adding a new Rule 4(c)(4):

2403 (4) Service under this rule is not required upon a party that has:
2404 (A) actual knowledge of the suit, the name of the court in which the suit
2405 was filed, and their relation to the suit (e.g. that they are a
2406 defendant); and
2407 (B) actual possession of, or PACER access to, a copy of the complaint.
2408 (Footnote to "defendant" omitted, and paragraph designations
2409 changed.)

2410 Sai explains that the point of service is to ensure actual knowledge of the action. Actual
2411 knowledge fulfills that purpose. In addition, relying on actual knowledge would avoid not merely
2412 the gamesmanship involved in snap removal, but also "the far more common shenanigans of
2413 people with actual knowledge trying to evade formal service."
2414 The proposal is careful to say that while the burden of proving actual knowledge is on the
2415 party that would have to make service, courts are quite capable of determining the question. Some
2416 situations will be easy, as when the party to be served has made a filing in the case. (Compare the
2417 Rule 12(b)(5) motion to dismiss for insufficient service of process.)

2418 A potential difficulty under Rule 4(m) is noted: what of the requirement that service be
2419 made within 90 days after the complaint is filed? Substituting proof of actual knowledge and the
2420 rest within 90 days may be awkward, and the problem of showing good cause for not managing
2421 actual knowledge within 90 days but getting more time for service looms apparent.

2422 This proposal is charmingly direct. Some support might be found by analogy to Rule
2423 15(c)(1)(C)(i), which allows an amendment of a complaint that changes the party against whom a
2424 claim is asserted to relate back if the new party "received such notice of the action that it will not
2425 be prejudiced in defending on the merits."

2426 Still, this proposal would, without further apology, make irrelevant much of Rule 4 and the
2427 ages-old tradition of insisting on formal service and all the ways in which it impresses the
2428 importance of the occasion. Apparently there would be no need for the summons and notice that a
2429 failure to respond will lead to default. It would substitute a much more casual, and occasionally
2430 accidental, procedure for the waiver-of-service provisions in Rule 4(d).

2431 Discarding formal service, either under present Rule 4 or as it might be expanded by a new
2432 project, is likely to present so many practical problems in application as to justify removing this
2433 proposal from the agenda rather than carrying it forward for further consideration.

21-CV-K

From: Sai
To: RulesCommittee Secretary
Cc: susan.steinman@justice.org
Subject: FRCP 4(c) proposal to abrogate service if actual notice (see 19-CV-W)
Date: Friday, April 16, 2021 10:52:32 AM

Dear FRCP Committee —

In 19-CV-W, AAJ, CC'd, proposed to address the problem of "snap removals" by adding a rule deeming all defendants to have constructively waived service if any defendant has actual notice, provided that all are timely served (and some other caveats).

I believe that AAJ's intent was good, and the problem that they pointed out is legitimate — but that their proposal was poorly written. It was too specific to the situation that they described, yet for a very broadly applicable rule. It would have unfairly caught many other situations in a rule that doesn't really apply well outside the situation envisioned by AAJ. Even apart from that, I don't believe it's fundamentally fair to have one defendant's knowledge impact another's rights.

I do, however, believe that the essence of the proposal was just, salvageable, and would apply very well to many situations besides the ones described by AAJ.

—

I therefore propose the following addition, at FRCP 4(c)(4), modifying the general case in (c)(1):

(4) Service under this rule is not required upon a party that has:
i) 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 [1]); and
ii) actual possession of, or PACER access to, a copy of the complaint.

[1] Some service is required on non defendants, or even non parties — e.g. Rule 4(i)(1)(B & C).

I've not tried to determine all other non-defendant service provisions, but this is intended to capture all service requirements.

That's why I didn't just write "and that they are a defendant", but put it instead as the primary example clause. It could probably be reworded to improve clarity.

—

This rule would address the situation AAJ raised, but limited to those with actual knowledge — not all other defendants.

And it would do away with purely pretend "service". It is deliberately framed not as a waiver, but as abrogating the need to serve at all.

The point of service is not an empty formalism; it's to ensure that a party actually knows that they're being sued and have a copy of the complaint.

If a party knows that, and has it, then it's a complete waste of time and resources to go through motions of "telling" them what they already know.

There is no legitimate purpose of justice served by such charades. This simply gives rise to gamesmanship like that identified by AAJ — not to mention the far more common shenanigans of people with actual knowledge trying to evade formal service.

While this might make for a great Marx Brothers episode, it's contrary to the fundamental principles of the Rules. See FRCP 1.

Naturally, the burden of proof would still be on the party that has to conduct service. Likewise, this doesn't toll service — though there may be "good cause" considerations under 4(m).

If a defendant takes an action like making a filing about the case, that should be obvious proof that they know about it perfectly well enough that they could have filed an appearance instead of, e.g., a removal motion. Burden fulfilled.

My proposal deliberately does not address what might prove actual knowledge. I'm certain that courts are quite capable of handling the inquiry, and that it will encompass a much wider range of situations than the rule could easily address if it tried to enumerate.

The question for the court is, at root, "does the defendant actually know you're suing them (in this court with this lawsuit etc), and have a copy of the complaint?".

An indirect way to address that is proving service.

The direct way is to prove actual knowledge.

It's simple, flexible, no-nonsense, and to the point.

I hope that the Committee will deem it just.

In the interests of disclosure, I note that I am a member of a civil rights coalition that also includes AAJ. I am not a member of AAJ (nor otherwise affiliated with them), and have not consulted with them on this proposal. Reading their proposal inspired this one; that is all.

However, I have CC'd them, and invite them to give their own views should they wish to do so.

Sincerely,
Sai
President, Fiat Fiendum, Inc., a 501(c)(3)

PS Non-gendered pronouns please. I'm a US citizen.

Sent from my mobile phone; please excuse the concision and autocorrect errors.

TAB 28

2434 **28. New Rule: Time to Decide: 21-CV-M:** This proposal came to the Civil Rules agenda late in
2435 its life. The initial proposal focused on lengthy delays in deciding an appeal by the petitioner in a
2436 habeas corpus case. The proposed remedy was a Criminal Rule "to mandate a time frame for ruling
2437 on habeas motions." It was referred to the Criminal Rules Committee and denied, but forwarded
2438 to the Committee on Court Administration and Case Management. Facing continued frustration in
2439 the court of appeals, this reiteration suggests that both Civil and Criminal Rules be amended to
2440 provide that all potentially dispositive motions must be decided within a set period after final
2441 submissions are due. The period might be as few as 30 days, or as many as 90 or even more.
2442 Narrowly defined exceptions might be included.

2443 This proposal was placed as an agenda item for the Appellate Rules Committee, 21-AP-F,
2444 and removed from the agenda after a prediction that it would meet "considerable resistance."
2445 Minutes of October 7, 2021, Appellate Rules Committee, p. 15.

2446 Considerable resistance can indeed be anticipated. The advisory committees regularly
2447 encounter suggestions that court rules direct "prompt" decision, or action within a specified period,
2448 or specific docket priorities. These suggestions are rejected with equal regularity. Docket
2449 circumstances change continually, and courts must remain free to set priorities to fit their case
2450 loads. This suggestion is no more deserving than other like suggestions.

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 28, 2021

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

Under date of April 17, 2019, I had communicated with you concerning a suggestion to amend the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas corpus motions. A copy of my April 17, 2019 letter is attached for your convenience. You were kind enough to address this issue, and in a response to me the Rules Committee felt that a new Criminal Rule wasn't needed, but that perhaps the courts could address the issue via local rules.

Despite the passage of two and a half (2-1/2) years since my letter to you, the U.S. Court of Appeals still has made no substantive ruling on my habeas corpus appeal. I have made five (5) semi-annual requests for a status report only to receive responses suggesting that the habeas appeal is proceeding as the court's docket permits and that a dispositive Order would be forthcoming "as soon as the court's docket permits." [Seventh Circuit Order of 4-13-21, docket No. 18-2732].

However, according to the Seventh Circuit's government website, http://www.ca7.uscourts.gov/opinions-and-oral-arguments/opinions-arguments.htm, as of 7:00 p.m. on 3-18-21 the Seventh Circuit had rendered at least 888 opinions, dissents, rulings, or corrected opinions in cases that were filed ***AFTER*** **mine** [18-2732] **was docketed**, to wit:

Appellate Case Numbers 18-2735 through 18-2799 =	20
Appellate Case Numbers 18-2803 through 18-2899 =	29
Appellate Case Numbers 18-2905 through 18-2993 =	16
Appellate Case Numbers 18-3000 through 18-3737 =	166
Appellate Case Numbers 19-1004 through 19-3534 =	537
Appellate Case Numbers 20- 1006 through 20-8005 =	120
Total =	888

Facing the frustration of two and a half (2-1/2) years with no decision on the Seventh Circuit's own Order to show cause, with no brief filed by the government/respondent/appellant and no dispositive order on the habeas appeal, I resigned myself to filing a Petition for Writ of Mandamus with the Supreme Court to

compel some action, any action, by the seventh circuit. My mandamus, filed on 3-23-21 was summarily denied on 4-26-21. See Supreme Court Docket No. 20-7597.

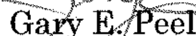
Again, I am NOT asking that you intervene in my habeas appeal. Instead, I am asking that your committee revisit the need for a change or amendment to the federal rules of criminal procedure to address the problem of non-action by the federal appellate courts on habeas corpus appeals.

When those courts refuse to act on pending habeas matters, and when the Supreme Court refuses to mandate appellate court action after a reasonable period of time, the habeas petitioner is left with NO option, despite having to endure the "in custody" restrictions imposed his/her freedoms.

Should you have any questions of me, I can be reached at Garyepeel@Hotmail.com or via cell phone at 618-514-7203

Thank you again for your time.

Sincerely,



Gary E. Peel

GEP:gep
Encl. (1)

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208

April 17, 2019

Ms. Rebecca A. Womeldorf
Rules Committee Chief Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment Federal Rules of Criminal Procedure
Former Agenda Item 18-CR-D

Dear Ms. Womeldorf;

I had previously suggested an amendment to the Federal Rules of Criminal Procedure to mandate a time frame for ruling on habeas motions. At the time, my concern was directed to the U.S. District Courts. You graciously informed me, by letter of 10-12-18 that my proposal had been declined but was being forwarded to the Advisory Committee for further consideration by the Judicial Conference Committee on Case Administration and Case Management.

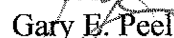
The purpose of this letter is to seek reconsideration in light of similar delays that occur at the *appellate* level. Again, I am NOT seeking any intervention in my current appeal to the Seventh Circuit Court of Appeals (Case No. 18-2732), but I wanted to advise your office that the inexplicable delays at both the District and Appellate levels are particularly prejudicial to habeas petitioners who lose standing if they are no longer "in custody."

My appeal was opened by the Seventh Circuit on 8-9-18. Eight months has now passed, and the matter has not even been assigned a briefing schedule. However, on 4-15-19, oral argument was heard on six (6) cases and five of those [non-habeas] cases were filed *at a later date* than my habeas appeal.

Do you think that my case now serves as an example of how habeas cases are placed on the back burner and should perhaps warrant a reconsideration of a rules change?

Thank you for your consideration.

Very truly yours,



Gary E. Peel

From: Gary Peel
To: RulesCommittee Secretary
Subject: RE: Suggestion on Criminal Rules
Date: Friday, May 14, 2021 4:42:59 PM

Thank you for your response.

I have two suggestions for the committee.

1. Amend the civil and criminal rules to provide that all potentially *dispositive* motions be addressed (decided) within a certain number of days (e.g. 30, 60, 90, ?) after the final Response, Reply or Sur-Reply Brief is due, and
2. Add a new civil and criminal rule that obligates all appellate courts to render merit-based decisions on a chronological basis, i.e. the oldest pending appeal should be addressed and decided first (or as near to chronological as reasonable).

Exceptions can be permitted to the above rules, for example,

a. in the case of an emergency filing, the appellate court could announce that it is taking up the case immediately, or earlier than normal, because of the emergency nature of the appeal, or
b. a case pending in the Supreme Court could be potentially dispositive of the pending appellate case and for that reason alone, the appellate decision on the merits could be postponed.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 2:51 PM
To: Gary Peel
Subject: RE: Suggestion on Criminal Rules

Mr. Peel – Your letter was also docketed as a suggestion on appellate rules (Docket No. 21-AP-F) and forwarded to the Chair and Reporter of the Advisory Committee on Appellate Rules. Thank you.

From: RulesCommittee Secretary
Sent: Friday, May 14, 2021 1:26 PM
To: Gary Peel
Subject: Suggestion on Criminal Rules

Good afternoon. The office of Rules Committee Staff received your April 28 letter concerning a new rule mandating a time frame for motion resolution. The suggestion has been forwarded to the Chair and Reporters of the Advisory Committee on Criminal Rules, and the Chair of the Standing Committee. We are posting the suggestion to the Rules & Policies page of the uscourts.gov website. Your suggestion will be located under the Rules Suggestions section as Docket No. 21-CR-G.

The minutes from the meetings of the Advisory Committees will reflect any action taken on your suggestion. The Judiciary’s Rulemaking website houses the minutes and agenda materials for each Advisory Committee meeting at Records of the Rules Committees.

We very much welcome suggestions and appreciate your interest in the rulemaking process. Please do not hesitate to contact us with questions.

RULES COMMITTEE STAFF
Rules Committee Staff | Office of the General Counsel
Administrative Office of the U.S. Courts
(202) 502-1820 | www.uscourts.gov
One Columbus Circle NE | Room 7-300 | Washington, DC 20544

TAB 29

2451 **29. Rule 26(a)(1) Initial Disclosure: 21-CV-X:** Submission 21-CV-X, from Magistrate Judge
2452 Jared Bennett (D. Utah), proposes that Rule 26(a)(1)(A)(i) be amended in a way that would make
2453 it more parallel with the disclosure required under Rule 26(a)(2)(C) regarding expert opinion
2454 testimony.

2455 The problem with the current rule is that it provides "an incentive to disclose as many
2456 witnesses as possible with as little meaningful information so that opposing counsel has to guess
2457 who is deposition-worthy." Then counsel "must use up some interrogatories" to determine which
2458 of the listed people are "deposition-worthy." The current rule thus leads to a "knee-jerk, disclose-
2459 them-all-even-though-we-haven't-talked-to-them-yet" list.

2460 So the proposal is that the rule be amended to require more -- that as to any person listed
2461 the attorney disclose (1) the subject matter of the witness's testimony; and (2) a summary of the
2462 facts and lay opinions that the witness will provide. Rule 26(g) would then require that counsel
2463 make "reasonable inquiry" about possible witnesses before listing them. And as more is learned
2464 after initial disclosure Rule 26(e) would require supplementation of the witness list or the details
2465 about likely testimony. Any witness or testimony not disclosed would presumably be subject to
2466 exclusion under Rule 37(c)(1).

2467 Initial disclosure has prompted controversy in the past, and many have told the Advisory
2468 Committee that it has not worked as well as had been hoped when it was first introduced in a
2469 preliminary draft amendment in 1991. Currently, there are pilot projects on enhanced initial
2470 disclosure in the District of Arizona and the Northern District of Illinois that are under study by
2471 the Federal Judicial Center.

2472 The 1991 amendment proposal called for disclosure of the identity of any person likely to
2473 have "information that bears significantly on any claim or defense." After the public comment
2474 period ended, the Committee changed the disclosure requirement to limit it to information
2475 "relevant to disputed facts alleged with particularity in the pleadings." But in recognition of the
2476 controversy attending this suggestion, the 1993 amendment also permitted districts to "opt out" of
2477 initial disclosure. That opt-out permission led to a patchwork of provisions across the country.

2478 Justices Scalia, Souter, and Thomas dissented from adoption of this amendment as
2479 inconsistent with "adversarial litigation," in part because "[r]equiring a lawyer to make a judgment
2480 as to what information is 'relevant to disputed facts' plainly requires him to use his professional
2481 skills in the service of the adversary." Scalia, J., dissenting from adoption of amendments to the
2482 Federal Rules of Civil Procedure, 146 F.R.D. 507, 510 (1993).

2483 Largely prompted by the diversity of local treatment of initial disclosure resulting from the
2484 "opt-out" provision in the 1993 amendments, in 2000 the rule was amended to apply nationwide,
2485 except in excluded categories of cases exempted from initial disclosure under Rule 26(a)(1)(B). It
2486 was also amended into its current form, which requires disclosure of:

2487 the name and, if known, the address and telephone number of each individual likely
2488 to have discoverable information -- along with the subjects of that information --

2489 that the disclosing party may use to support its claims or defenses, unless the use
2490 would be solely for impeachment.

2491 This is the provision that the submission would amplify.

2492 The Committee Note accompanying the 2000 amendment explained:

2493 A party is no longer obligated to disclose witnesses or documents, whether
2494 favorable or unfavorable, that it does not intend to use. The obligation to disclose
2495 information the party may use connects directly to the exclusion sanction of Rule
2496 37(c)(1). Because the disclosure obligation is limited to material that the party may
2497 use, it is no longer tied to particularized allegations of the pleadings. Subdivision
2498 (e)(1), which is unchanged, requires supplementation if information later acquired
2499 would have been subject to the disclosure requirement. As case preparation
2500 continues, a party must supplement its disclosures when it determines that it may
2501 use a witness or document that it did not previously intend to use.

2502 Rule 26(a)(3)(A)(i) then requires pretrial disclosures at least 30 days before trial about "the
2503 evidence it may present at trial other than solely for impeachment," including: "the name, and if
2504 not previously provided, the address and telephone number of each witness -- separately
2505 identifying those the party expects to present and those it may call if the need arises."

2506 The concerns identified by Judge Bennett may weaken initial disclosure, and there have
2507 been reported cases in which the problems identified seem to have emerged. See *Sender v. Mann*,
2508 225 F.R.D. 645 (D. Colo. 2004) (bankruptcy litigation trust failed to satisfy the rule by listing 196
2509 investors and 126 brokers without identifying those who had knowledge, instead giving the same
2510 general disclosure for each person). Compare *United States ex rel. Hunt v. Merck-Medco Managed*
2511 *Care, LLC*, 223 F.R.D. 330 (E.D. Pa. 2004) (U.S. listing of approximately 3,900 individuals did
2512 not violate its disclosure duties; the allegations were very broad, and a large number of persons
2513 would have knowledge of facts relating to them).

2514 Given the controversial history (and, perhaps, to some extent present) of the initial
2515 disclosure provision, further change may invite further controversy. Indeed, the possibility of
2516 exclusion of witnesses under Rule 37(c)(1) may make long lists fairly likely. In addition, the
2517 ongoing pilot projects about enhanced initial disclosure regimes could provide grounds for
2518 additional caution.

2519 Moving in the direction urged in this submission could make initial disclosure more
2520 efficient. Perhaps it would be very desirable for counsel to interview every potential witness before
2521 making initial disclosures. But it is doubtful that would often be workable. Particularly at the outset
2522 of litigation (and perhaps more particularly for defending parties) the current rule's "may use"
2523 formulation seems appropriate. That "may use" formulation appears in the expert disclosure
2524 requirements in Rule 26(a)(2) and the pretrial disclosures required by Rule 26(a)(3). So trying to
2525 insist on more precision about which witnesses will actually be called at trial (or used in regard to
2526 motions for summary judgment) at the time initial disclosure is due under Rule 26(a)(1)(C) would
2527 likely be quite difficult. Judge Bennett says the focus should be on witnesses the party "plans on

2528 calling." If the requirement at the expert disclosure stage and the pretrial disclosure stage is only
2529 about those witnesses the party "may use," changing Rule 26(a)(1)(A)(i) to "plans to call" would
2530 not only be out of synch with those other disclosure requirements, but also extremely demanding
2531 at the outset of litigation.

2532 The submission seems to be directed more toward the content of the disclosure about each
2533 listed witness than the question whether the disclosing "may use" them in the case. The submission
2534 says that "if a party puts a witness on a list of supporters for that party's claims or defenses, the
2535 party should already be aware of the basic information that the proposed rule change would
2536 require." That may not be an attainable goal.

2537 The submission builds on the required content specified in Rule 26(a)(2)(C). That
2538 requirement was added in 2010, addressing disclosure with regard to expert witnesses not required
2539 to make an extensive report under Rule 26(a)(2)(B) because not "retained or specially employed
2540 to provide expert testimony." The main example of such a witness was a treating physician.
2541 Previously, there was no requirement to disclose more than the identity of such persons the
2542 disclosing party "may use at trial." The 2010 amendment added the requirement that counsel
2543 disclose the subject matter on which the witness would provide expert opinion testimony and also
2544 provide "a summary of the facts and opinions to which the witness is expected to testify." The idea
2545 was that "attorney disclosure" of this sort was a reasonable thing to require, recognizing that
2546 lawyers for the patient would likely be unable to persuade the treating doctor to provide all the
2547 details required by Rule 26(a)(2)(B) for reports from retained expert witnesses (who are usually
2548 hired by counsel and get paid to prepare the report).

2549 It is doubtful that model would readily fit the initial disclosure situation. For one thing,
2550 under Rule 26(a)(2)(D) this disclosure regarding expert witnesses is not due until 90 days before
2551 trial, while initial disclosure is to occur much earlier in the case. For another, given the recurrent
2552 centrality of testimony from treating doctors, it may be fairly easy to determine that the party "may
2553 call" them at trial.

2554 Ordinary fact witnesses -- the focus of Rule 26(a)(1)(A)(i) -- seem a very different matter.
2555 There may be a large number of such potential fact witnesses at the outset. It would perhaps be
2556 desirable in some cases for counsel to do an initial interview with each of them before listing them
2557 in initial disclosures, but that may be asking a great deal in many cases. That difficulty might
2558 present obstacles for both plaintiff and defense counsel.

2559 And the potential impact of Rule 37(c)(1) exclusion would remain a strong prod toward
2560 listing many potential witnesses. If that rule were interpreted to forbid calling a witness to testify
2561 about anything not specified in the initial disclosure identifying the witness, that prospect might
2562 magnify the difficulties for counsel.

2563 Judge Bennett's submission reflects a very reasonable aspiration for initial disclosure, but
2564 making it a rule requirement may be a stretch too far. So it is recommended that this submission
2565 be removed from the agenda.

21-CV-X

From: Jared Bennett
To: RulesCommittee Secretary
Subject: Revised Proposed Change to Rule 26(a)(1)(A)(i)
Date: Wednesday, October 13, 2021 2:32:49 PM

Dear Rules Committee:

I propose a change to Fed. R. Civ. P. 26(a)(1)(A)(i) in an effort to make initial disclosures more useful for targeted discovery and early settlement discussions. When I was practicing and now that I am deciding discovery disputes, I have noticed that initial disclosures about fact witnesses are not helpful in their present, traditional form. In my experience, it seems quite common for a disclosing party to produce a lengthy list of witnesses accompanied by a generic description of what the witnesses will say. Usually, this same generic description is used for multiple witnesses. This becomes especially problematic in cases where there are numerous witnesses that have this same generic designation, and opposing counsel is left with the choice to depose all of them or to guess as to which of the witnesses has unique information that is worth deposing. Although the 1993 and 2000 Advisory Committee Notes provide some guidance as to how these disclosures should be made in a common sense fashion, there is considerable variation in the requirements that different courts place on disclosing parties in terms of the specificity of information about each disclosed witness.

This variation has led to at least two ill effects. First, disclosing counsel have an incentive to disclose as many witnesses a possible with as little meaningful information so that opposing counsel has to guess about who is deposition-worthy and who is not. To determine who is "deposition-worthy," opposing counsel must use up some of its interrogatories, which is inefficient. This makes discovery unnecessarily costly and ineffective. Second, because little meaningful information is required in an initial fact-witness disclosure, disclosing counsel has very little incentive to actually speak to a disclosed witness to know whether that witness has anything useful to say at all. In my experience as a lawyer and judge, the initial disclosure of fact witnesses amount to a "knee-jerk, disclose-them-all-even-though-we-haven't-talked-to-them-yet list" that results in inefficient fact discovery and stifles early settlement discussions.

Given this state of affairs, I propose that Rule 26(a)(1)(A)(i) require a more clear statement about the information that disclosing attorneys must provide for each witness to help the bench and the bar obtain maximum benefit from initial disclosures, which will fulfill the worthy purposes of Fed. R. Civ. P. 1. To accomplish this, my suggestion is to borrow from the disclosure rule pertaining to non-report-producing experts (i.e., Rule 26(a)(2)(C)). Rule 26(a)(1)(A)(i) could require the disclosing attorney to initially disclose: (1) the subject matter of the witness's testimony; and (2) a summary of the facts and lay opinions that the witness will provide. This specific requirement will send a clear message to both the bench and the bar as to the type of specificity required for initial disclosures; whereas now, it is certainly ambiguous as to the detail required. Adding this level of detail will reduce the need for follow-up interrogatories about which generically-described witness knows what, may reduce Rule 45 subpoena practice, will make deposition selection more efficient, will

improve the prospect of early settlement discussion, and will make these pre-trial disclosures easier to evaluate in the event of a Rule 37(c) challenge for summary judgment or before trial.

I recognize that counsel may object that this will be a burden. However, Rule 26(g) already provides that any disclosure that a party makes is certified to be "complete and correct as of the time it is made" after the party has engaged in a "reasonable inquiry." By disclosing a witness under current Rule 26(g), counsel should already know the subject of the witness's testimony and the facts/lay opinions that the disclosed witness will offer. This is especially true where, as here, the only witnesses a party must disclose are those that the party plans on calling in support of its claims or defenses. Indeed, if a party puts a witness on a list of supporters for that party's claims or defenses, the party should already be aware of the basic information that the proposed rule change would require. Thus, providing a more robust disclosure should not be an additional burden under the current rules. In fact, I think that this will encourage counsel to engage with witnesses sooner, which will transform initial disclosures from a knee-jerk, disclose-them-all-even-though-we-haven't-talked-to-them-yet list into something useful for guiding discovery and, hopefully, generating settlements. Of course, as more information about what a witness knows comes to light during the iterative discovery process, Rule 26(e) will provide for supplementation that will further guide discovery. Therefore, I respectfully request amending Rule 26(a)(1)(A)(i) to incorporate the disclosure obligations in Rule 26(a)(2)(C).

Respectfully,

Jared C. Bennett
United States Magistrate Judge
Orrin G. Hatch United States Courthouse
351 South West Temple
Salt Lake City, UT 84101
Phone: 801-524-6620