MINUTES
CIVIL RULES ADVISORY COMMITTEE
Denver, CO
April 9, 2024

The Civil Rules Advisory Committee met in Denver, Colorado, on April 9, 2024. The meeting was open to the public. Participants included Judge Robin L. Rosenberg, Advisory Committee Chair, and Advisory Committee members Judge Cathy Bissoon, Justice Jane Bland, Judge Jennifer Boal, Brian Boynton, David Burman, Professor Zachary Clopton, Judge Kent Jordan, Judge M. Hannah Lauck, Judge R. David Proctor, Joseph Sellers, Judge Manish Shah, Ariana Tadler, and Helen Witt. Professor Richard L. Marcus participated as Reporter, Professor Andrew D. Bradt as Associate Reporter, and Professor Edward H. Cooper as Consultant. Judge John D. Bates, Chair, Judge D. Brooks Smith, Liaison (remotely), Professor Catherine T. Struve, Reporter, and Professor Daniel R. Coquillette, Consultant (remotely) represented the Standing Committee. Judge Catherine P. McEwen participated as liaison from the Bankruptcy Rules Committee. Clerk liaison Carmelita Shinn also participated**.** The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III, Allison Bruff, and Zachary Hawari. The Federal Judicial Center was represented by Dr. Emery Lee and Dr. Tim Reagan (remotely). Members of the public who joined the meeting remotely or in person are identified in the attached attendance list.

Judge Rosenberg opened the meeting by welcoming all observers with appreciation for their participation and interest in the rulemaking process. She then acknowledged the invaluable contributions of several committee members whose terms will expire prior to the Advisory Committee's next meeting: Judge Kent Jordan, Judge Jennifer Boal, Joseph Sellers, Carmelita Shinn, Ariana Tadler, and Helen Witt. Judge Rosenberg thanked each of them for their commitment to and hard work for the committee. Judge Rosenberg also acknowledged Rakita Johnson, a new Administrative Analyst on the Rules Committee Staff at the Administrative Office and thanked her for her work in organizing the logistics for the meeting.

With respect to reports on the January 2024 meeting of the Standing Committee and the March 2024 meeting of the Judicial Conference of the United States, Judge Rosenberg referred members to the materials included in the agenda book. With respect to the status of proposed amendments to the Federal Rules, Allison Bruff pointed members to a detailed chart in the agenda book showing the progress of various rule amendments. In particular, she directed members' attention to page 54 of the agenda book, which notes that the recent amendment to Rule 12 has been approved by the Supreme Court and would be transmitted to the Congress by May 1. Rules Law Clerk Zachary Hawari then directed members to a chart in the agenda book detailing pending legislation that would directly or effectively amend the Federal Rules. Mr. Hawari indicated, however, that there was no legislation that would demand the committee's attention at the meeting.

Action Items

Review of Minutes

Judge Rosenberg then turned to the first action item: approval of the minutes of the October 17, 2023 Advisory Committee meeting, held at the Administrative Office. The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Final Approval of Amendments to Rules 16(b)(3) and 26(f)(3)

Judge Rosenberg then turned to the next action item: final approval by the Advisory Committee of the amendments to Rules 16(b)(3) and 26(f)(3), which require the parties to address any possible issues regarding privilege logs early in the litigation and to report any areas of disagreement to the judge.

Both proposed amendments had been approved for publication by the Standing Committee at its June 2023 meeting with only minor changes to shorten the committee note. At that meeting, there had been some discussion of adding a cross-reference to Rule 26(f) in Rule 26(b)(5)(A), but the Standing Committee opted against it and instead approved the rule as proposed for publication.

With Discovery Subcommittee Chair Judge David Godbey unable to attend the meeting due to an ongoing trial, Judge Rosenberg asked Professor Marcus to describe the events since publication. Professor Marcus then explained that the advisory committee had held three public hearings on the proposed amendments. The testimony offered at those hearings is summarized at pages 107-131 of the agenda book, as are the comments received during the publication period. Professor Marcus noted that the testimony and comments confirmed a stark division in attitude regarding how much detail a privilege log should contain among lawyers who typically find themselves as "requesters" of discovery material and those who are typically "producers." Neither the amended rule nor the committee note takes a side on these contentious matters. Rather, the goal of the rule is to prompt parties to address the issue and agree on a protocol up front in the litigation and to bring any disagreements to the judge's attention as early as possible. Moreover, Professor Marcus noted that the committee note directs the parties to notify the judge if they are not yet capable of getting into all of the details at an early status conference. Professor Marcus ended his presentation by noting that this should be an easy matter to approve, thanks in large part to the attorney members of the subcommittee, who had done astonishing work over a long period of time.

Judge Rosenberg then sought comment from subcommittee members and committee members, but none were offered. A motion to approve the rule followed. The motion was seconded and approved unanimously.

Final Approval of New Rule 16.1

Judge Rosenberg then introduced proposed new Rule 16.1 for final approval by the Advisory Committee. Prior to getting into the substance, Judge Rosenberg acknowledged that the work of many people had brought us to this moment, including Judge Bates, former Advisory

Committee and MDL Subcommittee Chair Judge Robert Dow, the attorney members of the subcommittee, the style consultants, and the reporters. This was the best possible rule because of the efforts of so many people. The subcommittee has listened and learned an enormous amount over the seven-year gestation of this rule. The subcommittee held three public hearings, received extensive commentary on the draft from attorneys, organizations, and judges, including seasoned MDL transferee judges including Judge Charles Breyer (N.D. Cal.) and Judge M. Casey Rodgers (N.D. Fla.), an esteemed group of California state court judges, and the Federal Magistrate Judges Association.

Judge Rosenberg then noted that the latest draft of the rule varies in non-substantive ways from the rule approved for publication in response both to testimony and to comments provided to the Advisory Committee, and the input of the style consultants. Aside from the removal of the provision related to coordinating counsel (discussed below), all of the changes are structural.

Judge Rosenberg then turned the presentation over to the subcommittee's chair, Judge Proctor. He thanked all those integrally involved in the process of drafting the rule. He thanked the style consultants, Joseph Kimble and Bryan Garner, whose suggestions were very helpful.

Judge Proctor then recounted the public-comment period, including three public hearings and many written submissions. He also noted that the subcommittee received some submissions after the close of the formal comment period, but that those submissions were considered equally with those that were timely submitted. In particular, Judge Proctor cited "en masse" support for the rule from MDL transferee judges, with whom he met in October 2022 and October 2023. The transferee judges are of the view that the set of prompts in the rule will facilitate better early case management in MDLs, particularly for first-time transferee judges. The Chair of the Judicial Panel on Multidistrict Litigation, Judge Karen K. Caldwell (E.D. Ky.), is a strong supporter of the rule and indicated that it would be the focus of trainings at future MDL Transferee Judges Conferences.

Turning to the final draft,[1] Judge Proctor noted that the draft rule now contains two lists of issues, in subsections (b)(2) and (b)(3). Subsection (b)(2) includes issues that the parties should discuss their views on early in the proceeding, including appointment of leadership counsel, if warranted. Subsection (b)(3) lists issues on which the parties should state their initial views to assist the judge in getting acquainted with the case. These are not two separate "tiers" of issues in terms of importance. Rather, the goal was to provide significant flexibility to transferee judges in addressing issues as they become pertinent in the proceeding. In particular, subsection (b)(3) focuses on "initial views" of the parties, in recognition that more definitive views of these matters before leadership is appointed may not be possible, but judges may nevertheless be able to learn a fair bit about the case from the parties' initial views on these matters. The changes to the rule do not change the substance.

Post-publication, the provision calling for the appointment of coordinating counsel for purposes of preparing a report for the initial management conference was deleted. This proposal

[1] The version referred to as the "final draft" was added to the end of the agenda book for the April 9, 2024 committee meeting. For the benefit of the committee members and public observers, the final draft was projected onto a screen in the meeting room and shared via Microsoft Teams, and the minor style changes from previous versions of the rule were summarized.

was criticized both by lawyers who typically represent plaintiffs and by those who typically represent defendants as adding an unnecessary and potentially complicating layer of process. Based on the lack of support for this provision, it was dropped. The only other change to the rule after publication was "reversing the default" to require the parties to address the issues listed in the rule unless the judge says otherwise.

Professor Marcus added his view that this rule had been worked on for seven years and the subcommittee's main conclusion was that for MDL proceedings, one size does not fit all. Judges require the flexibility to tailor arrangements to the circumstances of each MDL. This rule aims to provide them the information to do so in a productive way at the outset of MDL proceedings.

Judge Rosenberg then sought comment from subcommittee members. One attorney member offered two observations: (1) MDLs come in all shapes and sizes, so any rule that would accommodate all of them demanded "movement in the joints;" (2) in response to feedback from some lawyers the subcommittee has made clear that Rule 16.1 does not preempt Rule 23 in class actions transferred into an MDL. Judge Rosenberg added that the note makes clear that Rule 16.1 does not preempt any other rule, including Rule 23.

Another attorney subcommittee member added support for the rule and confirmed that the changes since publication were primarily stylistic. This member noted that although the subcommittee did not adopt all commenters' suggestions, "the perfect is the enemy of the good and the enemy of done." In this member's view, the subcommittee had done stellar work.

Another attorney subcommittee member agreed that the rule was excellent and expressed appreciation for the collegiality of the subcommittee, many of whose members started in different places but eventually reached consensus. This member also lauded the flexibility in the rule for judges, lawyers, and litigants. The rule gives parties the ability to ask the judge to do things differently to suit the needs of a particular MDL. In this member's view, the proposed rule is as close to perfect as a rule covering an area this broad and diverse could be.

A judge member of the subcommittee added that this was one of the most remarkable group efforts she had seen and was honored to be a part of this prodigious and thoughtful work.

Judge Rosenberg then sought input from those representing the Standing Committee. Judge Bates began by noting his presence at the inception of this project when he was Chair of the Advisory Committee and formed a subcommittee under the leadership of Judge Dow. The Standing Committee will of course have to review the rule if it is approved by the Advisory Committee, but it is a wonderful effort. Judge Bates noted that the division of issues in subsections (b)(2) and (b)(3) was an important change because it recognizes that there will be some issues on which the parties may not yet be prepared to take firm positions at the initial management conference. Judge Bates agreed that because of the variety of MDL proceedings, the task of creating a rule that would fit them all was a challenge, and he applauded the effort and the excellence of the product. Professor Struve added her gratitude for the excellent sustained work and her admiration for the expertise that has gone into it.

Judge Rosenberg then sought feedback from other members of the Advisory Committee. One judge member declared that he was a "relatively enthusiastic yes," despite continuing reservations about a rule that is largely precatory, in that it is more like a series of suggestions rather than a mandatory rule in the traditional sense. Nevertheless, this judge was persuaded by the widespread support for the rule among transferee judges; if the judges tasked with handling the most complex cases are in favor, that is of great importance. Another judge member indicated her support of the rule but sought clarification of the use of the word "actions" in the rule – the reporters responded that because only entire civil actions are transferred into an MDL, the use of that term should not create confusion.

Another committee member sought clarification on the "early exchange of information" provision of the rule and how it might interact with discovery and initial disclosures. Professor Marcus responded that because initial disclosures usually do not occur in some MDLs, it was better to draft the rule to provide flexibility for the transferee judge. A judge member added that such an early exchange could be considered discovery in some cases, but it is best left to the transferee judge how to address the issue in the context of a particular case. Judge Proctor agreed with that observation. Professor Cooper added that one size does not fit all when it comes to early exchange of information, and the rule allows for such flexibility. Judge Rosenberg added that the goal of the rule was to get these issues before the transferee judge early so that she may decide the best course of action in a particular MDL. Professor Bradt opined that what the rule requires is a *report* from the parties on these issues; it does not mandate any particular course of action for the transferee judge or displace any other civil rule.

Judge Bates then stated that the Standing Committee would benefit from the views of the Advisory Committee on whether the changes to the rule since publication required republication. Judge Rosenberg responded that the relevant standard for republication is whether substantial changes have been made since publication, unless republication would not assist the work of the rules committees. In her view, these changes are not sufficiently substantial to trigger the republication requirement, and even if they were, after the lengthy process of generating this rule, republication would not be helpful.

Professor Marcus agreed that these are not substantial changes contemplated by the republication provision. The main change to the rule was omitting the coordinating counsel provision in response to public comment. All other changes were organizational and stylistic in nature. Professor Marcus noted other examples of changes made after publication of proposed rules that were greater than those made to this rule, but republication was not required, including post-publication changes to Rule 37(e), Rule 34, Rule 23(e), and Rule 30(b)(6). Professor Marcus added that even if these were substantial changes, the committee would not gain anything from additional input. Professor Cooper then noted that the string of anecdotes of changes to rules after publication that did not require republication could go on. He cited the omission of required lists of disputed issues from a proposed amendment to Rule 56, and the omission of proposed procedural changes to Rule 23. In neither case did dropping a portion of a proposed amendment demand republication. Professor Bradt agreed that after seven years' worth of extensive public outreach that engaged all of the experts in this area republication would be unlikely to yield any new information that would affect the proposed rule.

Judge Proctor noted that the subcommittee had considered an array of possible provisions, including early vetting of claims, case censuses, mandatory interlocutory appeal, judicial supervision of settlement, disclosure of any third-party funding, and protocols for leadership appointments and bellwether trials. Adding any of those provisions to the rule at this point would surely require republication. But, aside from the deletion of coordinating counsel, this rule is substantively the same as the one published for public comment. In his view, therefore, the post-publication changes to the rule are neither substantial, nor would the committee benefit from additional public comment.

A judge member then asked Judge Bates how the Standing Committee approaches the question of republication. He responded that the Standing Committee would make its own judgment under the applicable standard, but that it would benefit from the views of the Advisory Committee expressed at this meeting. Professor Struve agreed and confirmed that omission of coordinating counsel should not raise concerns because omissions in response to negative feedback are typical. The only remaining change that might trigger republication is reversing the default that parties must include each listed item in their report unless the judge orders otherwise. In her view, however, such a change would not require republication, both because the change is sufficiently subtle and because it was discussed during the public-comment period, meaning that lawyers would not consider the change an "ambush."

Judge Rosenberg added that the subcommittee had thoroughly considered the question of republication. At each meeting, the reporters raised the question, and the subcommittee discussed it. The subcommittee concluded that, aside from omitting coordinating counsel, the content of the rule is unchanged. The judge has the same discretion to decide which issues must be addressed in the report. Moreover, the subcommittee concluded that there was nothing more it could learn that would be helpful in developing *this* rule. The process has been transparent and collaborative. Given the extensive outreach to the bench and bar since the subcommittee's creation in 2017, all relevant parties have had sufficient opportunity to be heard.

A motion was then made for final approval of the rule. The motion was seconded and approved unanimously.

Information Items

Report of the Discovery Subcommittee

Judge Rosenberg began by noting that the Discovery Subcommittee had been exceptionally busy with the hearings and post-publication comments on the privilege-log amendments, but that it had not lost momentum on the other items on its agenda. She again thanked the attorney members of the subcommittee for their efforts and thanked those members whose terms are expiring.

With Judge Godbey not in attendance, Professor Marcus presented on behalf of the subcommittee. The subcommittee had two information items on the agenda on which it sought feedback: manner of service of a subpoena and rules issues related to filing under seal.

(1) Manner of serving a subpoena. Rule 45(b)(1) says that serving a subpoena requires "delivering a copy to the named person." There are different interpretations of the rule, particularly about whether in-hand service is required. These varying interpretations create real problems for lawyers that ought to be avoidable. As demonstrated by a memorandum prepared for the subcommittee by former Rules Law Clerk Christopher Pryby, there are many different approaches to the method of service required in the states, so there is no dominant model for the Federal Rules to follow. One approach an amended rule could take would be to add the language from the venerable *Mullane* case defining the notice required by the Due Process Clauses, with a provision explicitly allowing courts to adopt more specific methods by order or local rule. One judge member expressed support for including the *Mullane* language because it appears to be a stable holding and it would not hurt to explicitly inform lawyers that due process is implicated here. Professor Marcus also noted that the current rule does not include a time period for notice, partly because it does not differentiate between a subpoena for deposition and one for trial or hearing, which may be more urgent. Professor Marcus asked for views of committee members on these issues, especially those of departing members.

One subcommittee attorney member expressed that another problem created by the current rule is the requirement to tender travel fees if the subpoena requires the person's attendance. Tendering such fees may not be easily accomplished alongside some electronic methods of service, such as email, which are reliable and should be encouraged. Having to tender the fees via a process separate from service can be a hassle and a rule amendment should take account of modern technology. Another attorney subcommittee member agreed with these comments and reiterated that any new rule should not constrain modern methods of reaching people electronically, although it should also continue to permit service "the old-fashioned way."

A judge member confirmed that there can be expensive litigation involving tendering fees, especially when the person being subpoenaed is "ducking" service and suggested that the rule permit tendering fees when the subpoenaed party produces documents or appears. With respect to the amount of time to produce documents in response to a subpoena, the judge suggested a "reasonable" time, such as 14 days, especially if the documents must be produced for a scheduled trial or hearing. Recipients of such subpoenas need ample time to both prepare to respond and perhaps seek a protective order. This judge also indicated that a bright-line deadline would have benefits, especially for pro se litigants who may benefit from clear guidance, but that such deadlines may also enable sharp tactics.

Judge Bates asked whether a new rule would include provisions facilitating waiver of service, as in Rule 4(d), with mandatory consequences for a person who refuses to waive service. Professor Marcus responded that the subcommittee had not yet discussed that question but would consider it.

(2) Filing Under Seal. Professor Marcus noted that the Advisory Committee had received several submissions urging that issuance of a protective order under Rule 26(c) be assessed under a "good cause" standard quite distinct from the more demanding standards that the common law and First Amendment require for sealing court files. As Professor Marcus noted, district and circuit courts understand well that the standard for filing under seal is more demanding than what is required to issue a protective order, but that tests and standards vary across courts. One mechanism for such a change, outlined in the agenda book at page 262, would be to amend Rule

26(c) to provide that filings may be made under seal pursuant only to a new Rule 5(d). Such a new rule would state that unless filing under seal is mandated by a federal statute or these rules, no paper shall be filed under seal unless it would be justified and consistent with the common law and First Amendment rights of public access to court filings.

Professor Marcus then referred to an array of other issues, outlined in the agenda book at pages 265-267, including: procedures for filing under seal, who may seek to unseal documents and when, and the like. There is an array of local rules on these topics, and any rule that would address all issues related to sealing could be quite complicated. For instance, the suggested rule submitted by the Sedona Conference was seven single-spaced pages long. Professor Marcus added that these are issues of great significance to lawyers, especially if they find themselves under time pressure due to a court deadline. Questions such as whether the motion to seal may itself be filed under seal, whether documents may -- pending the decision on the motion to file under seal -– be filed under a provisional seal, and how such documents might be redacted can be critical. Moreover, there are complex questions about who may intervene to unseal documents, and what happens to sealed documents after a case has concluded.

One judge member opined that both judges and litigants would benefit from a uniform rule addressing at least some of these issues. This judge reported that the rules committee of the Federal Magistrate Judges Association (FMJA) had met and agreed that a beneficial rule would make clear that absent a statute or order, nothing should be filed under seal without a preceding motion and that such a motion should be recorded on the docket. The FMJA committee did not, however, reach consensus on what should happen to documents delivered to the clerk's office if a motion to seal is denied, or what should happen to the documents at the close of a case. The FMJA did however urge that clerks' offices be consulted on any possible change since implementing any such rule could prove logistically challenging.

Another judge member agreed that this was a serious issue but urged a "less is more" approach to any rule amendment. This judge expressed concern that the endless array of circumstances in which sealing issues could arise would make drafting a national rule a challenge. Such a rule would have to be very general to cover all possible circumstances but may then be too general to provide any benefit. An attorney member agreed with these concerns.

A different judge offered the local rule of that judge's district as a potential model. It provides that documents proposed to be filed under seal go to the judge for in camera inspection. The judge might deny the motion, in which case the documents are not filed and go back to the party seeking sealing. Alternatively, the judge might grant the motion, or do so provisionally pending a hearing.

Another judge indicated that many states have a higher bar for sealing than mandated by the common law or First Amendment, and that those statutes should be considered, as well.

With respect to the practical challenges created by a diverse set of standards across different courts, one attorney member reiterated the additional challenges time pressure often creates. This attorney expressed concerns both about attempting to file under seal but not receiving permission in advance of a filing deadline and the converse problem of receiving documents from adversaries that are so heavily redacted as to be useless. Another attorney

member confirmed these observations and added that while he often views his adversaries as "overdesignating" documents for sealing, they often don't fight over it because of other more pressing matters. This attorney also noted additional questions regarding documents received from third parties and whether those parties must be notified before their materials are filed.

With respect to redaction practices, several committee members weighed in. One judge suggested an approach whereby documents are filed under seal but the attorneys need to prepare a redacted version for the public record that would at least inform non-parties of what's confidential and what's not. Another judge indicated that such a practice is common among magistrate judges. A different judge, however, noted that while redacting a brief is usually relatively simple, redacting appendices of exhibits, which can sometimes run into the thousands of pages, is far more burdensome.

Ms. Shinn offered a perspective from clerks' offices noting that differences in nomenclature in this area can create difficulties. For instance, a "sealed" document may mean a document that is filed but never referenced on the docket at all, a "restricted" document that is docketed on CM/ECF but is accessible only to court staff and the parties, or a document that is referenced on the docket but cannot be accessed by anyone.

Judge Bates added his perspective that courts will likely go along with what the parties want to do, so long as there is a public redacted version of anything filed. But when a judicial opinion requires reference to documents filed under seal, there is an additional problem because judges need to be able to tell the world on what materials they are basing their decisions. He gives parties 24 hours' notice before releasing an opinion that cites to sealed material, but this practice may not work in every district. Districts have distinct issues and cultures, so crafting a national rule could be quite challenging.

Rule 41 Subcommittee

Judge Bissoon reported on the work of the Rule 41(a) subcommittee. This committee, which has been examining potential amendments to Rule 41 to clarify issues related to voluntary dismissal, hopes to present draft rule language at the next Advisory Committee meeting. Professor Bradt noted that the subcommittee had reached a consensus that the rule should be amended to make clear that a plaintiff may dismiss one or more claims under the procedures outlined in the rule, as opposed to the entire action. This flexibility is both consistent with the policy of narrowing claims and issues during the pendency of the litigation and the practice of many district courts. Professor Bradt added that his research indicated that such increased flexibility was consistent with the original intent of the rule, based on contemporaneous evidence. Professor Coquillette agreed, noting that the history of the original Federal Rules supports the view that the drafters likely intended parties to be able to voluntarily dismiss one or more claims in the litigation.

Moreover, the subcommittee continues to consider an amendment to the rule that would clarify that only current parties to a litigation need to sign a stipulation of dismissal, as opposed to all parties who have *ever* been part of the litigation, as the Eleventh Circuit has recently held. One attorney member expressed support for a change in the rule that would increase flexibility,

especially with respect to stipulations. This member suggested going even further than the above proposal by requiring only the signatures of parties to the claim they seek to dismiss.

Rule 7.1 Subcommittee

Judge Rosenberg introduced the issues currently being investigated by the Rule 7.1 subcommittee, chaired by Justice Jane Bland. Judge Rosenberg noted that this subcommittee, formed after the March 2023 Advisory Committee meeting, is considering expanding the corporate disclosures mandated by Rule 7.1(a)(1) to better inform judges of financial interests in a party that would trigger the statutory requirement to recuse. Although the subcommittee is not yet at the point of circulating draft rule language, it would benefit from feedback from Advisory Committee members.

Justice Bland noted that shortly after the subcommittee's most recent meeting, on February 23, 2024, the Judicial Conference Codes of Conduct Committee issued a new advisory opinion providing judges new guidance on their recusal obligations based on their financial interest in a party. The new guidance endorses the current rule to the extent that it uses 10% ownership of a party as a proxy for financial interest, because 10% ownership creates a rebuttable presumption of "control" of a party. The goal of Rule 7.1 is aimed less at providing guidance on whether to recuse than to ensure that judges have the information necessary to make that judgment, consistent with the recusal statute and canons of judicial conduct. The goal is to align the disclosure requirement as much as possible with the considerations prompted by the guidance.

Professor Bradt noted that it is likely impossible to craft a rule that would ensure that all possible financial interests are disclosed. Indeed, too great a reporting burden would not only be onerous, it would be unlikely to yield useful information in many cases. Moreover, the more disclosure that is required, the more likely it may be that the only relevant information disclosed is overlooked. The subcommittee has been looking at various possibilities to ensure the optimal amount of disclosure, drawing on numerous examples from state and local rules. One possible approach is to require parties to disclose what is currently required by the rule and any "beneficial owners" with the power to exercise control over the disclosing party.

One attorney member noted that corporations have "many arms and legs," including constantly evolving corporate forms and structures that judges are unlikely to invest in. On the other hand, as such investment vehicles proliferate, it may not be a safe assumption that judges would not hold any stake.

Professor Cooper, who was Reporter for the most recent revision of Rule 7.1, stated that he was taken aback by the new guidance from the Codes of Conduct Committee, particularly its emphasis on "control" of a party as a proxy for financial interest. Not only was the rule not drafted with that concept in mind, 10% may in many cases not be consistent with control at all (as in a joint venture among three parties, two of which each have 45% control and the other only 10%). Professor Cooper also noted the array of potential structures and the dynamic nature of both corporate ownership and judges' investments.

Justice Bland thanked committee members for their valuable feedback and noted that the subcommittee would be working on draft rule language and seeking outreach to the bar.

Cross-Border Discovery Subcommittee

Judge Rosenberg introduced the work of the Cross-Border Discovery Subcommittee, chaired by Judge Manish Shah. This subcommittee was created after the October 2023 Advisory Committee meeting to address issues raised in a recent Judicature article by former Advisory Committee members Judge Michael Baylson and Professor Steven Gensler. The subcommittee held its first meeting on January 30, 2024.

Judge Shah reported that the subcommittee had begun its work, using the Baylson/Gensler article as a jumping-off point. The first question the subcommittee is considering is whether there is a problem that can be profitably addressed by a federal rule. Parties in cross-border cases can find themselves at the intersection of the Federal Rules and foreign law, especially with respect to whether discovery in a foreign nation should be conducted according to the rules or the Hague Convention. The problem can become especially challenging if the discovery is illegal in the country or the subject of a "blocking statute" prohibiting disclosure. One question is whether a rule mandating consideration of these issues at a case-management conference would be helpful. The subcommittee has begun initial research and outreach to the bench and bar, including feedback from the Department of Justice and the Federal Magistrate Judges Association (FMJA). The subcommittee will also follow up with the Sedona Conference and the ABA's cross-border institute.

Professor Marcus added that he has received several overtures from groups monitoring what we are doing. There seems to have been a significant increase in cross-border discovery in recent years. Because U.S. discovery remains an outlier, conflicts with other countries are prevalent.

Magistrate Judge Boal noted that there was not significant support from the FMJA to add cross-border discovery to the list of topics to be discussed at a pretrial conference, because the issues come up naturally.

Joshua Gardner, of the DOJ, stated that the consensus in the Department is that current Rules 16 and 26(f) are sufficient to allow parties to raise cross-border discovery issues if they are relevant in a particular case.

Professor Marcus noted that perhaps there are sufficient tools for judges to address these issues as they arise. The intersection of the rules and the Hague Convention is a "labyrinth" but perhaps consultation and collaboration can solve specific problems better than a rule.

Random Case Assignment

The Advisory Committee has been asked to consider a rule requiring random district-judge assignment in cases seeking injunctions mandating or prohibiting enforcement of federal law. The proposal arises from concerns about a specific form of "judge-shopping," whereby a party files a case in a division with only one sitting judge. In some districts, that judge will receive all cases filed in the division, meaning that the choice to file there carries with it the

choice of the presiding judge. At the October 2023 Advisory Committee meeting, Professor Bradt was tasked with researching questions related to rulemaking authority in this area, and whether the supersession clause of the Enabling Act would need to be invoked, given that there is currently a federal statute, 28 U.S.C. § 137, that delegates the power to assign cases to the districts. Professor Bradt indicated that these were complex questions and that his research would continue over the summer.

Judge Rosenberg indicated that this is an extraordinarily important issue that will remain on the Advisory Committee's agenda. But several weeks before the Advisory Committee meeting, the Judicial Conference Committee on Court Administration and Case Management issued guidance to the district courts suggesting random assignment of the same cases that would likely be the focus of a new rule. This guidance is not, however, mandatory, and it is unclear how many districts will choose to comply. Professor Bradt reported that he, with the assistance of Rules Law Clerk Zachary Hawari, will monitor the districts' responses to the guidance over the coming months.

Brian Boynton, representing the Department of Justice, which recently submitted an extensive suggestion supporting a rule change, endorsed the approach of monitoring the district courts to see if they uniformly follow the Judicial Conference guidance. If they do not, in his view, rulemaking may be necessary, so research should continue on the viability of such a rule.

Professor Bradt stated that his research would continue in earnest over the summer and that he would report findings to the Advisory Committee at its next meeting.

Social Security Numbers

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of Social Security numbers (SSN). Senator Wyden has asked for a reexamination of the current provisions in the privacy rules (including Civil Rule 5.2) that allow filings to include only the last four digits of the SSN. Redaction of the entire SSN may be preferable, and because such a shift would require amendments across all sets of federal rules, Mr. Byron has convened several meetings of all committee reporters to consider the issue as a working group. A memo in the agenda book, at page 342, outlines possible rule amendments. One question, however, is whether all of the privacy rules should be reexamined, since they have not received a close look in around 20 years. Mr. Byron indicated that such a reexamination could be undertaken by a joint subcommittee, the reporters' working group, or one advisory committee, which could take the lead.

Professor Marcus noted the importance of uniformity across the federal rules on these issues. There may not be a strong need for any SSN to appear in a civil filing, but there may be such a need in bankruptcy cases, in which case the needs of the bankruptcy courts may take precedence. Professor Marcus also took note of Civil Rule 5.2(h), which waives privacy protections for documents that are filed without redaction and not under seal. The clerk's office liaison added that any changes regarding privacy rules should take special consideration of the burdens of redacting personal information on court reporters.

Mr. Byron indicated that work would be ongoing on this issue and thanked the Advisory Committee for its feedback.

E-filing by pro-se litigants

Professor Struve presented on the ongoing effort to consider access to electronic filing by pro se litigants. She noted that a proposal would not be forthcoming at this meeting, but that the working group intended to convene with the aim to develop a proposal this summer.

Unified District Court Bar Admission

Professor Struve and Professor Bradt reported on the Joint Subcommittee on Unified District Court Bar Admission, chaired by Judge Paul Oetken (S.D.N.Y.). This subcommittee was formed in response to a proposal from Dean Alan Morrison and others supporting more seamless admission to federal district court bars. The subcommittee has met and is still in early stages of investigating the issue, and this was the first opportunity to seek feedback from the Advisory Committee. Although Dean Morrison's initial proposal was to create a national bar of the federal district courts, overseen by the Administrative Office, there was a lack of momentum for this idea in both the joint subcommittee and the Standing Committee at its January 2024 meeting. As a result, the subcommittee has instead turned toward considering less adventurous options, such as potentially preempting the requirement in some districts that applicants to the district court bar be members of the bar of the state in which the district is situated. Other possibilities remain under consideration, such as pro hac vice admissions and the potential impact of any rule change on the fees districts receive from bar applications. The subcommittee is also examining other possible effects of loosening bar-admission requirements, such as, perhaps, increased expectations of local counsel.

Professor Struve reported that at its January meeting, several members of the Standing Committee expressed support for the general idea of facilitating bar membership for lawyers with significant federal-court practices spanning multiple states, particularly lawyers of limited means or those who must move around a lot, such as military spouses. But some Standing Committee members expressed some skepticism, emphasizing the importance of districts' control over the quality of lawyering in their courts and the diversity of admission requirements reflecting aspects of local district culture. The subcommittee's next steps include: investigating the scope on Enabling Act authority for rulemaking in this area, examining closely relevant local rules, and working with the Appellate Rules Advisory Committee to better understand the effectiveness of Fed. R. App. P. 46, which takes a relatively permissive approach to admissions to Court of Appeals bars.

Professor Marcus asked about whether this project might affect a district's ability to require that its bar members adhere to its state's rules of professional responsibility. This concern prompted Professor Marcus to remind the committee of the prior unsuccessful effort to generate nationwide rules of professional responsibility for the federal courts. Professor Coquillette added his own view that such efforts were "a complete disaster," and should not be repeated, in part because the intersection between state rules of professional responsibility and applicable statutes barring unauthorized practice of law is an "absolute thicket." Professor Struve responded that

national rules of attorney conduct are not on the subcommittee's agenda, but that this prior experience is instructive.

A judge member of the committee asked why this would be an appropriate topic for rulemaking at all. Instead, in this judge's view, this is a topic best left to the districts and states because they have the on-the-ground responsibility of ensuring quality of lawyering in their courts. This judge also contested the use of the relatively lax appellate rule as a viable comparison because an appellate argument is a one-time, brief affair, while attorneys in the district court will inevitably appear more often. This judge also expressed concerns that too many nonlocal lawyers would water down the sense of community among lawyers and judges within the district.

Another judge member expressed similar reservations, noting that each district has a specific culture. One example is the oath bar members must take in this judge's district, which has not been modernized so as to better preserve a tangible link to past generations. This judge inquired whether pro hac vice admission was insufficient to address rulemaking proponents' concerns. A third judge agreed, noting that often bar-admission requirements are determined as much by local practitioners as judges, such as lawyers who may sit on district courts' local rules committees. This judge also noted that there may be valid reasons that some bars do not want local attorneys to be displaced by outsiders.

Professor Struve thanked Advisory Committee members for their feedback and promised to report it to the joint subcommittee investigating these issues.

Rule 81(c)

As presented previously to the Standing Committee, it has been proposed that an amendment to Rule 81(c) be considered because, as restyled in 2007, it could create confusion about whether a jury trial must be demanded after removal from state court if there has not yet been such a demand in the state court proceedings. As restyled, Rule 81(c)(3)(A) says that no demand for jury trial need be made after removal "[i]f the state law *did* not require an express demand for a jury trial" (emphasis added). The rule is arguably ambiguous with regard to states in which a jury-trial demand is required, but the deadline for such a demand had not yet passed at the time of removal. The rule appears to have been designed to excuse jury-trial demands after removal when the state from which the case was removed would *never* have required such a demand. This motivation for the rule was clearer under the rule prior to restyling, which provided that no federal jury demand would be necessary "i[f] the state law *does* not require an express demand for jury trial" (emphasis added). In sum, the change of verb tense creates an ambiguity in the applicability of the rule.

As Professor Marcus noted, courts seem to interpret the restyled rule as having the same effect as the prior rule, i.e., that a federal jury demand is required after removal unless it would never have been necessary in the state court from which the case was removed. Professor Marcus suggested two possible fixes that are under review: (1) reverting to the old language, which would make clear that a post-removal jury demand is required if none has been made before removal whenever a jury demand is required under the practice of the pertinent state court; or (2) removing the exemption for those states that do not require a jury demand and making clear that

an express jury demand must be made post-removal in every case if none was made post removal. Professor Marcus cautioned, however, that many lawyers practice only rarely in federal court so the Advisory Committee should be mindful that a change in the rule might unfairly surprise some practitioners. One lawyer member stated that this is an important issue and any such rule should strive to be as unambiguous as possible and therefore leaned toward the option that would require a jury demand in all cases after removal. The clerk's office liaison to the committee indicated that in their state there is no jury-demand requirement, so any such change would have to be accompanied by extensive outreach efforts in similar states to inform the local bar. The Advisory Committee has not yet decided which course to pursue.

Remote Testimony

Professor Marcus presented the following new issue: Several plaintiff-side lawyers recently submitted a proposal to resolve a split in the courts about the interaction of Rule 45(c)'s limitations on where a witness must appear under subpoena and the possibility of remote testimony under Rule 43(a) from an unwilling witness whose presence can be secured only by subpoena. The proposal was prompted by a Ninth Circuit decision, In re Kirkland, 75 F.4th 2030 (9th Cir. 2023), that even when Rule 43(a) authorizes remote testimony a subpoena may not be used to compel an unwilling witness to provide such testimony within the range authorized by Rule 45(c). The committee note to Rule 45, as amended in 2013, states that a subpoena could be used for such a purpose, but the Ninth Circuit held that it could not. The proposal also sought amendments to Rule 43(a) that would significantly relax present limitations on remote testimony in trials or hearings.

Professor Marcus noted that in the wake of the CARES Act and the pandemic, some rules regarding remote testimony may now look "antique," and revisiting them may be worthwhile. Rule 43 was amended in 1996 with an emphasis on the value of face-to-face communication when possible. But the Ninth Circuit's conclusion nevertheless seems odd in that under its interpretation the rule cannot compel remote testimony across the street from the subpoenaed person's home.

One attorney member expressed support for the proposed amendment, citing positive experiences with remote testimony in recent arbitrations in which the Federal Rules of Evidence applied. In this member's view, remote testimony worked well.

Another attorney member noted, however, that there are significant concerns about remote testimony with respect to witnesses perhaps receiving off-camera assistance in their testimony. A judge member agreed, noting the possible effects of artificial intelligence and "deep fakes." Professor Marcus indicated that it is not clear the changes to Rules 43 and 45 must be considered in tandem, but it will be important that considering changes to one of those rules take account of the effect those changes could have on the other rule.

Judge Bates queried whether a change to Rule 45(c) would effect a significant difference in how Rule 43(a) is applied. Professor Marcus indicated that any changes to Rules 43 and 45 would have to be considered in tandem. Professor Cooper noted that the first step would be to decide whether we simply want to have the district judge decide whether to permit remote

testimony; if so, the subsequent question will be figuring out how to tell the witness how to comply.

Because the interplay of changes to Rules 43 and 45 would be quite complicated, Judge Bates suggested formation of a subcommittee. Based on her experience serving on a similar project in Texas, Justice Bland volunteered to serve on the subcommittee, noting that remote testimony can be very useful if the integrity of the process is well safeguarded.

Subsequent to the Advisory Committee meeting, such a subcommittee was formed, to be chaired by Judge M. Hannah Lauck.

Deletion of the Word "Master" in the Rules

Professor Marcus introduced this proposal by the American Bar Association to eliminate the use of the word "master" in the rules and to replace it with "court-appointed neutral." The word "master" has been employed in Anglo-American legal systems for centuries and appears throughout the rules, most prominently in Rule 53. Professor Marcus also noted that there is a concurrent proposal to similarly amend Bankruptcy Rule 9031 to allow Rule 53 to apply in bankruptcy proceedings. Prior to the Advisory Committee meeting, the Association of Court-Appointed Neutrals submitted a letter in support of the ABA proposal.

Professor Marcus noted that while there does not appear to be any connection between the use of the word "master" in the rules and slavery, updating rule language to keep up with prevailing norms is not an unprecedented project. For instance, in the 1980s, the rules were updated to use gender-neutral language. Professor Struve noted that there is also an Appellate Rule using the term master, so any efforts should consult that committee. Another judge questioned whether the Standing Committee might take jurisdiction over this matter if the word master needed to be changed across all of the rule sets.

One judicial member stated that there was unlikely to be significant confusion if the language were to change since Rule 53 is more "task-driven," and nothing turns on the terminology used. Professor Struve reported that there is some precedent for this from the "synonym subcommittee" that looked at the entire universe of terminology employed in the federal rules, but that subcommittee ultimately did not act.

One judge asked whether this change could be applied to Rule 16.1, which uses the word "master." Judge Bates replied that such a change to the now-approved rule should not be made, and that if this project goes forward it would be better to amend 16.1 in the normal course.

FJC Research Projects

Dr. Emery Lee and Dr. Tim Reagan (remotely) presented on current research projects of the Federal Judicial Center, as reflected in a memo in the agenda book at page 653. Dr. Lee stated that while such reports had been typical, the practice had fallen into desuetude. His hope was that reintroducing the practice of reporting on FJC projects would highlight the role the FJC plays in supporting the rules committees and other Judicial Conference committees. Dr. Lee also indicated that an FJC study on unredacted private information would be forthcoming this summer, and that the report could inform the reporters' working group looking at SSN redaction.

Judge Rosenberg noted the importance and reliability of the work of the FJC, including on the ongoing revision of the Manual for Complex Litigation, on whose board of editors Judge Rosenberg serves. The FJC is working tirelessly on that complex project, alongside the valuable work it does for the rules committees.

Conclusion

Judge Rosenberg thanked the Administrative Office staff for its tireless work and incredible responsiveness in support of the Advisory Committee. Judge Rosenberg then thanked Judge Bates for this support of the committee. Prior to the meeting's adjournment, Judge Bates took a moment to congratulate Judge Rosenberg on receiving the 2024 Distinguished Federal Judicial Service Award presented by the Chief Justice of the Supreme Court of Florida. Judge Rosenberg then adjourned the meeting.

Respectfully submitted,

Andrew Bradt
Associate Reporter