COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: December 14, 2021

Introduction

The Civil Rules Advisory Committee met on a teleconference platform that included public access, on October 5, 2021. Draft minutes of the meeting are attached.

Part I of this report presents one item for action at this meeting, recommending publication of an amendment of Rule 12(a)(2) and (3) to recognize statutes that set a time to file a responsive pleading different than the 60-day period in the present rule.

Part II of this report provides information about a proposal that will be recommended for publication at the June meeting, recommending that Rule 6(a)(6) be amended to add "Juneteenth National Independence Day" to the list of statutory holidays. This proposal might well be adopted as a technical amendment, but the choice should be uniform for all the advisory committees that make the same recommendation.

Part II also provides information about ongoing subcommittee projects. The MDL Subcommittee is continuing to consider possible rule amendments that would include provisions in Rule 16(b) or Rule 26(f) addressing the court's role in appointment and compensation of leadership counsel and management of the MDL pretrial process, including ongoing supervision by the court of the development and resolution of the litigation. The draft now being developed would simply focus attention on these issues by the court and the parties without greater direction or detail. The subcommittee has begun to receive comments from interested bar groups on the approach presented to the Advisory Committee in October and outlined in this report. The Discovery Subcommittee has begun to study suggestions that amendments should be made to Rule 26(b)(5)(A) on what have come to be called "privilege logs." It will defer further consideration of a proposal to create a new rule to address standards and procedures for sealing matters filed with the court. A sealing project has been launched by the Administrative Office, and it seems better to wait to receive the benefits of that project. The work of these two subcommittees is described in parts IIA and IIB.

There is no need for further description of the work of two other subcommittees. A joint subcommittee with the Appellate Rules Committee has explored possible amendments to address the effects of Rule 42 consolidation in determining when a judgment becomes final for purposes of appeal. It awaits completion of a second FJC study. Another joint subcommittee continues to consider the time when the last day for electronic filing ends. Work to support further deliberations continues, but it may be some time before enough information has been gathered to support renewed deliberations.

The Advisory Committee has determined that it remains premature to begin work toward possible rules related to third party litigation financing. Third-party funding continues to grow and to take on new forms. The agreements that establish funding relationships vary widely, and may not express the full reality of the actual relationships. It would be difficult even to define what sorts of funding might be brought within the scope of a rule. And many of the questions raised about third-party funding address issues of possible regulation that are beyond the reach of Enabling Act rules. The Advisory Committee continues to gather information.

Part III describes continuing work on topics carried forward on the agenda for further study. The first is a proposal to amend Rule 12(a)(4) to allow 60 days to file a responsive pleading after the court denies, or postpones until trial, a motion under Rule 12 in an action against a federal officer sued in an individual capacity for acts on the United States' behalf. This proposal was published in 2020 and discussed extensively in the Standing Committee last June. Additional information about experience in present practice has been requested from the Department of Justice.

Four other topics are carried forward. One is the question whether an attempt should be made to establish uniform standards and procedures for deciding requests for permission to proceed in forma pauperis.

Another topic carried forward is a proposal to amend Rule 9(b) to allow malice, intent, knowledge, and other conditions of a person's mind to be pleaded as a fact, without requiring

additional circumstances that support an inference of the fact. A subcommittee has been appointed and has begun studying this proposal.

Rule 4 provisions for serving the summons and complaint were studied by the CARES Act Subcommittee and are involved with the emergency rules provisions in Rule 87 as published last August. Rule 4 will continue to be studied in light of the comments on Rule 87 and may carry forward for independent consideration. A recent proposal sent to the Advisory Committee suggests a possible first step by amending Rule 4(d)(1) to allow a request to waive service of the summons and complaint to be made by email.

Rule 5(d)(3)(B) limits on electronic filing by unrepresented parties also are being carried forward, to be studied by a cross-committee group that is refining a research agenda.

Part III omits an additional topic carried forward on the agenda but not discussed at this meeting. This topic arises from a potential ambiguity in Rule 4(c)(3) that may affect the procedure for ordering a United States marshal to serve process in an in forma pauperis or seaman case.

Part IV describes several new items that have been added to the agenda for further work.

Judge Furman suggested that it may be desirable to amend Rule 41(a)(1)(A) to resolve a split in the decisions on the question whether a party can dismiss part of an action by notice without prejudice. This question leads to related questions, some of them implicated in the same words referring to "the plaintiff" and "an action."

Rule 55(a) directs that the clerk "must" enter a default in prescribed circumstances, and Rule 55(b)(1) directs that the clerk "must" enter a default judgment in narrowly described circumstances. An informal survey suggests that in many districts all default judgments are entered by the court. The first step will be to undertake a broader survey of actual practices for lessons about what the rule might say.

Rule 63 lists criteria for determining whether a successor judge "must" recall a witness to complete a hearing or nonjury trial begun before a different judge. Discussion of a suggestion that the rule might point to the value of a video transcript in applying these criteria led to a broader question whether the criteria are too narrow.

A thoughtful submission suggested that a rule should be adopted to establish uniform national standards and procedures for filing amicus curiae briefs in the district courts. Guidance can be found in a good local rule, the Appellate Rules, and the Supreme Court Rules. A central question will be whether the role of district court litigation, and party control of the record, complicate the issues beyond the analogies in appellate practice. The submission suggests that amicus briefs are filed in about 0.1% of district court cases, some 300 a year; the relative infrequency of the practice may be a reason to avoid adding a new rule on a topic, briefs, that is not otherwise addressed in the rules.

Part V describes four proposals that are not being pursued further. One suggested adoption of a new Rule 9(i) to establish a "particularity" standard for pleading access impediment claims under Title III of the Americans with Disabilities Act. A second suggested that opt-out class actions

be discarded, substituting opt-in classes. A third suggested that Rule 25(a)(1) be amended to provide that a judge may enter a statement of death on the record. The fourth raised a question about the alternative sanctions provision in Rule 37(c)(1).

I. Action Item: Rule 12(a)(2), (3) for Publication

Rule 12(a) sets the times to serve responsive pleadings. Rule 12(a)(1) recognizes that a federal statute setting a different time should govern. Rule 12(a)(2) and (3) does not recognize the possibility of conflicting statutes. Statutes setting shorter times than the 60 days provided by paragraph (2) exist. It is not clear whether any statute inconsistent with paragraph (3) exists now. This proposal would amend paragraphs (2) and (3) to bring them into line with paragraph (1), recognizing that a different statutory time should supersede the general 60-day rule time.

Rule 12(a) begins like this:

(a) TIME TO SERVE A RESPONSIVE PLEADING.

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

(A) A defendant must serve an answer:

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

* * * * *

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

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

* * * * *

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

> (a) TIME TO SERVE A RESPONSIVE PLEADING. ~~(1)*In General.*~~ Unless another time is specified by ~~this rule or~~ a federal statute, the time for serving a responsive pleading is as follows:
>
> (1) *In General.*
>
> (A) a defendant must serve an answer
>
> * * * * *

The most frequently encountered statute that sets a different time from Rule 12(a)(2) is the Freedom of Information Act. The Department of Justice reports that it understands and adheres to the 30-day response time set by FOIA. But this question came to the agenda from a lawyer who had to argue with a clerk's office to gain a 30-day summons, and research by an independent journalist with a law librarian suggests that many districts issue 60-day summonses and that mean and median response times exceed 30 days.

The reasons to recommend the amendment are direct. Rule 12(a)(2) and (3) was never intended to supersede inconsistent statutes. It is embarrassing to have rule text that does not reflect the intent to defer. Worse, comparison of the text of paragraph (1) with the texts of paragraphs (2) and (3) might suggest a deliberate choice that only the response times set by paragraph (1) should defer to inconsistent statutory periods. And the risk that the rule text may be read to supersede inconsistent statutory provisions may be real. Working through a supersession argument, moreover, would lead to the prospect that the rule supersedes inconsistent earlier statutes, but is superseded by later statutes. It is better to avoid these problems by a simple amendment.

The reasons to hesitate are few. One is the ever-present concern that bench and bar should not be burdened with a never-ending flow of minor rules amendments. Time and again the committees find divergent or likely wrong interpretations of the rules but draw back from proposing amendments. The other is that the Department of Justice regularly encounters actions that involve both claims subject to a shorter period and claims subject to the general 60-day period in Rule 12(a)(2) and (3). Often it wins an order that allows it to file a single answer within the 60-day period. The Department has some concern that express recognition of the shorter statutes in rule text might make it more difficult to win such extensions. These reasons proved troubling to the Advisory Committee when this proposal was first considered in October 2020; the proposal was held for further study by an evenly divided vote.

The reasons to recommend this amendment for publication proved more persuasive to the Advisory Committee after further discussion. The recommendation was adopted without dissent.

II. Information Items

A. Rule 6(a)(6): Juneteenth National Independence Day

The Juneteenth National Independence Act, P.L. 117-17 (2021) amends 5 U.S.C. § 6103(a) to add "Juneteenth National Independence Day, June 19" to the list of public legal holidays.

The Bankruptcy Rules Committee has recommended that Bankruptcy Rule 9006(a)(6) be recommended for adoption without publication as a technical amendment. Civil Rule 6(a)(6)(A) should be amended in parallel, as also the similar Appellate and Criminal Rules. Publication for comment does not seem necessary, but the same approach should be followed for all four rules.

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

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

(a) COMPUTING TIME. * * *

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

(A) the day set aside by statute for observing * * * Memorial Day, Juneteenth National Independence Day, Independence Day,

* * * * *

Even without this amendment, Rule 6(a)(6)(B) will effect the same result until amended subparagraph (A) takes effect. Subparagraph (B) includes as a "legal holiday" "any day declared a holiday by the President or Congress." It remains important, however, to maintain a complete set of statutory holidays in subparagraph (A).

Committee Note

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

B. MDL Subcommittee

As reported during the Standing Committee's June meeting, the MDL Subcommittee continues to study some of the topics it originally undertook to examine.[1] Another topic initially assigned to the subcommittee was a proposal to require disclosure of third party litigation funding (TPLF) arrangements. After review of these issues, and in light of the reported infrequency of TPLF issues in MDL proceedings, the subcommittee decided that the issues did not warrant

[1] One topic that was intensely considered was a proposal to create by rule an additional route to interlocutory appellate review for at least some orders in at least some MDL proceedings. After extensive consideration the subcommittee concluded that rulemaking was not warranted for this purpose.

rulemaking for MDLs. But because TPLF did appear to be an important and rapidly evolving matter, the Advisory Committee kept the topic on its agenda and has been monitoring it. The agenda book for the Advisory Committee's October 5, 2021 meeting contained more than 40 pages of material reporting on that monitoring activity, including the 20-page compilation prepared by successive Rules Law Clerks of articles about TPLF. The agenda book did not recommend immediate action on this front, and during the meeting the Advisory Committee did not decide that immediate action was called for, but it did recognize that TPLF is a large topic, and that continued monitoring was in order. This report outlines current thinking. The subcommittee invites and welcomes reactions from the Standing Committee.

1. Current Focus: Facilitating Early Attention to "Vetting" and Provisions Regarding Appointment of Leadership

As it began its work, the subcommittee looked carefully at a different set of issues, sometimes called "vetting," prompted partly by assertions that a large proportion of plaintiffs in some mass tort MDLs had not used the product involved or had not suffered the harm allegedly caused by the product.

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

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

Meanwhile, the subcommittee's focus shifted to early attention to other matters in MDL proceedings, notably appointment of leadership counsel on the plaintiff side and arrangements (often called common benefit fund arrangements) for compensating leadership counsel for their added efforts.

This focus on settlement and management was partly stimulated by a comparison of MDL mass tort proceedings with class actions. At least among academics, there have been calls for rules specifying criteria for appointment of leadership counsel parallel to the criteria for appointment of class counsel in class actions, and also for adoption of rules for judicial involvement in the process

of settling MDL proceedings, or major parts of them, analogous to Rule 23(e)'s newly expanded provisions regarded review of class action settlements.

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

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

But input from the bench and bar has identified significant concerns about importing some of these class action practices into the MDL context. In class actions, the court is in effect appointing class counsel to act as lawyers for all members of the class. Hence the directive of Rule 23(g)(4) that class counsel represent the interests of the class as a whole, not just their individual clients. As the committee note to Rule 23(g) points out, that means that although the class representatives are in form the "clients" of class counsel, they cannot "fire" class counsel as an ordinary client may fire a lawyer. Under Rule 23(g)(4), class counsel must give class interests priority over the interests of the class representatives as individual clients. The MDL situation is different.

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

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

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

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

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

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

> [C]ourts and attorneys need clearer guidance regarding attorney compensation in mass litigation, at least outside the class action context. The Civil Rules Advisory Committee should consider crafting a rule that brings some semblance of order and predictability to an MDL attorney compensation system that seems to have gotten totally out of control. (slip op. at 1)

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

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

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

> [L]ead counsel's hard work helped lay the groundwork for other lawyers in the MDL to get settlements for their clients, but the settlements obtained by those lawyers were likely far lower than the settlements obtained by lead counsel for their "inventories," thus diminishing the need to address the free rider problem [that IRPAs get a free ride due to the work of leadership counsel]. (slip op. at 27)

Judge Chhabria also raised questions about whether familiar common fund practices in MDL proceedings really correspond to situations in which the litigation itself creates the fund that is then distributed to beneficiaries. In the MDL context, the "funds" may come from settlements with individual plaintiffs or groups of plaintiffs, and the fund results solely from the court's order holding back a portion of those settlement proceeds. See slip op. at 9-16.

Need for attention to MDL proceedings in the Civil Rules? One additional topic merits mention. Discussions with experienced MDL transferee judges and lawyers with much MDL experience did not disclose great enthusiasm for rule changes. Indeed, there might be some resistance to that idea.

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

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

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

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

Hansel, *Extreme Litigation: An Interview with Judge Wm. Terrell Hodges, Chairman of the Judicial Panel on Multidistrict Litigation*, 19 Me. B.J. 16, 16 (2004).

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

2. Current Focus: Rule 16(b) Approach/Rule 26(f) Corollary

Below is the sketch of the current subcommittee approach as presented to the Advisory Committee during its October 5 meeting. Since that meeting, the subcommittee (which now includes Judge Proctor, a former member of the Judicial Panel on Multidistrict Litigation) has held an online meeting to examine these issues with care, and its exploration of them is ongoing. In addition, representatives of the subcommittee will likely participate in events with experienced members of the bar to receive reactions to the approach outlined below. The first of these events occurred on December 3, 2021.

The sketch below includes a variety of questions that the subcommittee has already begun discussing in detail, and which are receiving ongoing scrutiny. It is expected that input received from members of the bench and bar will also focus on the subcommittee's current thoughts, though discussions are ongoing on whether the Rule 26(f) treatment should be expanded to include items beyond information exchange, such as sequencing of decisions and scheduling of pretrial conferences.

It bears emphasis that the subcommittee's examination of these issues — including the questions below — is ongoing and dynamic. The subcommittee has already had one online meeting (on November 2, 2021), and its focus continues to evolve. Among the possible issues going forward are whether to expand the topics for consideration at Rule 26(f) conferences in MDL proceedings beyond the exchange of information on claims and defenses, whether to pursue a judicial role in regard to settlements, and the appropriate role for the MDL transferee court regarding common benefit funds.

Careful attention to terminology is also ongoing. An example is the term "leadership counsel" rather than "lead counsel." The term "lead counsel" has long been recognized, but there may be good reason to use a different term in a Civil Rule for multidistrict litigation. In addition, some attention to appointment of liaison counsel on the defense side may be valuable. Indeed, it may be useful also to address a possible judicial role regarding common benefit funds to cover defense costs. *See In re Three Additional Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litigation*, 93 F.3d 1 (1st Cir. 1996) (upholding requirement that defendants added late in the litigation contribute more than $41,000 as their share of common benefit defense costs under the

district court's case management order, even though these defendants said they wanted to "go it alone" and had not benefitted from the common benefit expenditures).

Given the evolving nature of subcommittee discussions, Standing Committee input would be valuable to the subcommittee as it receives reactions from sectors of the bar.

Rule 16(b) Approach

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Case Management.

* * * * *

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

* * * * *

(B) *Permitted Contents.*

* * * * *

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

(viii) include other appropriate matters.

* * * * *

(5) ***Multidistrict Litigation***. In addition to complying with Rules 16(b)(1) and 16(b)(3), a court managing cases transferred for coordinated pretrial proceedings under 28 U.S.C. § 1407 should[2] consider entering an order about the following at an early pretrial conference:

(A) directing the parties to exchange information about their claims and defenses at an early point in the proceedings;[3]

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

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

(B) appointing leadership counsel[4] who can fairly and adequately discharge[5] their duties in representing plaintiffs' interests[6], and including specifics on the responsibilities of leadership counsel,[7] [specifying that leadership counsel must throughout the litigation fairly and adequately discharge the responsibilities designated by the court],[8] and stating any limitations on the activities of other plaintiff counsel[9];[10] [11]

(C) addressing methods for compensating leadership counsel [for their efforts that provide common benefits to claimants in the litigation];[12]

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

[5] This phrase somewhat emulates Rule 26(g)(1)(A)'s criteria for appointing class counsel. A committee note might mention the similarity of concerns, but it seems that the detail included in Rule 23(g)(1)(A) would not be helpful here.

[6] The question what exactly "represent" means here may need to be addressed carefully in a committee note since most (perhaps all) plaintiffs have their own lawyers.

[7] There may be some reason to stress in the committee note the value of fairly detailed appointment orders as a way to avoid problems down the line.

[8] 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.

[9] This provision refers to the common limitation on activities by other plaintiff lawyers (the IRPAs). Absent such limitations, an MDL proceeding might become unmanageable.

[10] This provision does not discuss appointment of lead counsel for defendants, though that may be vital in multi-defendant situations.

[11] 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.

[12] 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 Disaster 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

411 **(D)** providing for leadership counsel to make regular reports to
412 the court — in case management conferences or otherwise
413 — about the progress of the litigation;[13]

414 **[(E)** providing for reports to the court regarding any settlement of
415 [multiple] {a substantial number of} [all] individual cases
416 pending before the court;][14] and

417 **[(F)** providing a method for the court to give notice of its assessment of
418 the fairness of the process that led to any proposed settlement subject
419 to Rule 16(b)(5)(E) to plaintiffs potentially affected by that
420 settlement].[15]

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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.

[13] It seems likely that MDL transferee judges will often schedule case management conferences at regular intervals to supervise the evolution of the litigation. It may be that, beyond that, courts would desire regular written reports. One focus of this management, or of the original appointment order, might be the method used by leadership counsel to advise IRPAs and their clients about the progress of the litigation.

[14] The subcommittee has considerable uneasiness about a rule provision delving into settlement in this manner. It may be that the preferable approach would include reference to developments on this front under (B) or (D).

Separately, it is worth noting that providing rule language to define which settlement proposals trigger this reporting obligation is tricky. 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 choice to the court. But, if so, it might suffice to include that issue under (B) or (D).

[15] (F) is retained in brackets. But the inclination of the subcommittee is that proceeding along these lines would invite considerable problems without providing considerable advantage.

For one thing, it is difficult to say how the court is to assess the settlement deal. As noted above, the court is really not in any position to evaluate what might be called the "merits" of the deal — whether it is a good deal or a bad deal. Instead (F) asks the court to assess the "process" by which it was reached. The 2018 amendments to Rule 23(e) settlement review in class actions recognized in the committee note

The Rule 26(f) Corollary

If something like the foregoing were pursued, it seems valuable to have the parties get to work on the PFS/DFS sorts of issues at their Rule 26(f) conference and include a report about those efforts in their report to the court before it enters its Rule 16(b) scheduling and case management order:

Rule 26. Duty to Disclose; General Provisions 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 under 28 U.S.C. § 1407, whether the parties should be directed to exchange 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).

There may be many other topics the court would consider under something along the lines of new Rule 16(b)(5) above. But it does not seem that defendants have a rightful seat at the table to discuss most of those topics, such as selection of leadership counsel, creation of a common benefit fund, judicial oversight of the conduct of the litigation by leadership counsel, or settlement. As noted above, however, the subcommittee is engaged in ongoing discussions of whether to

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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 the 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.

expand the list of matters on which counsel in MDL proceedings should confer and address in their report to the court in relation to the entry of a Rule 16(b) order.

An additional consideration is the question who should speak for the plaintiffs during this early meet-and-confer session. In class actions, Rule 23(g)(3) authorizes the court to appoint interim class counsel before making the formal appointment of class counsel. In some MDL proceedings, arrangements of this sort have occurred. Whether a provision for such a temporary appointment should be included in a rule (or perhaps mentioned instead in a committee note) is under subcommittee consideration.

C. Discovery Subcommittee

The Discovery Subcommittee has two principal issues before it, but one of them seems to be a part of a more general A.O. study of sealed filings, and Advisory Committee action will likely be deferred pending the outcome of that A.O. work.

1. Privilege Logs

The Advisory Committee received two recommendations that it revisit Rule 26(b)(5)(A), adopted in 1993, requiring that parties withholding materials on grounds of privilege or work product protection provide information about the material withheld. Though the rule did not say so and the accompanying committee note suggested that a flexible attitude should be adopted, the submissions said that many or most courts had treated the rule as requiring a document-by-document log of all withheld materials. One suggestion made was that the rule be amended to make it clearer that such listing is not required, and another was that the rule be amended to provide that a listing by "categories" be recognized as sufficient in the rule.

In May, the subcommittee concluded that it should seek more information about experience under the current rule. Accordingly, at the beginning of June, the subcommittee posted an invitation for comment on the A.O. website and also sent copies to a variety of bar groups inviting dissemination. That invitation produced more than 100 thoughtful comments. A summary of those comments appears at pp. 213-43 of the agenda book for the Advisory Committee's October 5 meeting. In addition, the National Employment Lawyers Association organized an online discussion with its members for the subcommittee in July, and representatives of Lawyers for Civil Justice (LCJ) held an online discussion with subcommittee members in September. Finally, later in September members of the subcommittee had the opportunity to participate in a very informative online conference organized by retired Magistrate Judge John Facciola and Jonathan Redgrave, who was also the source of one of the proposals for rulemaking that stimulated this effort.

One thing that this input has made clear is that there appears to be a recurrent and stark divide between the views of plaintiff counsel (who worry that a rule change could enable defendants to hide important evidence) and defense counsel (who stress the burdens of preparing privilege logs, say the logs are rarely of value, and feel that the need for a document-by-document log might sometimes be used by plaintiff counsel to apply pressure to defendants).

In addition, the subcommittee held an online meeting in August concerning the ideas presented to the Advisory Committee during its October 5, 2021, meeting and presented below. It is worth noting that various subcommittee members expressed differing attitudes toward these ideas, so none of them is presented as a subcommittee preference. They are the subject of ongoing subcommittee study, and it is expected that there will be at least one additional session with an interested bar group — the American Association for Justice — about privilege log concerns.

Perhaps it is useful to begin by presenting the original proposed addition to Rule 26(b)(5)(A) submitted by LCJ:

> If the parties have entered an agreement regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(e), or if the court has entered an order regarding the handling of information subject to a claim or privilege or of protection as trial-preparation material under Fed. R. Evid. 502(d), such procedures shall govern in the event of any conflict with this Rule.

In early August, LCJ submitted a more extensive and aggressive proposal to amend the rule. Meanwhile, the subcommittee has begun to focus on Rule 26(f) and Rule 16(b), which might be the natural place to locate a rule provision designed to consider such an agreement and call it to the court's attention. The subcommittee welcomes input from the Standing Committee on this approach.

Rule 26(f)/16(b) Approach

Rule 26(f)(3)(D) could be revised along the following lines to say that the parties' discovery plan must state the parties' views on:

> (D) any issues about claims of privilege or of protection as trial-preparation materials, including the method to be used to comply with Rule 26(b)(5)(A) and—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502.

Rule 16(b)(3)(B)(iv) could be amended in a parallel manner, providing that the scheduling order may:

> (iv) include the method to be used to comply with Rule 26(b)(5)(A) and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502.

These changes could support a committee note explaining that the parties and the court can benefit from early discussion, with details, of the method to be used for creating a workable privilege log. The note might also stress the value of early "rolling" privilege log exchanges and warn against deferring the privilege log exchange until the end of the discovery period. It might also stress the value of early judicial review of disputed privilege issues as a way to provide the

parties with detailed information about the court's view on what items privilege does and does not apply to. The parties can then govern their later handling of privilege issues with that knowledge.

This approach can be supported on the ground that it is desirable to prod the parties and the court to attend to the privilege log method up front. Several members of the subcommittee reported that serious problems can develop when privilege logs are not forthcoming until near the end of the discovery period, and disputes about them or about what was withheld therefore had to be addressed at that time. A prompt in a committee note in favor of production of a "rolling" privilege log might also be desirable.

One thing the parties might address in their Rule 26(f) conference, and the court might include in a Rule 16(b) scheduling order, would be categories of materials that need not be listed. Subcommittee discussion has suggested that often communications with outside counsel dated after the commencement of the litigation might be a category exempted from listing on a log. Another category that has been discussed within the subcommittee is that any documents produced in redacted form need not also be listed in the log since it will be apparent from the face of the redacted documents that portions have not been included.

This Rule 26(f) approach would allow the parties to tailor any categorical exclusions or methods of reporting withheld materials to their case. It bears noting that some comments received asserted that some parties seem to route communications through in-house counsel, or copy them on communications, in situations in which no privilege really applies. Some who commented claim that this is a subterfuge designed to conceal evidence. Presumably that sort of misgiving could be explored in conferences of counsel.

Another feature of this approach is that the nature of privileges may vary significantly in different types of federal court litigation. It may be that the original submissions to the Advisory Committee were principally concerned with what might be called commercial litigation. But comments submitted in response to the invitation for comment emphasized that very different issues often exist in other types of litigation. One example involves suits for violation of civil rights due to alleged police use of excessive force. Various sorts of privilege that may be invoked in such litigation — internal review privilege or informer's privilege, for example — are quite different from the attorney-client and work product protections. Another example is medical malpractice litigation, which may involve peer review, confidentiality of medical records, and other privileges that do not often appear in typical commercial litigation.

Another topic that is mentioned in many of the comments and has come up in subcommittee discussions is the possibility that technology can facilitate creation of a log. It does seem that technology can now sometimes ease the task of preparing a log, perhaps even make it a "push the button" exercise to produce a "metadata log." But subcommittee members' experience has been that this possibility has not proved a cure-all for privilege-log disputes. To the contrary, attempts to use technology to generate logs too often produce disputes between counsel. Often, the technology "solution" is ultimately abandoned in favor of document-by-document logs. All of this can generate more work for the court.

Perhaps, if the parties carefully considered this high-tech possibility during their Rule 26(f) conference and presented the judge with either an agreed method or their contending positions on how it should be done, the court could, early in the litigation, direct use of a method that seemed effective, and also direct that an initial logging report using that method be presented fairly promptly so that if further disputes occurred, they could be addressed in a timely fashion.

All in all, then, it may be that adding this topic to the Rule 26(f) discussion may provide needed flexibility that takes account of both the nature of the privileges likely to be invoked and the nature of the litigation and the litigants. And calling the court's attention to it in relation to the Rule 16(b) scheduling order may pay dividends.[16]

2. Sealed Court Filings

Several parties — Prof. Eugene Volokh, the Reporters Committee for Freedom of the Press, and the Electronic Frontier Foundation — submitted a proposal to adopt a new Rule 5.3, setting forth a fairly elaborate set of requirements for motions seeking permission to seal materials filed in court.

[16] The agenda book for the Advisory Committee's October 5 meeting also included discussion of the possibility of amending Rule 26(b)(5)(A) directly, perhaps in conjunction with a change to Rule 26(f) and Rule 16(b). Various alternative drafts were presented, including the following:

Alternative 1

(ii) describe <u>for each item withheld — or, if appropriate, for each category of items withheld —</u> the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Alternative 2

(ii) describe the nature of the documents, communications or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim. <u>The description may, if appropriate, be by category rather than a separate description f or each withheld item.</u>

Alternative 3

(ii) describe the nature of the <u>categories of</u> 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.

There is considerable concern, however, that amending the rule to invite use of "categories" to satisfy the rule might "tip the playing field" on this subject, or invite overbroad categories. Going beyond this general approach and attempting to describe in a rule the categories that need not be listed seems to present even greater challenges. These possibilities remain under study by the subcommittee, however.

The question of filing under seal is an important one, but the proposal itself included a significant number of complicating features that may be unnecessary to the fundamental points to be made — (1) that "good cause" sufficient to support a Rule 26(c) protective order does not itself supply a ground for filing under seal, and (2) that every circuit has a more demanding standard for permitting filings under seal, as required by the common law and First Amendment right of public access to court files. Research done by the Rules Law Clerk demonstrated that every circuit has articulated a standard for such filing under seal.

The subcommittee initially discussed revisions to Rule 26(c) to recognize that good cause supporting a protective order does not itself provide a basis for filing under seal, and a revision to current Rule 5(d) specifying that filing under seal may only be done on grounds sufficient to satisfy the common law and First Amendment right of access to court files. The thinking was that a rule ought not try to spell out those common law or First Amendment requirements, which are phrased somewhat differently in different circuits.

In addition, information received from the Federal Magistrate Judges' Association suggested that, while using the applicable circuit standard for sealing decisions worked well, there might be reason to consider adopting some nationally uniform procedures for sealing decisions. At present, it seems that sealing procedures and methods vary considerably in different districts. Whether to attempt to develop uniform national standards remains on the agenda, but it seems worthwhile to make some observations about the issues that might arise in such an effort, so this report introduces some of the issues.

As a starting point, it's likely that there are differences among districts on how to handle other sorts of motions. In the N.D. Cal., for example, 35 days' notice is required to make a pretrial motion in a civil case, absent an order shortening time. The local rules also limit motion papers to 25 pages in length, and provide specifics on what motion papers should include. Oppositions are due 14 days after motions are filed and also subject to length limitations. There is also a local rule about seeking orders regarding "miscellaneous administrative matters," perhaps including filing under seal, which have briefer time limitations and stricter page limits.

In all likelihood, most or all districts have local rules of this sort. In all likelihood, they are not identical to the ones in the N.D. Cal. An initial question might be whether motions to seal should be handled uniformly nationwide if other sorts of motions are not.

One reason for singling these motions out is that common law and constitutional protections of public interests bear on those motions in ways they do not normally bear on other motions. Indeed, in our adversary litigation system it is likely that if one party files a motion for something the other side will oppose it. But it may sometimes happen not only that neither side cares much about the public right of access to court files, but that both sides would rather defeat or elude that right. So there may be reason to single out these motions, though it may be more difficult to see why notice periods, page limits, etc. should be of special interest in regard to these motions as compared with other motions.

A different set of considerations flows from the reality at present that local rules diverge on the handling of motions to seal. At least sometimes, districts chafe at "directives from

Washington." There have been times when rule changes insisting on uniformity provoked that reaction. Though this committee might favor one method of processing motions over another, it is not obvious that this preference is strong enough to justify making all districts conform to the same procedure for this sort of motion.

Without meaning to be exhaustive, below are some examples of issues that might be included in a national rule designed to establish a uniform procedure, building on the proposal from Prof. Volokh et al:

Procedures for motion to seal: The submission proposes that all such motions be posted on the court's website, or perhaps on a "central" website for all district courts. Ordinarily, motions are filed in the case file for the case, and not displayed otherwise on the court's website. The proposal also says that no ruling on such a motion may be made for seven days after this posting of the motion. A waiting period could impede prompt action by the court. Such a waiting period may also become a constraint on counsel seeking to file a motion or to file opposing memoranda that rely on confidential materials. The local rules surveyed for this report are not uniform on such matters.

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that "confidential" materials be filed under seal? In at least some instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designate materials they produce "confidential" and subject to the terms of the protective order. It is frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

Provisional filing under seal: Some local rules permit filing under seal pending a ruling on the motion to seal. Others do not. Forbidding provisional filing under seal might present logistical difficulties for parties uncertain what they want to file in support of or opposition to motions, particularly if they must first consult with the other parties about sealing before moving to seal. This could connect up with the question whether there is a required waiting period between the filing of the motion to seal and a ruling on it.

Duration of seal: There appears to be considerable variety in local rules on this subject. A related question might be whether the party that filed the sealed items may retrieve them after the conclusion of the case. A rule might also provide that the clerk is to destroy the sealed materials at the expiration of a stated period. The submission we received called for mandatory unsealing

Procedures for a motion to unseal: The method by which a nonparty may challenge a sealing order may relate to the question whether there is a waiting period between the filing of the motion and the court's ruling on it. A possibly related question is whether there must be a separate motion for each such document. Perhaps there could be an "omnibus" motion to unseal all sealed filings in a given case.

Requirement that a redacted document be available for public inspection: The procedure might require such filing of a redacted document unless doing so was not feasible due to the nature of the document.

Nonparty interests: The rule proposal authorizes any "member of the public" to oppose a sealing motion or seek an order unsealing without intervening. Some local rules appear to have similar provisions. But the proposal does not appear to afford nonparties any route to protect their own confidentiality interests. Perhaps a procedure would be necessary for a nonparty to seek sealing for something filed by a party without the seal, or at least a procedure for notifying nonparties of the pendency of a motion to seal or to unseal.

Findings requirement: The rules do not normally require findings for disposition of motions. See Rule 52(a)(3) (excusing findings with regard to motions under Rule 12 or Rule 56). There are some examples of rules that include something like a findings requirement. See Rule 52(a)(2) (grant or denial of a motion for a preliminary injunction). The rule proposal calls for "particularized findings supporting its decision [to authorize filing under seal]." Adding a findings requirement might mean that filing under seal pursuant to court order is later held to be invalid because of the lack of required findings.

Treating "non-merits" motions differently: Research by the Rules Law Clerk indicates that the circuits seem to say different things about whether the stringent limitations on sealing filings apply to material filed in connection with all motions, or only some of them. (This issue might bear more directly on the standard for sealing.) The Eleventh Circuit refers to "pretrial motions of a nondiscovery nature." The Ninth Circuit seems to attempt a similar distinction regarding non-dispositive motions, perhaps invoking a standard similar to Rule 72(a) on magistrate judge decisions of nondispositive matters. The Seventh Circuit refers to information "that affects the disposition of the litigation." And the Fourth Circuit seems to view the right of access to apply to "all judicial documents and records." And another question is how to treat matters "lodged" with the court or submitted for in camera review (as to whether a privilege applies, for example). If the subcommittee moves forward on these proposals, some of the above issues will likely have to be addressed.

The subcommittee's inquiries also revealed, however, that the Administrative Office is undertaking a broader project on sealing of court files. That project may consider not only civil cases, but also criminal cases and other court files. The effort aims to address the management of sealed documents through operational tools such as model rules, best practices, and the like. A newly formed Court Administration and Operations Advisory Council will provide advice on operational issues. It may be that this effort will provide views on the desirability or framing of a new civil rule.

In light of this A.O. effort, the Advisory Committee determined at its October 5 meeting that further work on the question of sealing court files should be deferred to await the results of the A.O. work. It would be premature to conclude there is no need to consider amending the Civil Rules, but also premature to pursue action now.

This matter will remain on the Advisory Committee's agenda.

III. Continuing Projects Carried Forward

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

This proposal to amend Rule 12(a)(4) was suggested by the Department of Justice and published for comment in August 2020:

> **Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing**
>
> (a) TIME TO SERVE A RESPONSIVE PLEADING.
>
> (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
>
> * * * * *
>
> (4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:
>
> (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

There were only three public comments. Two of them opposed the amendment. The deliberations in the Advisory Committee, moved in part by these comments, were more vigorous than the discussion before publication. Two central issues were debated: If any additional time is appropriate, should it be reduced to some period less than 60 days? And if any additional time is appropriate, should it be afforded only when the motion raised an immunity defense? Proposals to reduce the number of days, and to limit any extended period to motions that raise an immunity defense, failed by rather close votes.

The questions were framed around perceptions of current practice, to be informed by empirical answers to at least these questions: How often does the Department seek an extension now? How often is an extension granted? How many days are typically allowed by an extension? How many cases involve an immunity defense? And how often is an immunity appeal taken? Only anecdotal information was available, but it seemed to support the proposal.

Thorough discussion during the Standing Committee meeting last June explored the same questions — how much extra time, if any, and whether extra time should be available only in actions that raise an immunity defense. Empirical questions about Department of Justice experience were raised. The proposal was deferred for further consideration in light of whatever additional empirical information about actual practices might be made available.

The Department of Justice stated clearly at the October meeting of this Committee that any period shorter than 60 days would not be worth the burdens entailed by the amendment process. It did not provide any additional empirical information before the meeting, and remained unable to provide more than somewhat elaborated anecdotal information at the meeting.

This Committee continues to believe that it is important to have as much information as can be gathered about current experience with these cases, focusing on "Bivens" actions as those most likely to be involved and most readily researched. It may prove difficult to gather information as precise as might be wished. Diffuse sources are involved. The Torts Branch in the Department of Justice has much of the experience, but another large swath is held in United States Attorney offices in each district.

One continuing view sees the rule and the proposal as alternative presumptions. The present rule presumes that a responsive pleading should be filed within 14 days after a motion to dismiss is denied or postponed to trial. It recognizes that extensions can be ordered. The amendment would shift the presumption, setting 60 days as the standard period but recognizing that a shorter time can be set. Shifting to the 60-day presumption will not often increase delays in developing litigation on the merits if the government commonly wins extensions now, and the extensions commonly come at least close to 60 days. The risk of increasing delays may be greater as actual experience falls farther from that level. In that circumstance, the case for the 60-day period will need to be evaluated in light of the intrinsic needs described by the Department of Justice.

The thorough discussion last June, and the anticipation of a recommendation to be made to the Standing Committee next June, limit the present value of a more thorough review of the reasons advanced by the Department of Justice for needing more time than other litigants, including state agencies that similarly provide defenses to state employees. The Department urges both that it needs the full 60 days in all of these cases, and that a more particular need arises from the need to consider the availability of immunity appeals in many of them. These concerns will continue to weigh in the balance, along with such additional empirical information as may become available.

B. In Forma Pauperis Standards and Procedures

There are serious problems with administration of 28 U.S.C. § 1915, which allows a person to proceed without prepayment of fees on submitting an affidavit that states "all assets" the person[17] possesses and states that the person is unable to pay such fees or give security therefor. The procedures for gathering information and granting leave vary widely. Many districts use one of two forms created by the Administrative Office, but many others do not. The standards for

[17] The statutory text says "prisoner" at this point, but this is accepted as a scrivener's error.

granting leave also vary widely, not only from court to court but often within a single court as well. Widely used forms for gathering information have been criticized as ambiguous, as seeking information that is not relevant to the determination, and as invading the privacy of nonparties. There are clear opportunities for improvement.

The Appellate Rules Committee is considering Appellate Rules Form 4, the "Affidavit Accompanying Motion for Permission to Appeal in Forma Pauperis." This work may provide valuable information for work on other sets of rules.

The opportunities for improvement, however, may not be well suited for the Enabling Act process. One potential limit is that many of the issues test the vague zone that separates substance from procedure for these purposes. One example is obvious: what should be the test for inability to pay court fees, as it is affected by living expenses, dependents, assets, income, alternative earning opportunities, and other financial circumstances? Should these standards vary between districts that have high costs of living, at least in some areas, and districts that have lower costs of living? Another example is not so obvious, but implies equally substantive judgments. Appellate Rules Form 4 exacts extensive information about a spouse's financial circumstances, implying a judgment that this information is relevant to the statutory determination of ability to pay.

Even apart from possible substantive entanglements, the range of information that may be relevant to determining i.f.p. status could be wide, at least in theory. The scope of a uniform form or rule might be less comprehensive, reasoning as a practical matter that few i.f.p. applicants are likely to be involved with most of the more elaborate and sophisticated possibilities. But even the most common elements may be complex. Dependents can be family members, or not. Each dependent may have distinctive needs and distinctive abilities to contribute to meeting those needs. What counts as a dependent's "need" also may be distinctive — what, for example, of college tuition, whether at a low-rate local public institution or at a prestigious private college ranked among the very best in the world?

Not only are there many and difficult, almost diffuse, determinations to be made. Some of them are likely to call for reconsideration and for adjustments to be made on a schedule that does not fit the designedly deliberate pace of the Rules Enabling Act process.

This topic has been retained on the agenda because of its obvious importance and with the thought that ongoing work by the Appellate Rules Committee may provide new grounds for continuing work. It remains important, however, to continue to ask what other bodies might be found outside this Committee to provide more expert advice in these matters and more nimble responses to changing circumstances.

C. Rule 9(b): Pleading State of Mind

A Rule 9(b) Subcommittee has been appointed to study this proposal. A report and recommendations are scheduled for consideration at the March 29 meeting of this Committee. The

questions can be described by repeating the description presented to the Standing Committee for its June 22, 2021 meeting:

Dean Spencer, a member of the Advisory Committee, has submitted a suggestion, developed at length in a law review article, that the second sentence of Rule 9(b) should be revised to restore the meaning it had before the Supreme Court decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 686-687 (2009). A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal," 41 Cardozo L. Rev. 1015 (2020). The suggestion has been described to the Advisory Committee in some detail, both in the April agenda materials and in the April meeting. In-depth consideration was deferred to the October meeting, however, because there was not time enough to deliberate in April.

The proposal would amend Rule 9(b) in this way:

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

The opinion in the *Iqbal* case interpreted "generally" to mean that while allegations of a condition of mind need not be stated with particularity, they must be pleaded under the restated tests for pleading a claim under Rule 8(a)(2).

Dean Spencer challenges the Court's interpretation on multiple grounds. In his view, it is inconsistent with the structure and meaning of several of the pleading rules taken together. It also departs from the meaning intended when Rule 9(b) was adopted as part of the original Civil Rules. The 1937 committee note explains this part of Rule 9(b) by advising that readers see the English Rules Under the Judicature Act. Dean Spencer's proposed new language tracks the English rule, and he shows that it was consistently interpreted to allow an allegation of knowledge, for example, by pleading "knew" without more. More importantly, the lower court decisions that have followed the *Iqbal* decision across such matters as discrimination claims and allegations of actual malice in defamation actions show that the rule has become unfair. It is used to require pleaders to allege facts that they cannot know without access to discovery, and it invites decisions based on the life experiences that limit any individual judge's impression of what is "plausible."

For about a decade, the Advisory Committee studied the pleading standards restated by the decisions in *Iqbal* and *Bell Atlantic Corp. v. Twombly, 550 U.S. 544* (2007). That work focused on Rule 8(a)(2) standards, not Rule 9(b). Consideration of Rule 9(b) is not preempted by the decision to forgo any present consideration of Rule 8(a)(2). But any decision to take on Rule 9(b) will require deep and detailed work to explore its actual operation in current practices across a range of cases that account for a substantial share of the federal civil docket. Any eventual proposal to undo this part of the *Iqbal* decision must be supported by a strong showing of untoward dismissals.

D. Rule 4: Service of Summons and Complaint

Rule 87, published for comment last summer, includes several Emergency Rule 4 provisions for a court order authorizing service by a method specified in the order that is reasonably calculated to give notice. Study of these provisions by the CARES Act Subcommittee included several alternatives. The alternatives remain open for further study. Comments on the published proposal may show that it is better to adopt what were proposed as emergency rules provisions directly into Rule 4 itself, dispensing with the emergency rules. Or it may be shown that it is better to forgo any alternative methods of service, either as emergency rules provisions or generally. Or it may appear that other and more detailed revisions of Rule 4 should be recommended.

Rule 4 will be considered further as comments on Rule 87 come in. There is no sense now what directions this work will take.

E. Rule 5(d)(3)(B)

Rule 5(d)(3)(B)(i) provides: "A person not represented by an attorney: (i) may file electronically only if allowed by court order or by local rule * * *."

This rule was worked out in collaboration with the other advisory committees to reach consensus on a common approach and language. Some participants in that process were initially drawn toward a more open approach that would allow electronic filing more generally, subject to the court's ability to direct paper filing by a party unable to engage successfully with the court's system. Experience with limited programs in some courts seemed encouraging. Important benefits would be realized for the unrepresented party, including speed, low cost, and avoiding what may be considerable costs in delivering papers to the court. The court and other parties would also benefit. Fears about the difficulties that might arise from ill-advised attempts to engage with the court's system, however, led to the more conservative approach adopted in the rule.

Reconsideration of these questions may be appropriate in light of experience with electronic filing by unrepresented parties during the pandemic. Some, perhaps many, courts allowed electronic filing and found it a success. Often these practices involved not direct access to the court's system but e-mail messages to the clerk, who then entered the filing in the system. Other courts, however, seem to have found less success.

A promising next step will be to undertake a broader survey of recent experience with electronic filing by unrepresented parties. As with drafting the current rules, the Appellate, Bankruptcy, Civil, and Criminal Rules Committees will work together to determine whether, when, and how the task will be taken up.

IV. New Subjects Carried Forward

A. Rule 41(a)(1)(A): Dismissing of Part of an Action

Rule 41(a)(1) governs voluntary dismissals without court order:

Rule 41. Dismissal of Actions

(a) VOLUNTARY DISMISSAL.

(1) By the Plaintiff.

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice of dismissal or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

Rule 41(a)(2) governs dismissal at the plaintiff's request by court order. It is not involved with the present proposal.

The question was originally brought to the Advisory Committee by Judge Furman, who pointed to the longstanding 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. The preponderant view is that the rule text authorizes dismissal only of all claims. Anything less is not dismissal of "an action." Some courts, however, allow dismissal as to some claims while others remain. Somewhat surprisingly, however, many courts appear to allow dismissal of all claims against a particular defendant even though the rest of the action remains.

One reason to study this question is the simple value of uniformity. Disuniformity of interpretations, however, has not always been found a sufficient reason to propose amendments. It may even be valuable to allow divergent interpretations to persist and perhaps point the way to the better answer. So it may be here. If experience suggests it is better to allow Rule 41(a)(1)(A)(i)

dismissal as to part of an action, displacing the opposite interpretation, amendment may be appropriate.

Taking up this proposal will include the question of dismissing only as to a defendant, leaving others to continue in the action. It is not clear on the face of the rule how this is dismissal of "an action" while dismissal of some claims is not, nor is it clear what the better answer may be.

Taking up these direct questions also may lead to related questions. Rule 41 speaks of dismissal by a "plaintiff." What of other claimants, whether by counterclaim, crossclaim, or third-party claim? How is the rule interpreted now, and what may be the good answer?

The study of Rule 41(a)(1)(A)(i) also may extend to another longstanding puzzle. The right to dismiss by notice is cut off by an answer or motion for summary judgment. Why not also a motion to dismiss? A similar question was presented by Rule 15(a)(1), which cut off the right to amend a pleading once as a matter of course by a responsive pleading, but not a motion to dismiss. Rule 15(a)(1) was amended in 2009 to add a motion to dismiss to the events that cut off the right to amend as a matter of course. Defendants urged this amendment on the ground that a motion to dismiss often requires as much effort as or more than an answer, and does more to educate the plaintiff about the shortcomings of the action as initially pleaded. It may be useful to address this question if any amendments are to be proposed.

B. Rule 55: Clerk's Duties

Judges curious about departures of local practices brought to the Advisory Committee questions about the clerk's duties under Rule 55 to enter defaults and, in narrowly defined circumstances, default judgments. Incomplete information indicates that at least some courts restrict the clerk's role in entering defaults short of the scope of Rule 55(a), and many courts restrict the clerk's role in entering default judgments under Rule 55(b).

Rule 55. Default; Default Judgment

(a) ENTERING A DEFAULT. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.

(b) ENTERING A DEFAULT JUDGMENT.

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

* * * * *

"Must" in these rules clearly imposes a duty. An incongruity appears in the rules, however, because Rule 77(c)(2) provides:

> (c) CLERK'S OFFICE HOURS; CLERK'S ORDERS.
>
> * * * * *
>
> (2) *Orders.* Subject to the court's power to suspend, alter, or rescind the clerk's action for good cause, the clerk may: * * *
>
> (B) enter a default;
>
> (C) enter a default judgment under Rule 55(b)(1); and
>
> * * * * *

"May" is not "must." And the court's power to suspend, alter, or rescind the clerk's action seems to depend on finding good cause.

The Style Project changed "shall" in Rule 55 to the "must" that was put in place in 2007 with a committee note statement that the changes "are intended to be stylistic only." Former Rule 77(c)(2) provided that "All motions and applications in the clerk's office * * for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but the clerk's action may be suspended or altered or rescinded by the court upon cause shown." "[G]rantable of course" seems to trace to Equity Rule 16, which authorized a plaintiff to "take an order as of course that the bill be taken pro confesso."

An entry of default can be set aside rather readily. Courts prefer to decide actions on the merits. Under Rule 54(b) a default judgment against one defendant can be set aside, albeit with greater difficulty, before entry of a partial final judgment or a final judgment that disposes of all claims among all parties. After final judgment, the demanding standards of Rule 60(b) apply.

There may be persuasive reasons to distinguish between the duties fairly imposed on the clerk to enter a default under Rule 55(a) and the duties now imposed by Rule 55(b) to enter a default judgment. Entry of a default may be a rather routine task in many cases. Court files show whether a party has failed to plead, and a proof of service may be regarded as sufficient to establish jurisdiction over a defendant. Failure of a present party to respond to a claim after the complaint may be readily apparent. Still, it may be useful to gather information on how many cases present more difficult questions. Rule 55(a) precludes a default against a party that has "otherwise defend[ed]," including acts that may not be apparent to the court and may not be shown "by affidavit or otherwise."

Information from clerks about these sorts of questions will help in thinking about such questions as whether "must" in Rule 55(a) should be changed to "should," or "may."

The Rule 55(b) direction that the clerk "must" enter a default judgment when the claim is for a sum certain or that can be made certain by computation is a clear candidate for further inquiry. The random but small sample in the committee showed several districts where all default judgments are ordered by a judge. This practice may rest on experience with difficulties in implementing the rule, on more conceptual concerns, or on something else. It is important to find out more.

The Federal Judicial Center will be asked to help in framing a suitable research project to learn as much as can be learned about actual practices under Rule 55. The information gathered by this project will guide the determination whether to propose amendments.

C. Rule 63: Decision by Successor Judge

After substantial expansion in 1991 and a style revision in 2007, Rule 63 reads:

Rule 63. Judge's Inability to Proceed

> If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

Rule 63 was brought to the Advisory Committee by a judge who reacted to a nonprecedential decision in the Federal Circuit. Although the Federal Circuit case did not directly involve the question, the judge suggested that the availability of a video transcript of a witness's testimony should bear on the decision whether to recall a witness when a successor judge is proceeding with a hearing or nonjury trial after the initial judge becomes unable to proceed.

Rule 63 as it stands includes several provisions that seem to authorize a successor judge to take account of the advantages that may be offered by a good video transcript. Reliance on a video transcript may be more easily justified for some types of "hearings," as compared to completing a nonjury trial. If the only question is whether to amend the rule to point to the possible advantages of a video transcript, the question might well be dropped there.

Brief discussion in the Advisory Committee, however, elicited concerns that the rule may be phrased in ways that defeat the elements of flexibility and discretion that may properly influence a decision whether to recall a witness. The Advisory Committee will explore reported decisions to see whether the rule is interpreted in ways that inappropriately restrict a successor judge's discretion.

D. Briefs Amicus Curiae

Three lawyers with an extensive nationwide practice in submitting briefs amicus curiae to district courts have suggested adoption of a rule to establish uniform standards and procedures for filing amicus briefs. They report that practices vary widely, and are so little formed that some

courts do not quite know what to make of a motion for leave to file. And they offer a draft rule, based on a local rule in the District Court for the District of Columbia and informed by Appellate Rule 29 and the Supreme Court Rules. The draft would be a good starting point for any rule that might be proposed.

The submission also reports that district court amicus briefs are filed in some 300 cases a year, about 0.1% of all federal civil actions. It is likely that a few districts receive a preponderant share. This relative infrequency likely accounts for much of the vagueness and uncertainty encountered in many courts. It also frames the question whether a national rule is needed.

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.

The absence of any provisions for briefs in the Civil Rules may be another reason for caution. Details of format, length, times for filing and the like are left to local practice. Any national rule for amicus briefs should take care to ensure that such matters are governed by local rules, even if a national standard is set to time a motion to file an amicus brief.

The Advisory Committee will explore these questions further.

V. Proposals Removed from Docket

A. Rule 9"(i)": ADA Title III Pleading

A letter dated June 7, 2021, from Senators Tillis, Grassley, and Cornyn to Chief Justice Roberts suggests that the Chief Justice "coordinate with the Judicial Conference to create a pleading standard for Title III ADA cases that employs the 'particularity' requirement currently contained in Rule 9(b) of the Federal Rules of Civil Procedure."

The letter suggests that pleading with particularity would facilitate prompt removal of barriers to access by the owners of noncompliant facilities, to the benefit of disabled persons and the owners. Enhanced pleading also would enable courts to determine more readily whether Title III has been violated.

The letter and Advisory Committee discussion suggest that Title III litigation has expanded at a great rate, especially in a few states. Appellate decisions at times identify individual plaintiffs that, acting as testers, have filed hundreds of actions against as many defendants. Burgeoning litigation may well reveal that many noncomplying barriers remain in facilities open to the public.

Recognizing the growth in litigation, and the problems it may present, the Advisory Committee was not persuaded that these problems should be addressed by a court rule specifically addressed to Title III actions alone. The powerful tradition that counsels against substance-specific rules was invoked and explored thoroughly in the lengthy discussions that preceded approval for adoption of the Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g). In the end, the value of adopting rules that reflect the character of § 405(g) actions as seeking review on an administrative record prevailed. A contrast is provided by the Advisory Committee's experience over nearly fifteen years as it considered whether to propose heightened pleading requirements for specific kinds of cases, such as official immunity cases. The Advisory Committee could not find a persuasive reason for attempting to propose any such rules. There may be opportunities for statutory amendments to address problems that Congress may find in litigation under Title III, but a particularized pleading rule is not among them.

The Advisory Committee removed this proposal from its agenda.

B. Rule 23: Opt-in, Not Opt-out Classes

This proposal revived a question that has been encountered at intervals since Rule 23(b)(3) opt-out class actions were adopted in 1966. One suggestion was to authorize opt-in class actions as an alternative, giving courts the choice between certifying an opt-out class or an opt-in class. That suggestion did not succeed. The present suggestion is to abolish opt-out classes, substituting only opt-in classes.

The suggestion was advanced by a person who was dissatisfied by the opt-out procedure in a class action that included his wife as a class member. The Advisory Committee recognizes that many countries approach collective litigation by opt-in procedures, not opt-out. But the opt-out procedure in Rule 23(b)(3) is firmly established. Changing to an opt-in procedure likely would defeat many "small claims" class actions.

The Advisory Committee removed this proposal from its agenda.

C. Rule 25(a)(1): Court Statement of Death

Rule 25(a) includes these provisions:

Rule 25. Substitution of Parties

(a) DEATH.

(1) *Substitution if the Claim is not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed. * * *

(3) *Service.* A motion to substitute, together with a notice of hearing, must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner. Service may be made in any judicial district.

The suggestion by a law clerk to a federal judge is that Rule 25(a)(1) should be amended to include an express provision for entry of a statement of death by the court. The concern is that a case may linger indefinitely as a "zombie" action if there is neither a motion to substitute nor a statement of death to trigger the 90-day deadline for a motion to substitute.

The research submitted with the motion identified a few cases that present this set of non-events. They do not seem to show any actual problems with the actual dispositions.

The first sentence of Rule 25(a)(1) can readily be found to confer full authority to order substitution, and to impose terms that set a deadline, when a court becomes aware of a party's death. Action, indeed, may be required. Under Article III, the death of a party moots claims by or against the party, requiring dismissal unless a substitute party is brought in.

Reliance on the current authority to order substitution may have an additional advantage. An order may find a suitable method to give notice to a nonparty that is not bound by the particular requirements of Rule 4 for serving a summons and complaint that are invoked by Rule 25(a)(3).

The Advisory Committee removed this proposal from its agenda.

D. Rule 37(c)(1): Sanctions for Failures to Disclose

Rule 37(c)(1) implements the initial disclosure provisions of Rule 26(a) and the allied duty to supplement the disclosures imposed by Rule 26(e):

> (c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

This submission pointed to a pair of dissenting opinions by the same judge that rely on the 1993 committee note to Rule 37(c)(1) to find a meaning that contradicts the plain text. The text provides first that a party who fails to disclose information or a witness, or to supplement a disclosure, is barred from using that information or witness to supply evidence. Then it explicitly provides a list of other sanctions "[i]n addition to or instead of this sanction." Even if the failure was not substantially justified and is not harmless, the omitted information or witness may be used to supply evidence and the court may order an alternative sanction.

The 1993 committee note characterizes exclusion as a "self-executing sanction" and an "automatic sanction" because it can be implemented without a motion. The note then observes that exclusion is not an effective sanction when a party fails to disclose information that it does not want to have admitted in evidence. The alternative sanctions address that circumstance. The dissent juxtaposes these note observations to conclude that the alternative sanctions cannot be imposed as a substitute for excluding evidence offered by the party who failed to disclose it.

Research by the Rules Law Clerk found that other courts have been bemused by this argument from the committee note, but that district judges' hands are not tied. The rule has functioned as intended.

The Advisory Committee removed this subject from its agenda.