

**ADVISORY COMMITTEE
ON
CIVIL RULES**

October 16, 2020

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Meeting of the Advisory Committee on Civil Rules
October 16, 2020

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RULES COMMITTEES — CHAIRS AND REPORTERS

Committee on Rules of Practice and Procedure (Standing Committee)

Chair

Honorable John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Reporter

Professor Catherine T. Struve
University of Pennsylvania Law School
3501 Sansom Street
Philadelphia, PA 19104

Secretary

Rebecca A. Womeldorf, Esq.
Secretary, Standing Committee and
Rules Committee Chief Counsel
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

Advisory Committee on Appellate Rules

Chair

Honorable Jay S. Bybee
United States Court of Appeals
Lloyd D. George U.S. Courthouse
333 Las Vegas Boulevard South, Suite 7080
Las Vegas, NV 89101-7065

Reporter

Professor Edward Hartnett
Richard J. Hughes Professor of Law
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Bankruptcy Rules

Chair

Honorable Dennis R. Dow
United States Bankruptcy Court
Charles Evans Whittaker U.S. Courthouse
400 East Ninth Street, Room 6562
Kansas City, MO 64106

Reporter

Professor S. Elizabeth Gibson
University of North Carolina at Chapel Hill
5073 Van Hecke-Wettach Hall, C.B. #3380
Chapel Hill, NC 27599-3380

Associate Reporter

Professor Laura B. Bartell
Wayne State University Law School
471 W. Palmer
Detroit, MI 48202

Advisory Committee on Civil Rules

Chair

Honorable Robert M. Dow, Jr.
United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn Street, Room 1978
Chicago, IL 60604

Reporter

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Associate Reporter

Professor Richard L. Marcus
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

RULES COMMITTEES — CHAIRS AND REPORTERS

Advisory Committee on Criminal Rules

Chair

Honorable Raymond M. Kethledge
United States Court of Appeals
Federal Building
200 East Liberty Street, Suite 224
Ann Arbor, MI 48104

Reporter

Professor Sara Sun Beale
Duke Law School
210 Science Drive
Durham, NC 27708-0360

Associate Reporter

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Advisory Committee on Evidence Rules

Chair

Honorable Patrick J. Schiltz
United States District Court
United States Courthouse
300 South Fourth Street, Room 14E
Minneapolis, MN 55415

Reporter

Professor Daniel J. Capra
Fordham University
School of Law
150 West 62nd Street
New York, NY 10023

ADVISORY COMMITTEE ON CIVIL RULES

Chair

Honorable Robert M. Dow, Jr.
United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn Street
Chicago, IL 60604

Reporter

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Associate Reporter

Professor Richard L. Marcus
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

Members

Honorable Jennifer C. Boal
United States District Court
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Room 6400
Boston, MA 02210-3002+

Honorable Ethan P. Davis*
Assistant Attorney General (ex officio)
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

* Alternate Representative:
Joshua E. Gardner, Esq.
United States Department of Justice
1100 L Street, N.W., Suite 11502
Washington, DC 20005

Honorable Joan N. Ericksen
United States District Court
300 South Fourth Street, Room 12W
Minneapolis, MN 55415

Honorable Kent A. Jordan
United States Court of Appeals
J. Caleb Boggs Federal Building
844 North King Street, Room 5100
Wilmington, DE 19801-3519

Honorable Thomas R. Lee
Associate Chief Justice
Utah Supreme Court
450 South State, PO Box 140210
Salt Lake City, UT 84114-0210

Honorable Sara Lioi
United States District Court
John F. Seiberling Federal Building
and U.S. Courthouse
Two South Main Street, Room 526
Akron, OH 44308

ADVISORY COMMITTEE ON CIVIL RULES

Members (continued)

Honorable Brian Morris
United States District Court
Missouri River Courthouse
125 Central Avenue West, Suite 301
Great Falls, MT 59404

Honorable Robin L. Rosenberg
United States District Court
Paul G. Rogers Federal Building
701 Clematis Street, Room 453
West Palm Beach, FL 33401

Virginia A. Seitz, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington DC 20005

Joseph M. Sellers, Esq.
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue N.W., Fifth Floor
Washington, DC 20005

Dean A. Benjamin Spencer
William & Mary Law School
613 South Henry Street, Hixon Center
Williamsburg, VA 23185

Ariana J. Tadler, Esq.
Tadler Law LLP
One Pennsylvania Plaza
New York, NY 10119

Helen E. Witt, Esq.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Liaisons

Honorable A. Benjamin Goldgar
(*Bankruptcy*)
United States Bankruptcy Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn Street, Room 638
Chicago IL 60604

Peter D. Keisler, Esq.
(*Standing*)
Sidley Austin, LLP
1501 K Street, N.W.
Washington DC 20005

Clerk of Court Representative

Susan Y. Soong, Esq.
Clerk
United States District Court
Phillip Burton United States Courthouse
450 Golden Gate Avenue, Box 36060
San Francisco, CA 94102-3434

ADVISORY COMMITTEE ON CIVIL RULES

Secretary, Standing Committee and Rules Committee Chief Counsel

Rebecca A. Womeldorf, Esq.
Administrative Office of the U.S. Courts
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
			Member: 2013	----
Robert M. Dow, Jr.	D	Illinois (Northern)	Chair: 2020	2023
Jennifer C. Boal	M	Massachusetts	2018	2021
Ethan P. Davis*	DOJ	Washington, DC	----	Open
Joan N. Ericksen	D	Minnesota	2015	2021
Kent A. Jordan	C	Third Circuit	2018	2021
Thomas R. Lee	JUST	Utah	2018	2021
Sara Lioi	D	Ohio (Northern)	2016	2022
Brian Morris	D	Montana	2015	2021
Robin L. Rosenberg	D	Florida (Southern)	2018	2021
Virginia A. Seitz	ESQ	Washington, DC	2014	2020
Joseph M. Sellers	ESQ	Washington, DC	2018	2021
A. Benjamin Spencer	ACAD	Virginia	2017	2020
Ariana J. Tadler	ESQ	New York	2017	2020
Helen E. Witt	ESQ	Illinois	2018	2021
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Associate Reporter	ACAD	California	1996	Open
Principal Staff: Rebecca Womeldorf		202-502-1820		
	Julie Wilson	202-502-1820		

* Ex-officio - Assistant Attorney General, Civil Division

RULES COMMITTEE LIAISON MEMBERS

Liaisons for the Advisory Committee on Appellate Rules	<p>Hon. Frank M. Hull <i>(Standing)</i></p> <p>Hon. Bernice B. Donald <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Bankruptcy Rules	<p>Hon. William J. Kayatta, Jr. <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Civil Rules	<p>Peter D. Keisler, Esq. <i>(Standing)</i></p> <p>Hon. A. Benjamin Goldgar <i>(Bankruptcy)</i></p>
Liaison for the Advisory Committee on Criminal Rules	<p>Hon. Jesse M. Furman <i>(Standing)</i></p>
Liaisons for the Advisory Committee on Evidence Rules	<p>Hon. James C. Dever III <i>(Criminal)</i></p> <p>Hon. Carolyn B. Kuhl <i>(Standing)</i></p> <p>Hon. Sara Lioi <i>(Civil)</i></p>

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Staff**

Rebecca A. Womeldorf, Esq.
Chief Counsel
Administrative Office of the U.S. Courts
Office of General Counsel – Rules Committee Staff
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-300
Washington, DC 20544

Bridget M. Healy, Esq.
Counsel
(Appellate, Bankruptcy, Evidence)

Brittany Bunting
Administrative Analyst

S. Scott Myers, Esq.
Counsel
(Bankruptcy, Standing)

Shelly Cox
Management Analyst

Julie M. Wilson, Esq.
Counsel
(Civil, Criminal, Standing)

FEDERAL JUDICIAL CENTER
Staff

Hon. John S. Cooke
Director
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 6-100
Washington, DC 20544

Laural L. Hooper, Esq.
Senior Research Associate
(Criminal)

Marie Leary, Esq.
Senior Research Associate
(Appellate)

Molly T. Johnson, Esq.
Senior Research Associate
(Bankruptcy)

Dr. Emery G. Lee
Senior Research Associate
(Civil)

Timothy T. Lau, Esq.
Research Associate
(Evidence)

Tim Reagan, Esq.
Senior Research Associate
(Standing)

TAB 1

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
June 23, 2020

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) convened on June 23, 2020 by videoconference. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta Jr.
Peter D. Keisler, Esq.

Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zippis

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules

Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules

Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

Advisory Committee on Criminal Rules

Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Civil Rules

Judge John D. Bates, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules

Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Brittany Bunting and Shelly Cox, Rules Committee Staff Analysts; Allison A. Bruff, Law Clerk to the Standing Committee; and John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

* Elizabeth J. Shapiro (Deputy Director, Federal Programs Branch, Civil Division) and Andrew D. Goldsmith (National Coordinator of Criminal Discovery Initiatives) represented the Department of Justice on behalf of the Honorable Jeffrey A. Rosen, Deputy Attorney General.

OPENING BUSINESS

Professor Catherine Struve, Reporter to the Standing Committee, and Professor Daniel Coquillette, Consultant, honored Judge David Campbell for his 15 years of service with the Rules Committees and presented mementos to Judge Campbell on behalf of the Standing Committee's members, staff, and consultants and the advisory committee Chairs and Reporters. Three former Standing Committee Chairs (Judges Lee Rosenthal, Anthony Scirica, and Jeffrey Sutton) joined to congratulate Judge Campbell for a remarkable tenure with the Rules Committees. Department of Justice (DOJ) representative Elizabeth Shapiro presented a letter from Attorney General William P. Barr thanking Judge Campbell for his leadership in the rulemaking process and service to the federal judiciary. Judge Campbell thanked everyone for the kind comments and gifts of recognition.

Judge Campbell opened the meeting with a roll call and welcomed those listening to the meeting by telephone. Judge Campbell noted that the Chief Justice has extended until December 31, 2020 the terms of Rules Committees members scheduled to end on October 1, 2020. Judge Campbell welcomed a new member of the Standing Committee, Judge Patricia Millett of the D.C. Circuit, who fills the unexpired term of Judge Sri Srinivasan who recently became Chief Judge of the D.C. Circuit. Before her judicial service, Judge Millett had a distinguished career as a Supreme Court practitioner in the U.S. Solicitor General's Office and in private practice. Judge Campbell recognized those who have been newly appointed to serve as committee chairs beginning in the fall: Judge John Bates as Chair of the Standing Committee, Judge Robert Dow as Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee as Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz as Chair of the Advisory Committee on Evidence Rules. Judge Campbell thanked Judges Michael Chagares and Debra Livingston for their service as chairs.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on voice vote: **The Committee unanimously approved the minutes of the January 28, 2020 meeting.**

STATUS OF PENDING RULES AMENDMENTS

Ms. Rebecca Womeldorf reported that proposed amendments are proceeding through the Rules Enabling Act process without incident and referred members to the detailed tracking chart in the agenda book for further details. Judge Campbell noted that, since the Committee's last meeting, the Supreme Court had adopted a package of proposed amendments to the Appellate, Bankruptcy, Civil, and Evidence Rules. Those proposed amendments are before Congress, with a presumed effective date of December 1, 2020.

CONSIDERATION OF EMERGENCY RULES UNDER THE CARES ACT

Professor Struve provided an overview of the congressional directive in the Coronavirus Aid, Relief, and Economic Security (CARES) Act to the Judicial Conference to consider potential rules amendments to ameliorate the effects on court operations of future emergencies. The

advisory committees have begun work on this effort, with each advisory committee focusing on its own rules set. Public comment on potential emergency procedures has been sought. The advisory committees are working on drafts for discussion at their fall 2020 meetings with the goal of presenting drafts to the Standing Committee with requests for publication in the summer of 2021. Professor Struve explained that Professor Daniel Capra will coordinate the advisory committees' collective efforts. Under the ordinary timeline of the Rules Enabling Act process, any such rules amendments could go into effect as early as December 1, 2023.

Professor Sara Beale reported on the Criminal Rules Advisory Committee's emergency rules work, which will proceed through a subcommittee, chaired by Judge James Dever. The reporters and subcommittee are conducting research and preparing for a miniconference to be held in July.

Judge John Bates provided a summary of the Civil Rules Advisory Committee's emergency rules work. A subcommittee, chaired by Judge Kent Jordan, was formed after Congress passed the CARES Act. The subcommittee has met by several times and will meet again in one week. The first task is gathering information from judges, clerks, practitioners, and the public. The reporters have examined much of that information. Judge Bates added that the question remains whether any amendments to the Civil Rules are needed and what shape they should take. Among the areas of review that have been identified generally are service issues, remote proceedings, time limits, and conducting trials. The subcommittee's goal is to have recommendations to present to the full Advisory Committee at its fall 2020 meeting.

Judge Dennis Dow reported that the Bankruptcy Rules Advisory Committee has formed a CARES Act subcommittee which has met several times. The subcommittee has discussed a general approach which would grant courts the authority to continue hearings and extend deadlines. An alternate approach would authorize courts to do so in individual cases by motion or sua sponte, notwithstanding other limitations and restrictions that may exist in the rules. The latter approach mirrors a similar approach being considered regarding possible changes to the bankruptcy code. The subcommittee has reviewed the Bankruptcy Rules and identified those with deadlines and provisions governing extensions. It found few, if any, impediments in the rules to a more general approach. Professor Elizabeth Gibson is preparing a draft for review at the subcommittee's next meeting. Judge Dow noted that, in the process of reviewing the rules and public submissions, several other areas have been identified. Those include electronic filing and online payment of fees by unrepresented parties, guidelines for using remote hearing technology, burdens imposed by signature verification requirements, and issues regarding service of process by mail. The subcommittee will continue study of these issues and others.

Judge Chagares reported on the work of the Appellate Rules Advisory Committee's subcommittee on emergency rules. Each subcommittee member reviewed the Appellate Rules to identify potential issues. Appellate Rule 2 provides helpful flexibility but only permits a court to suspend rules in individual cases. The subcommittee is considering an emergency provision for broader application. Rule 33 provides for appeal conferences in person or by telephone and may require revision to account for modern technology. The subcommittee expects to present any potential rules amendments at the Advisory Committee's next meeting.

Professor Capra explained that he and Judge Livingston reviewed the Evidence Rules and concluded that no amendments were necessary to address issues such as remote proceedings. Professor Capra conferred with state evidence rules committees, and they observed that evidence rules distinguish between testimony and physical presence in court. “Testimony” as used in the rules, encompasses remote testimony. Further, Rule 611 provides trial judges with authority to control the mode of testimony. Professor Capra noted that trial practice would be impacted by the use of remote testimony and the inability of juries to make credibility determinations in the same way. A remote trial renders Rule 615, which deals with sequestration of witnesses, irrelevant because witnesses will not be in the courtroom. For the past two years, the Advisory Committee has been considering whether to amend Rule 615 to clarify whether sequestration can extend beyond physical presence in the courtroom. Professor Capra added that the Advisory Committee will continue to monitor the rules for possible emergency issues. Judge Campbell repeated a question raised in a public submission regarding authentication of evidence, namely whether a faster procedure for authentication should be available to shorten remote trials. Professor Capra pointed to recent amendments to Rule 902(13) and (14), which may alleviate this problem, but stated the Advisory Committee will take another look. Finally, Professor Capra noted that remote trials may raise a face-to-face confrontation issue which will need to be considered by the rules committees generally.

A member of the Standing Committee asked whether there has been any coordination with other Judicial Conference committees on the possible implications of emergency rules. Judge Campbell explained that there has been significant coordination with the Committee on Court Administration and Case Management (CACM Committee) regarding CARES Act procedures and other accommodations. He added that this coordination should continue as the advisory committees begin formulating draft emergency rule amendments. He also suggested seeking input from the Committee on Defender Services and the Criminal Law Committee. Ms. Womeldorf noted that the Administrative Office staff supporting those Judicial Conference committees – as well as the CACM Committee and the Committee on Bankruptcy Administration – are monitoring the Rules Committees’ response to the CARES Act directive to consider emergency rules.

MULTI-COMMITTEE REPORTS

Judge Chagares reported on the E-filing Deadline Joint Subcommittee which is exploring the possibility of an earlier-than-midnight deadline for electronic filing. The subcommittee continues to gather information, including data from the FJC about actual filing patterns, i.e., what time of day litigants are filing and who is filing. Judge Chagares explained that the subcommittee seeks to cast a wide net to gather as much input as possible and has reached out to law school deans, bar associations, paralegal associations, and legal assistant associations. Based on a survey conducted by the Lawyers Advisory Committee for the District of New Jersey, there are strong opinions on different sides of the electronic-filing deadline issue. The subcommittee will continue to study this issue closely.

Judge Bates reported on the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee which was formed to examine the question whether rules amendments might be proposed to address the effects of Civil Rule 42 consolidation orders on the final-judgment approach to appeal jurisdiction in the wake of the Supreme Court’s decision in *Hall v. Hall*, 138

S. Ct. 1118 (2018). In *Hall*, the Court ruled that disposition of all claims among all parties to a case that began as an independent action is a final judgment, notwithstanding the consolidation of that action with one or more other actions pursuant to Rule 42(a). The subcommittee, chaired by Judge Robin Rosenberg, is comprised of members from the Appellate Rules Advisory Committee and Civil Rules Advisory Committee. The subcommittee is looking at the effects of the *Hall* decision and developing information from the FJC. Empirical research on consolidated cases will inform the subcommittee’s work to determine whether any rule change is needed. This process will take time.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Edward Hartnett provided the report of the Appellate Rules Advisory Committee, which last met on April 3, 2020 by telephone conference. The Advisory Committee presented several action items and information items.

Action Items

Final Approval of Proposed Amendment to Rule 42 (Voluntary Dismissal). Judge Chagares explained that the proposed amendment to Rule 42 would assure litigants that an appeal will be dismissed if the parties settle the case at the appellate level. The current rule provides that such an appeal “may [be] dismiss[ed]” by the circuit clerk and the proposed amendment would restructure the rule to remove ambiguity. Two legal entities filed comments after publication of the draft rule. The Association of the Bar of the City of New York (ABCNY) suggested that the Advisory Committee include language giving additional examples in proposed Rule 42(b)(3). Because the proposed amendment uses non-exclusive language, the Advisory Committee decided against providing additional examples. The ABCNY also suggested adding the phrase “if provided by applicable statute” to the amendment language. Because nothing in the rule permits courts of appeals to take actions by order that are not otherwise authorized by law, the Advisory Committee found the suggested addition unnecessary. The National Association of Criminal Defense Lawyers (NACDL) submitted a comment supporting the amendment as “well taken” but suggested additional language regarding the responsibilities of individual criminal defendants and defense counsel with respect to dismissals of appeals. The Advisory Committee decided against this suggestion, as the appellate rules generally do not address defense attorneys’ responsibilities to clients.

Judge Chagares explained that the Advisory Committee made minor changes to the proposed amendment based on suggestions from Standing Committee members at the last meeting. First, the word “mere” was taken out of the proposed language in Rule 42(b)(3). Second, the Advisory Committee made a change to paragraph (3) to clarify that it applies only to dismissals under Rule 42(b) itself. Minor changes were also made in response to helpful suggestions by the style consultants. Judge Chagares sought final approval of the proposed amendment to Rule 42.

Referencing a comment filed by NACDL, Judge Bates flagged a concern that some local circuit rules will be inconsistent with the proposed rule’s statement that a court “must” dismiss. He noted that several circuits’ local rules contain other requirements (beyond those in Rule 42) for dismissal. The Fourth Circuit’s local rule, for example, requires in criminal cases that a stipulation

of dismissal or motion for voluntary dismissal must be signed or consented to by the defendant. Another circuit's local rule requires an affidavit. Judge Chagares responded that the Advisory Committee had not addressed that issue. Professor Coquillette commented that a local rule which includes additional requirements beyond a uniform national rule may be considered inconsistent. Professor Capra clarified that unless a national rule prohibits additional requirements imposed by local rules, a local rule that does so is not necessarily inconsistent. Professors Coquillette and Capra agreed that local rule variances that do not facially contradict a uniform national rule have not been considered inconsistent historically. Judge Bates observed that the amendment might create uncertainty for attorneys practicing in circuits that have local rules that mandate requirements in addition to those in Rule 42 for dismissal. He asked whether language should be added to the committee note to address this potential problem. Professor Coquillette expressed concern about committee notes that change the meaning of the actual rule text. Professor Struve suggested that Judge Bates's question may warrant further consideration by the Advisory Committee, as it raises unexplored issues. She inquired whether discussion with circuit clerks may help resolve the question. Judge Campbell added that, unlike some other rules, proposed Rule 42 requires the circuit clerk to take an action rather than the parties. He recommended that the Advisory Committee take a closer look at local rules before moving forward with the proposal. Judge Chagares agreed.

Final Approval of Proposed Amendment to Rule 3 (Appeal as of Right—How Taken) and Conforming Amendments to Rule 6 and Forms 1 and 2. Judge Chagares explained that the Advisory Committee began studying issues with notices of appeal in 2017. Research revealed inconsistency across the circuits in how designations in a notice of appeal are used to limit the scope of an appeal. In 2019, the Supreme Court stated in *Garza v. Idaho*, 139 S. Ct. 738, 746 (2019), that the filing of a notice of appeal should be a “simple, non-substantive act.” Consistent with *Garza*, the proposed amendments seek to simplify and make more uniform the process for filing a notice of appeal.

Professor Hartnett summarized the comments received on the proposal after publication. The first critical comment, submitted by Michael Rosman, asserted that the proposal was inconsistent with Civil Rule 54(b). In Mr. Rosman's view, there is no finality for appeal purposes (under 28 U.S.C. § 1291) until the district court enters a single document that recites the disposition of every claim by every party in an action; in this view, finality does not occur if the district court merely enters an order that disposes of all remaining claims. Professor Hartnett noted that neither the Advisory Committee nor the Standing Committee at its January meeting were persuaded by this critique, which had been submitted previously. The second critical comment, submitted by Judge Steven Colloton, urged abandonment of this project on the theory that litigants should be held to the choices made in their notice of appeal. In Judge Colloton's view, it is easy for a litigant to designate everything, and the Advisory Committee should not be encouraging counsel to seek to expand the scope of appeal beyond what is specified in the notice. The Advisory Committee considered this critique but was not persuaded.

Other comments urging suggestions for expanding or simplifying the proposed rule were considered and rejected by the Advisory Committee. Professor Hartnett explained that one of the suggestions, which proposed a simplification, might make the designation of a judgment or order completely irrelevant and might not overcome the problem initially identified. NACDL suggested

expanding proposed Rule 3(c)(5) to appeals in criminal cases. The provisions in paragraph (5) concern Appellate Rule 3's connection to Civil Rule 58. Professor Hartnett noted that NACDL did not identify a specific problem in criminal cases that such expansion would address. Instead, NACDL's concern was that a rule limited to civil cases might lead courts to adopt an *expressio unius* conclusion that a similar approach should not be taken in criminal cases. Rather than changing the proposed rule, the Advisory Committee added language to the committee note to explain that while similar issues might arise in criminal cases – and perhaps similar treatment may be appropriate – this rule is not expressing a view one way or the other about those issues. The Advisory Committee also received a suggestion regarding Rule 4(a)(4)(B)(ii)'s treatment of appeals from orders disposing of motions listed in Rule 4(a)(4)(A). The suggestion is that Rule 4(a)(4)(B)(ii) be amended to remove the requirement that appellants file a new or amended notice of appeal in order to challenge orders disposing of such motions. The Advisory Committee chose not to make changes in response to this suggestion, which would require further study and republication. This question, however, is closely related to a new suggestion to more broadly allow the relation forward of notices of appeal to cover decisions issued after the filing of the notice. The Advisory Committee decided that the best way to address these issues would be to roll them forward for future consideration.

At the Standing Committee's January 2020 meeting, members raised some concern that the proposed rule may inadvertently change the doctrine that treats a judgment as final notwithstanding a pending motion for attorneys' fees. To address this concern, the Advisory Committee added language to the committee note explaining that the proposed amendment has no effect on Supreme Court doctrine as laid out in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), and *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Engineers & Participating Employers*, 571 U.S. 177 (2014). Professor Hartnett explained that these holdings – which treat attorneys' fees as collateral to the merits of the case for purposes of the final judgment rule – can coexist with the proposed amendment.

In response to Judge Colloton's submission, the Advisory Committee made one change to the rule text as published. Judge Colloton expressed concern about litigants filing (after the entry of final judgment) a notice of appeal designating only a prior interlocutory order. The Advisory Committee added language to proposed Rule 3(c)(7) that states an appeal must not be dismissed for failure to properly designate the judgment if the notice of appeal was filed after the entry of the judgment and designates an order that merged into that judgment.

One matter divided the Advisory Committee: whether to continue to permit a party to limit the scope of the notice of appeal. A minority of members concluded that such limitation should no longer be permitted. In their view, courts should look to the briefs to narrow the claims and issues on appeal. In contrast, most members found value in leaving this aspect of the proposal as published – allowing parties to limit the scope if expressly stated. For example, in multi-party cases, a party who has settled as to some claims may wish to appeal the disposition of other claims without violating a settlement agreement. The Advisory Committee voted to retain the feature permitting limitation and to revisit the issue in three years if problems develop. Judge Chagares observed that a provision in current Rule 3(c)(1)(B) permits the express limiting of a notice of appeal.

The Advisory Committee also sought final approval of conforming amendments to Rule 6 and Forms 1 and 2. Judge Chagares reported that the Chief Judge of the United States Tax Court has expressed approval for the proposed amendment to Form 2 (concerning notices of appeal from decisions of the Tax Court).

Professor Struve thanked Judge Chagares, Professor Hartnett, and the Advisory Committee for their work on this thorny problem. Judge Campbell offered suggestions regarding the committee note. First, he suggested that “and limit” be removed from the portion of the committee note that discusses the role of the briefs with respect to the issues on appeal. Second, he suggested clarification of two rule references in the note. These suggestions were accepted by Judge Chagares. A judge member recommended substitute language for the multiple uses of the term “trap” in the committee note. Professor Hartnett responded that the phrasing had been studied and that it is not pejorative or indicative of intentional trap-setting. Another member suggested adding “inadvertently” to the first sentence using the word “trap” in the committee note – thus: “These decisions inadvertently create a trap” Judge Chagares and Professor Hartnett accepted the suggestion and changed the committee note accordingly.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3 and conforming amendments to Rule 6 and Forms 1 and 2 for final approval by the Judicial Conference.**

Publication of Proposed Amendment to Rule 25 (Filing and Service). The Advisory Committee sought publication of an amendment to Rule 25 to extend existing privacy protections to Railroad Retirement Act benefit cases. Judge Chagares explained that counsel for the Railroad Retirement Board requested protections for their litigants like those provided in Social Security benefit cases. Because Railroad Retirement Act benefit cases are appealed directly to the court of appeals, amending Civil Rule 5.2 would not work to extend privacy protections to those cases. The Advisory Committee made no changes to the draft amendment since the January 2020 Standing Committee meeting.

A judge member commented that, in other areas of the law such as ERISA, the Hague Convention, and medical malpractice, courts address privacy concerns on an ad hoc basis rather than with a categorical rule. This member expressed hesitation about picking out one area for categorical treatment without stepping back and looking comprehensively at balancing the public’s right to access court records against individual privacy concerns. He also inquired whether such endeavor fell within the scope of the Committee’s mandate. In response, Judge Chagares noted that Civil Rule 5.2(c) restricts only remote electronic access. He also explained that the Advisory Committee has focused on Railroad Retirement Act benefit cases because they are a close analog to Social Security benefit cases. In other cases that involve medical information, courts are still empowered to enter orders to protect that information. Judge Chagares further noted that the Supreme Court recently emphasized the close relation between the Social Security Act and the Railroad Retirement Act. Professor Hartnett explained that the Railroad Retirement Act benefit cases in the court of appeals mirror Social Security benefit cases in the district court, as they are essentially appellate in nature. Both types of cases involve administrative records full of sensitive information. Professor Edward Cooper recalled that when the Civil Rules Advisory Committee was working on Civil Rule 5.2, the Social Security Administration made powerful representations

regarding the filing of an administrative record. Under statute, it is required in every case to file a complete administrative record, which involves large amounts of sensitive information beyond the capacity of the court to redact. The Civil Rules Advisory Committee was persuaded that a categorical rule was appropriate for Social Security benefit cases. The judge member suggested that there are hundreds of ERISA disability cases every year that are almost identical to Social Security disability cases. Those cases also require the filing of an administrative record. The judge member asked whether the Rules Enabling Act publication process would reach stakeholders in other types of cases like ERISA proceedings. Judge Campbell suggested that the committees deliberately invite input from those stakeholders, as has been done with other rules in the past. The judge member agreed that such feedback would be beneficial, particularly from stakeholders not covered by the proposed amendment. Judge Chagares concurred in this approach.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved the proposed amendment to Rule 25 for publication with added request for comment from identified groups.**

Information Items

Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing). Judge Chagares stated that the Advisory Committee is conducting a comprehensive study of Rules 35 and 40 with a view to reducing duplication and confusion.

Suggestion Regarding Decision on Grounds Not Argued. Judge Chagares described a suggestion submitted by the American Academy of Appellate Lawyers (AAAL) that would require the court to give notice and opportunity for additional briefing before deciding a case on unbriefed grounds. After studying this issue, the Advisory Committee concluded that it was not well-suited for rulemaking. Upon the Advisory Committee's recommendation, Judge Chagares wrote to each circuit chief judge with a copy of the AAAL's suggestion. He received feedback that unanimously concluded such a rule change was unnecessary. The Advisory Committee will reconsider this issue in three years.

Suggestion Regarding In Forma Pauperis Standards. Professor Hartnett noted that the Appellate Rules Advisory Committee continues to look into this issue. There remains a question whether rulemaking can resolve the issue. Professor Hartnett explained that, at the very least, the Advisory Committee could consider possible changes to Form 4 (the form for affidavits accompanying motions to appeal *in forma pauperis*).

Suggestion Regarding Rule 4(a)(2). Current Rule 4(a)(2) allows a notice of appeal filed after the announcement of a decision but before its entry to be treated as filed after the entry of decision. This provision allows modestly premature notices of appeal to remain viable. Professor Bryan Lammon's suggestion proposes broader relation forward. The Advisory Committee considered this question a decade ago and decided against taking action. In his suggestion, Professor Lammon argues that the issue has not resolved itself in the intervening decade. The Advisory Committee is looking to see if any rule change can be made to protect those who file their notice of appeal too early.

Suggestion Regarding Rule 43 (Substitution of Parties). Judge Chagares described a suggestion regarding amending Rule 43 to require use of titles instead of names of government officers sued in their official capacities. The Advisory Committee decided to table this suggestion while its clerk representative gathers information from clerks of court.

Review of Recent Amendments. Judge Chagares reviewed the impact of two recent amendments to the Appellate Rules. In 2019, Rule 25(d)(1) was amended to eliminate the requirement for proof of service when service is made solely through the court’s electronic-filing system. At least two circuits continue to require certificates of service, despite the rule change. The Advisory Committee’s clerk representative agreed to reach out to the clerks of court to resolve the issue. In 2018, Rule 29(a)(2) was amended to permit the rejection or striking of an amicus brief that would result in a judge’s disqualification. The Advisory Committee polled the clerks to find out if any amicus briefs had been stricken under the new rule. At least three circuits have stricken such amicus briefs since the amendment became effective.

Judge Chagares thanked everyone involved during his tenure with the Rules Committees and wished everyone and their families well.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dow and Professors Gibson and Laura Bartell delivered the report of the Bankruptcy Rules Advisory Committee, which last met on April 2, 2020 by videoconference. The Advisory Committee presented several action items and two information items.

Action Items

Final Approval of Proposed Amendment to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Dow explained that Rule 2005 deals generally with the apprehension of debtors for examination under oath. The last subpart deals with release of debtors. Current Rule 2005(c) refers to provisions of the criminal code that have since been repealed. The proposed change substitutes a reference to the relevant section in the current criminal code. The proposed amendment was published in August 2019. The Advisory Committee received no comments of substance. The National Conference of Bankruptcy Judges expressed a general indication of support for the proposed amendment. Judge Dow stated that the Advisory Committee recommends that the Standing Committee approve the proposed amendment to Rule 2005 as published. There were no comments from members of the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 2005 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 3007 (Objections to Claims). Judge Dow next introduced the proposed amendment to Rule 3007, which deals generally with objections to claims filed by creditors. The subpart at issue – Rule 3007(a)(2)(A) – deals with service of those objections on creditors. It generally provides for service by first-class mail. Rule 3007(a)(2)(A)(ii) imposes a heightened service requirement for “insured depository institution[s].” “Insured

depository institution” has two different definitions in the bankruptcy rules and bankruptcy code. Rule 7004(h) imports a definition for “insured depository institution” from the Federal Deposit Insurance Act (FDIA). The FDIA definition (which is incorporated into Rule 7004(h)) does not encompass credit unions because credit unions are insured by the National Credit Union Administration rather than by the Federal Deposit Insurance Corporation. The bankruptcy code also defines “insured depository institution,” in 11 U.S.C. § 101(35), and the Code’s definition expressly does include credit unions. The Code definition applies to the Bankruptcy Rules pursuant to Rule 9001.

Several years ago, Rule 3007 was revised to make clear that generally standard service was adequate for purposes of the rule. But the Rule, as amended, provides that if the claimant is an insured depository institution, service must also be made according to the method prescribed by Rule 7004(h). The Advisory Committee recognized the exception to conform to the congressional desire for enhanced service on entities included under the FDIA definition. The Advisory Committee, however, did not think there was any congressional intent to afford enhanced service to entities that fall outside the FDIA definition. For purposes of consistency with other bankruptcy rules, and to conform to what the Advisory Committee understands as the congressionally-intended scope for enhanced service, the proposed amendment to Rule 3007(a)(2)(A)(ii) inserts a reference to the FDIA definition. The Advisory Committee received one comment, and it expressed support for the proposed amendment. There were no comments or questions from the Standing Committee.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 3007 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 7007.1 (Corporate Ownership Statement). Rule 7007.1 deals with disclosure of corporate ownership information in adversary proceedings. Judge Dow explained that the proposed amendment to Rule 7007.1 seeks to conform to the language in related rules: Appellate Rule 26.1, Bankruptcy Rule 8012, and Civil Rule 7.1. As published, the proposed amendment would amend Rule 7007.1(a) to encompass nongovernmental corporations that seek to intervene, would make stylistic changes to the rule, and would change the title of Rule 7007.1 from “Corporate Ownership Statement” to “Disclosure Statement.” The Advisory Committee received two comments in response to publication. One comment suggested that the word “shall” in Rule 7007.1 be changed to “must.” While the Advisory Committee agreed with the suggestion, it concluded that such word change will be considered when Part VII is restyled. The other comment, from the National Conference of Bankruptcy Judges, suggested that Rule 7007.1 retain the title and language referring to “corporate ownership statement.” The comment offered two reasons: (1) “disclosure statement” is a term of art in bankruptcy law; and (2) five other bankruptcy rules refer to the same document as a corporate ownership statement. The Advisory Committee was persuaded by this and voted to approve Rule 7007.1 with the current title (“Corporate Ownership Statement”) retained and the word “disclosure” in subparagraph (b) changed to “corporate ownership,” with the other features of the proposed amendments remaining unchanged since publication.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 7007.1 for approval by the Judicial Conference.**

Final Approval of Proposed Amendment to Rule 9036 (Notice and Service Generally). Professor Gibson introduced the proposed amendment to Rule 9036. She explained that the Advisory Committee has been considering possible amendments to the Bankruptcy Rules to increase the use of electronic service and noticing in the bankruptcy courts. One amendment to Rule 9036 became effective on December 1, 2019. When the 2019 amendment to Rule 9036 was published for public comment in 2017, related proposed amendments to Rule 2002(g) and Official Form 410 were also published. The proposed amendments to Rule 2002(g) and Official Form 410 would have authorized creditors to designate an email address on their proof of claim for receipt of notices and service. Based on comments received during the 2017 publication period, the Advisory Committee decided to hold the proposed amendments to Rule 2002(g) and Official Form 410 in abeyance.

The current proposed amendment to Rule 9036 was published in August 2019 and would encourage the use of electronic noticing and service in several ways. First, the rule would recognize the court's authority to provide notice or make service through the Bankruptcy Noticing Center to entities that currently receive a high volume of paper notices from the bankruptcy courts. This program, set up through the Administrative Office, would inform high-volume paper-notice recipients to register for electronic noticing. The proposed amendment would acknowledge this process and authorize notice in that manner. Anticipating that the Advisory Committee would move forward with the earlier-mentioned amendments to Rule 2002(g) and Official Form 410, Professor Gibson explained that the rule as published would have allowed courts and parties to provide notice to a creditor at an email address indicated on the proof of claim.

The Advisory Committee received seven sets of comments on the published proposal to amend Rule 9036. Commenters expressed concern about the proposed amendments to Rule 9036 as well as about the earlier-published proposals to amend Rule 2002(g) and Official Form 410. There was, however, enthusiastic support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. The commenters included the Bankruptcy Noticing Working Group, the Bankruptcy Clerks Advisory Group, an ad hoc group of 34 clerks of court, and individual court staff members. Their concerns fell into three categories: clerk monitoring of email bounce-backs; the administrative burden of the proof-of-claim opt-in form for email noticing, and the interplay of the proposed amendments to Rules 2002(g) and 9036. Because the same provision regarding bounce-backs is in the version of Rule 9036 that went into effect last December and in Rule 8011(c)(3), the Advisory Committee decided not to change the language in the published version of Rule 9036(d); but it did add a new sentence to that subdivision stating that the recipient has a duty to keep the court informed of the recipient's current email address.

The greatest concern was the administrative burden of allowing creditors to opt-in to email noticing and service on their proof-of-claim form (Official Form 410). Some commenters asserted that without an automated process for extracting email addresses from proofs of claim, the burden of checking each proof of claim would be too great. Others suggested that, even with automation, the process would be time consuming and burdensome (given that paper proofs of claim would continue to be filed). Persuaded by this reasoning, at its spring 2020 meeting, the Advisory Committee voted not to pursue the opt-in check-box option on the proof of claim form. Accordingly, it revised the proposed amendment to Rule 9036 so as to omit the reference to

Rule 2002(g)(1). Professor Gibson further explained that the Advisory Committee’s ultimate approach here does not give any benefit to parties because parties do not have access to the Bankruptcy Noticing Center. Future improvements to CM/ECF may allow entry of email addresses in a way that will be accessible to parties. The language in proposed Rule 9036(b)(2) would allow for parties to take advantage of that future development.

Judge Campbell observed that the Advisory Committee’s revisions to the Rule 9036 proposal provide a good illustration of the value of the Rules Enabling Act’s public-comment process.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to recommend the amendment to Rule 9036 for approval by the Judicial Conference.**

Retroactive Approval of Amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1. Enacted in March 2020, the CARES Act made certain changes to the bankruptcy code, which required changes to five Official Forms. Because the law took effect immediately, the Advisory Committee acted under its delegated authority to make conforming changes to Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. Professor Gibson explained the two main changes the CARES Act made to the bankruptcy code, both of which will sunset in one year from the effective date of the Act. First, the Act provided a new definition of “debtor” for purposes of subchapter V of Chapter 11. The new one-year definition raised the debt limit for a debtor under subchapter V from \$2,725,625 to \$7,500,000. As a result of that legislative change, there are at least three categories of Chapter 11 debtors: (1) A debtor that satisfies the definition of small business debtor, with debts of at most \$2,725,625; (2) a debtor with debts over \$2,725,625 but not more than \$7,500,000; and (3) a debtor that doesn’t meet either definition, and proceeds as a typical Chapter 11 debtor. The court will separately need to know which category a debtor falls within to know whether special provisions apply. The Advisory Committee thus amended two bankruptcy petition forms – Official Forms 101 and 201 – to accommodate these changes.

Second, the CARES Act changed the definition of “current monthly income” in the Bankruptcy Code to add a new exclusion from computation of currently monthly income for federal payments related to the Coronavirus Disease 2019 (COVID-19) pandemic. An identical exclusion was also inserted in § 1325(b)(2) for computing disposable income. Both changes are effective for one year, unless extended by Congress. These changes effect eligibility for Chapter 7 and the required payments under Chapter 13. As a result, the Advisory Committee added a new exclusion in Official Forms 122A-1, 122B, and 122C-1.

Judge Campbell asked whether the Advisory Committee would seek to reverse these amendments if Congress did not extend the sunset date of the relevant CARES Act provisions. Professor Gibson replied in the affirmative.

Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the technical and conforming amendments to Official Forms 101, 201, 122A-1, 122B, and 122C-1, and to provide notice to the Judicial Conference.**

Publication of Restyled Parts I and II of the Bankruptcy Rules. Professor Bartell introduced the first two parts of the restyled Bankruptcy Rules. She observed that the restyling process should get easier over time, as the first two parts required the Advisory Committee to resolve issues that will recur in subsequent parts. She noted that the style consultants have been wonderful to work with, and their work has made the restyled Bankruptcy Rules much easier to understand. For the restyling process, the Advisory Committee endorsed five basic principles. First, the Advisory Committee will avoid any substantive changes, even where some may be needed. Second, the restyled rules will not modify any term defined in the bankruptcy code. This does not include terms used, but not defined, in the code. Third, the restyled rules will preserve terms of art. There was some disagreement between the Advisory Committee and the style consultants on what constitutes a term of art. Fourth, all Advisory Committee members would remain open to new ideas suggested by the style consultants. Finally, the Advisory Committee will defer to the style consultants on matters of pure style.

Professor Bartell addressed one substantive issue that arose. In the past, Congress has directly amended certain bankruptcy rules. Rule 2002(o) (Notice for Order of Relief in Consumer Case) is a result of legislative amendment and was originally designated as Rule 2002(n) as set forth in the legislation. A subsequent amendment adding a provision earlier in the list of subdivisions in the rule resulted in changing the designation of Rule 2002(n) to 2002(o), and minor stylistic changes have been made since the provision was legislatively enacted. The question arose whether the Advisory Committee had authority to make stylistic changes to or revise the designation of the rule. The Advisory Committee concluded that any congressionally enacted rules should be left as Congress enacted them.

Judge Campbell thanked Judge Marcia Krieger for her work and leadership as Chair of the Restyling Subcommittee, as well as Professor Bartell and the style consultants, Professors Bryan Garner, Joe Kimble, and Joe Spaniol. Judge Dow echoed this sentiment and opined that the bankruptcy rules will be much improved by this process. Judge Dow also noted that progress has been made on Parts III and IV of the rules. Professors Garner and Kimble expressed their appreciation for being involved in the restyling process and the work done so far. A judge member of the Standing Committee said that the restyled rules are much more readable.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the Restyled Parts I and II of the Bankruptcy Rules.**

Publication of SBRA Rules and Official Forms. The Advisory Committee is seeking publication of the rules and forms amendments previously published and issued on an expedited basis as interim rules, in response to the Small Business Reorganization Act (SBRA). The interim rules include amendments to the following Bankruptcy Rules: 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, and 3019. Professor Gibson noted that the only change made to the interim rules was stylistic. In response to suggestions by the style consultants, the Advisory Committee made stylistic changes to Rule 3017.2. The Advisory Committee did not make the suggested style changes to Rule 3019(c) because they would have created an inconsistency among the subheadings in the rule. Professor Gibson explained that the headings would be reconsidered as part of the restyling process.

Professor Gibson also introduced the changes made to Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A. Under its delegated authority, the Advisory Committee previously made technical and conforming amendments to all but one of these forms in response to the SBRA. Despite these already having taken effect, the Advisory Committee seeks to republish them for a longer period and in conjunction with the proposed amendments to the SBRA rules. The package of forms prepared for summer 2020 publication includes one addition beyond the forms initially amended in response to the SBRA: Form 122B needed to be amended to update instructions related to individual debtors proceeding under subchapter V.

Judge Campbell commended the Advisory Committee for this impressive work. Congress passed the SBRA with a short window before its effective date. Despite this, the Advisory Committee managed to produce revised rules and forms, get them approved by the Standing Committee and by the Executive Committee of the Judicial Conference, and distribute them to all the bankruptcy courts before the SBRA took effect so they could be adopted as local rules.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rules 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 and Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, and 425A.**

Publication of Proposed Amendment to Rule 3002(c)(6) (Time for Filing Proof of Claim). Judge Dow next addressed the proposed amendment to Rule 3002(c)(6), which provides that the court may extend the deadline to file a proof of claim if the notice of the need to file a claim was insufficient to give the creditor a reasonable time to file because the debtor failed to file the required list of creditors. The Advisory Committee identified several problems with this provision. First, the rule would almost never come into play because a failure to file the list of creditors required by Rule 1007 is also cause for dismissal. Because such a case would likely be dismissed, there would be no claims allowance process. Second, under the language of paragraph (c)(6), the authorization to grant an extension is extremely narrow. For example, there is no provision for notices that omit a creditor's name or include an incorrect address. Further, Professor Bartell's research revealed a split in the caselaw. The proposed amendment seeks to resolve these problems by stating a general standard for the court's authority to grant an extension if the notice was insufficient to give a creditor reasonable time to file a claim. This same standard currently applies to creditors with foreign addresses. The proposed amendment would bring consistency to domestic creditors and provide more flexibility for the courts to offer relief as warranted.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendments to Rule 3002.**

Publication of Proposed Amendment to Rule 5005 (Filing and Transmittal of Papers). Professor Bartell explained that Rule 9036 allows clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by electronic filing. She then introduced proposed amendment to Rule 5005. Rule 5005(b) governs transmittal of papers to the U.S. trustee and requires that such papers be mailed or delivered to an office of, or another place designated by, the U.S. trustee. It also requires the entity transmitting the paper file as proof of transmittal a verified statement. The Advisory Committee consulted with the Executive Office for U.S. Trustees

about whether Rule 5005 accurately reflects current practice and whether it could be conformed more closely to the practice under Rule 9036. The proposed amendment, which is supported by the Executive Office for U.S. Trustees, would allow papers to be transmitted to the U.S. trustee by electronic means and eliminate the requirement to file a verified statement.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 5005.**

Publication of Proposed Amendment to Rule 7004 (Process; Service of Summons, Complaint). A committee note to Rule 7004's predecessor, Rule 704, specified that in serving a corporation or partnership or other unincorporated association by mail, it is not necessary for the officer or agent of the defendant to be named in the address so long as the mail is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title. When Rule 704 became Rule 7004, that committee note was dropped and no longer included in the published version of Rule 7004. Professor Bartell explained that, as a result, courts have divided over whether a notice addressed to a position or title is effective under Rule 7004. The Advisory Committee's proposal would insert a new subdivision (i), which inserts the substance of the previous committee note for Rule 704 into Rule 7004.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 7004.**

Publication of Proposed Amendment to Rule 8023 (Voluntary Dismissal). Professor Bartell introduced the proposed amendment to Rule 8023, which is based on Appellate Rule 42(b), regarding voluntary dismissal of appeals. She indicated that the Standing Committee's deferred consideration of the proposed amendments to Appellate Rule 42(b) should not affect the Standing Committee's decision to approve the proposed amendment to Bankruptcy Rule 8023 for publication. She noted that the version of the proposed amendment to Rule 8023 in the agenda book needed two minor additional changes to conform to Appellate Rule 42(b). First, the phrase "under Rule 8023(a) or (b)" should be added to subdivision (c). Second, the word "mere" should be eliminated from subdivision (c). The resulting rule text for Rule 8023(c) would read ". . . for any relief under Rule 8023(a) or (b) beyond the dismissal of an appeal . . ." Professor Bartell also suggested that publication of the proposed amendment to Rule 8023 should not preclude the Advisory Committee from making further changes if Appellate Rule 42(b) is changed.

Judge Campbell asked whether a decision by the Appellate Rules Advisory Committee not to move forward with the proposed amendments to Appellate Rule 42(b) would affect the Bankruptcy Rules Advisory Committee's desire to move forward with the proposed amendment to Bankruptcy Rule 8023. Professor Bartell responded affirmatively and clarified that the proposed amendment to Rule 8023 is purely conforming. Because Appellate Rule 42(b) has already been published and is being held at the final approval stage, the Bankruptcy Rules Advisory Committee can publish the conforming amendment to Bankruptcy Rule 8023 and be ready for final approval if Appellate Rule 42(b) is later approved.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the amendment to Rule 8023.**

Information Items

Amendment to Interim Rule 1020. As previously noted, the CARES Act altered the definition of “debtor” under subchapter V of Chapter 11. This change required an amendment of interim Rule 1020, which was previously issued in response to the SBRA. The Advisory Committee drafted the amendment to the interim rule to reflect the definition of debtor in § 1182(1) of the Bankruptcy Code. The Standing Committee approved the amendment, and the Executive Committee of the Judicial Conference authorized its distribution to the courts. Professor Gibson noted that Rule 1020 is one of the rules that the Advisory Committee is publishing as part of the SBRA rules package. The version being published with the SBRA rules is the original interim Rule 1020. Because the version amended in response to the CARES Act will sunset in one year, it will no longer be applicable by the time the published version of Rule 1020 goes into effect.

Director’s Forms for Subchapter V Discharge. The Advisory Committee approved three Director’s Forms for subchapter V discharges. One is for a case of an individual filing for under subchapter V and in which the plan is consensually confirmed. The other two apply when confirmation is nonconsensual. These forms appear on the Administrative Office website.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Richard Marcus provided the report of the Civil Rules Advisory Committee, which last met on April 1, 2020 by videoconference. The Advisory Committee presented three action items and several information items.

Actions Items

Judge Bates introduced the proposed amendment to Civil Rule 7.1 (Disclosure Statement) for final approval. The proposed amendment to Rule 7.1(a)(1) parallels recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a) adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. The technical change to Rule 7.1(b) conforms to the change to subdivision (a). Judges Bates stated that the amendment to subdivision (b) was not published but is appropriate for final approval as a technical and conforming amendment. The new provision in Rule 7.1(a)(2) seeks to require timely disclosure of information that is necessary to ensure diversity of citizenship for jurisdictional purposes. Problems have arisen with certain noncorporate entities – particularly limited liability companies (LLCs) – because of the attribution rules for citizenship. Many courts and individual judges require disclosure of this citizenship information.

Most public comments received supported the proposed amendment. In response to the comments, the Advisory Committee revised the language concerning the point in time that is relevant for purposes of the citizenship disclosure. Judge Bates explained that the time relevant to determining citizenship is usually when the action is either filed in or removed to federal court. The proposed language also accommodates other times that may apply for determining jurisdiction. The comments opposing the amendment expressed hope that the Supreme Court or Congress would address the issue of LLC citizenship. The Advisory Committee believes that

action through a rule amendment is warranted. Judge Bates noted that in response to a concern previously raised by a member of the Standing Committee, a sentence was added to the committee note to clarify that the disclosure does not relieve a party asserting diversity jurisdiction from the Rule 8(a)(1) obligation of pleading grounds for jurisdiction.

A member of the Standing Committee asked whether the language regarding other relevant times can be made more precise. Professor Cooper responded that the language is deliberately imprecise to avoid trying to define the relatively rare circumstances when a different time becomes controlling for jurisdiction. He provided examples of such circumstances. He also noted that a defendant in state court who is a co-citizen of the plaintiff cannot create diversity jurisdiction by changing his or her domicile and then removing the case to federal court. The law prohibits this, even though at the time of removal there would be complete diversity. Professor Cooper explained that the Advisory Committee sought to avoid more definite language based on the twists and turns of diversity jurisdiction and removal.

A judge member asked how the provision in question interplays with Rule 7.1(b) (Time to File). What triggers the obligation to file under subdivision (b) if there is another time that is relevant to determining the court's jurisdiction? This member observed that it was unclear whether a party or intervenor is obliged to refile or supplement under subdivision (b). Professor Cooper explained that two distinct concepts are at play: the time at which the disclosure is made and the time of the existent fact that must be disclosed. He provided an example. A party discloses the citizenship of everyone that is attributed to it, as an LLC. Later on, the party discovers additional information that was in existence (but not known to the party) at the time for determining diversity. Paragraph (b)(2) would trigger the obligation to supplement.

Another member suggested it would be better to require a party at the outset to disclose known information and impose an obligation to update that disclosure within a certain time if there is a change in circumstances that affects the previous disclosure. He also expressed concern about the language in Rule 7.1(a)(2) that places "at another time that may be relevant" with the conjunction "or" between subparagraphs (A) and (B). Professor Cooper explained that Rule 7.1(b)(1) sets the time for disclosure up front and Rule 7.1(a)(2)(B) refers to the citizenship that is attributed to that party at some time other than the time for disclosure. Judge Campbell commented that he understood Rule 7.1(a) as the "what" of what must be disclosed and Rule 7.1(b) as the "when." Professor Cooper confirmed that Judge Campbell's understanding aligned with the intent of the proposed amendment. Judge Campbell suggested revising Rule 7.1(a)(2)(B) to state "at any other time relevant to determining the court's jurisdiction." Discussion followed on the possibility of collapsing subparagraphs (A) and (B) into one provision.

A judge member echoed similar concerns regarding subparagraph (B)'s vagueness. This member suggested using as an alternative "at some other time as directed by the court." On the rare occasions when this arises, he explained, presumably the issue of the relevant time will be litigated, and the court can issue an order specifying it. This member also observed that, although subparagraph (B) would require a lawyer to make a legal determination as to what another relevant time may be, the rule does not require the lawyer to specify what that moment in time was.

Another judge member asked whether subparagraphs (A) and (B) are intended to qualify “file” or “attributed.” Professor Cooper responded that the provisions are intended to qualify “attributed.” A different member shared concerns about the “or” structure of Rule 7.1(a)(2)(A) and (B). This structure leaves it to the discretion and understanding of the filers whether they fall into the category that applies most often or some other category. This member favored a version that would reflect that most cases will be governed by subparagraph (A) and include a carve-out provision such as “if ordered by the court or if an alternative situation applies.” He also suggested some of this uncertainty may be best resolved through commentary rather than rule language. Another judge member asked about the purpose of “unless the court orders otherwise” earlier in Rule 7.1(a)(2). This member suggested that this language might play into the resolution of subparagraph (B).

Professor Cooper then proposed a simplification of paragraph (2): “is attributed to that party or intervenor at the time that controls the determination of jurisdiction.” Judge Bates noted that this proposal would still require the lawyer to make a legal determination. Judge Campbell offered an alternative, namely to instruct the parties that if the action is filed in federal court, they must disclose citizenship on the date of filing. If the action is removed to federal court, they must disclose citizenship on the date of removal. This alternative makes it clear what the parties’ obligations are when they are making the disclosure and leaves it to judges to ask for more. Judge Bates agreed that this suggestion provides a clearer approach than trying to address a very rare circumstance in the rule. He also responded to a question raised earlier regarding “unless the court orders otherwise.” The committee note addresses situations in which a judge orders a party not to file a disclosure statement or not to file publicly for privacy and confidentiality reasons.

A different member suggested that ambiguity remained whether subparagraphs (A) and (B) qualify “file” or “attributed.” This member suggested breaking up paragraph (2) into two sentences to make clear that the latter provisions qualify “attributed.” A judge member asked whether the committee note could resolve the ambiguity, but Judge Campbell noted that the committee note is not always read.

Judge Campbell recapped what the proposal would look like based on suggestions so far. Rule 7.1(a)(2) would state “In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement at the time provided in subdivision (b) of this rule.” A second sentence would then state that the disclosure statement must name and identify the “citizenship of every individual or entity whose citizenship is attributed to that party or intervenor at the time the action is filed in or removed to federal court.” Another judge member pointed out that this proposal raises issues regarding an intervenor, whose attributed citizenship may not be relevant at the time of filing or removal.

In response to an earlier suggestion about using the committee note to resolve the issue, Professor Garner noted that many textualist judges will not look to committee notes. Such judges will consider a committee note on par with legislative history. Professor Coquillette agreed and observed that it is not good rulemaking practice to include something in a note that could change the meaning of the rule text. A judge member agreed and encouraged simpler rule language.

Judge Campbell recommended that the Advisory Committee continue working on the draft amendment to Rule 7.1 to consider the comments and issues raised. Judge Bates agreed and stated that the Advisory Committee would resubmit a redrafted rule in the future.

Publication of Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). Judge Bates then introduced the proposed Supplemental Rules for Social Security Review Actions. He noted that this project raises the issue of transsubstantivity. The subcommittee, chaired by Judge Sara Lioi, has been working on this for three years. The initial proposal came from the Administrative Conference of the United States. The Social Security Administration has strongly supported adoption of rules specific to Social Security review cases. Both the DOJ and the claimants' bar groups have expressed modest opposition. The Advisory Committee received substantial input – generally supportive – from district court judges and magistrate judges. The proposed rules recognize the essentially appellate nature of Social Security review proceedings. The cases are reviewed on a closed administrative record. These cases take up a substantial part of the federal docket. Judge Bates explained that the proposed rules are modest and simple. The Advisory Committee rejected the idea of considering supplemental rules for all administrative review cases given the diversity of that case category and the complicated nature of some types of cases.

The Supplemental Rules provide for a simplified complaint and answer. The proposed rules also address service of process and presentation of the case through a briefing process. Judge Bates noted several examples of civil or other rules that address specific areas separately from the normal rules. Some are narrow, while others are broad. The Rules Enabling Act authorizes general rules of practice and procedure. Here, the Advisory Committee is dealing with a unique yet voluminous area in which special rules can increase efficiency. When applied in Social Security review cases, the Civil Rules do not fit perfectly, a conclusion supported by magistrate judges and the Social Security Administration. The Advisory Committee submits that the benefits of these Supplemental Rules outweigh the risks and that the Rules Enabling Act will be able to protect against future arguments for more substance-specific rules of this kind.

The DOJ's opposition to the proposal stems from the possibility of these Supplemental Rules opening the door to more requests for subject-specific rules in other areas. After close study by the subcommittee and input from stakeholders, the Advisory Committee believed that publication and resulting comment process will shed light on whether the transsubstantivity concerns should foreclose adoption of this set of supplemental rules. Remaining issues are not focused on the specific language of the proposed rules, but rather on whether special rules for this area are warranted at all.

Judge Bates further clarified that the proposed Supplemental Rules would apply only to Social Security review actions under 42 U.S.C. § 405(g). They would not cover more complicated Social Security review matters that do not fit this framework (e.g., class actions). Professor Cooper added that the subcommittee worked very hard on this proposal, holding numerous conference calls and hosting two general conferences attended by representatives of interested stakeholders. The subcommittee has significantly refined the proposal. Professor Coquillette commended the work of the subcommittee and Advisory Committee. He also expressed his support for the decision

to draft Supplemental Rules, rather than to build a special rule into the Civil Rules themselves. The risk of transsubstantivity problems is much less under this approach.

A member of the Standing Committee commented that the decision here involves weighing the benefit that these rules would bring against the erosion of the transsubstantivity principle. He asked what kind of input the Advisory Committee received regarding the upside of this proposal. Judge Bates responded that one intended benefit is consistency among districts in handling these cases. Professor Cooper added that many judges already use procedures like the proposed Supplemental Rules with satisfactory results. He noted that the claimants' bar representatives have expressed concern that the proposed Supplemental Rules will frustrate local preferences of judges that employ different procedures.

A member noted that no one is criticizing the content of the proposed Supplemental Rules – a reflection of the care and time put in by the subcommittee. And no one is saying that the proposed rules favor a particular side. The debate largely surrounds transsubstantivity and form. A judge member generally agreed, but raised the concern expressed by some magistrate judges that the content of Supplemental Rules will limit their flexibility in case management. For example, in counseled cases some magistrate judges require a joint statement of facts. Who files first might be determined by whether the claimant has counsel: if so, then the claimant files first, but if not, then the government files first. In this judge's district the deadlines are a lot longer than those in the proposed rules. This member suggested a carve-out provision – “unless the court orders otherwise” – in the Supplemental Rules to give individual courts more leeway. He clarified that he did not oppose publication of the proposal but anticipated additional criticism and pushback.

Professor Coquillette commended the work of the subcommittee. He recognized that the Rules Committees are sensitive to the issue of transsubstantivity. One possible issue is Congress taking Supplemental Rules like this as precedent to carve out other parts of the rules. He inquired whether this issue was the basis of the DOJ's modest opposition to the proposal. Judge Bates confirmed that it was.

Judge Campbell expressed his support for publication. This situation is unique in that a government agency, the Administrative Conference of the United States, approached the Rules Committees and asked for this change. Another government agency, the Social Security Administration, has said this rule change would produce a significant benefit. The Supplemental Rules are drafted in a way that reduces the transsubstantivity concern. He cautioned against adding a carve-out provision that would allow courts to deviate, as that would not produce the desired benefit.

A DOJ representative clarified that, despite the Department's mild opposition to the proposed rules, the Department does not oppose publication. The Department may formally comment again after publication. An academic member commended the Advisory Committee and subcommittee for their elegant approach to a very difficult problem. A judge member asked whether the Supplemental Rules should be designated alphabetically rather than numerically. Professor Cooper explained that some sets of supplemental rules use letters to designate individual rules, while other sets use numbers. Professor Cooper added that his preference is to use numbers for these proposed Supplemental Rules. The judge member suggested that using letters might help

to avoid confusion, as lawyers might be citing to both the Civil Rules and the Supplemental Rules in the same submission. Judge Bates stated that the Advisory Committee will consider this issue during the publication and comment period.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g).**

Publication of Proposed Amendment to Rule 12(a)(4). Judge Bates introduced the proposed amendment to Rule 12(a)(4), which was initiated by a suggestion submitted by the DOJ. The proposed amendment would expand the time from 14 days to 60 days for U.S. officers or employees sued in an individual capacity to file an answer after the denial of a Rule 12 motion. This change is consistent with and parallels Rule 12(a)(3), as amended in 2000, and Appellate Rule 4(a)(1)(B)(iv), added in 2011. The extension of time is warranted for the DOJ to determine if representation should be provided or if an appeal should be taken. Judge Bates noted that the proposed language differs from the language proposed by the DOJ but captures the substance.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 12(a)(4).**

Information Items

Report of the Subcommittee on Multidistrict Litigation (MDL). Judge Bates stated that the subcommittee, chaired by Judge Robert Dow, has been at work for over three years. The subcommittee is actively discussing and examining three primary subjects. The subcommittee's work is informed by members of the bar, academics, and judges.

The first area of focus is early vetting of claims. This began with plaintiff fact sheets and defense fact sheets, secondarily. It has evolved to looking at initial census of claims. The FJC has researched this subject and indicated that plaintiff fact sheets are widely used in MDL proceedings, particularly in mass tort MDLs. Plaintiff fact sheets are useful for early screening and jumpstarting discovery. Initial census forms have evolved as a preliminary step to plaintiff fact sheets and require less information. Four current MDLs are utilizing initial census forms as a kind of pilot program to see how effective they are. Whether this results in a rule amendment or a subject for best practices, there is strong desire to preserve flexibility for transferee judges.

The second area is increased interlocutory review. The subcommittee is actively assessing this issue. The defense bar has strongly favored an increased opportunity for interlocutory appellate review, particularly for mass tort MDLs. The plaintiffs' bar has strongly opposed it, arguing that 28 U.S.C. § 1292(b) and other routes to review exist now, and it is not clear that these are inadequate. Judge Bates explained that delay is a major concern, as with any interlocutory review for these MDL proceedings. Another question concerns the scope of any increased interlocutory review. Should it be available in a subset of MDLs, all MDLs, or even beyond MDLs to capture other complex cases? The role of the district court is another issue that the subcommittee is considering. The subcommittee recently held a miniconference, hosted by Emory Law School and Professor Jaime Dodge, on the topic of increased interlocutory review. The miniconference

involved MDL practitioners, transferee judges, appellate judges, and members of the Judicial Panel on Multidistrict Litigation. Judge Bates stated that the miniconference was a success and will be useful for the subcommittee. A clear divide remains between the defense bar and plaintiffs' bar regarding increased interlocutory review, with the mass tort MDL practitioners being the most vocal. The judges at the miniconference were generally cautious about expanded interlocutory appeal and concerned about delay.

The third and newest area of concentration by the subcommittee is settlement review. The question is whether there should be some judicial supervision for MDL settlements, as there is under Rule 23 for class action settlements. Leadership counsel is one area of examination. As with the interlocutory review subject, one issue here is the scope of any potential rule. Judge Bates further noted that defense counsel, plaintiffs' counsel, and transferee judges have expressed opposition to any rule requiring greater judicial involvement in MDL settlements. Academic commenters are most interested in enhancing the judicial role in monitoring settlements in MDLs. The subcommittee continues to explore these questions and has not reached any decision as to whether a rule amendment is appropriate.

A member asked what research was available on interlocutory review in MDL cases. This member observed while Rule 23(f) was likely controversial when it was adopted, it has had a positive effect. He also stated that interlocutory review in big cases would be beneficial because most big cases settle, and the settlement value is affected by the district court rulings on issues that are not subject to appellate review. Judge Bates responded that the subcommittee is looking at Rule 23(f), but that rule's approach may not be a good fit. Professor Marcus noted that information on interlocutory review in MDL cases is difficult to identify, but research has been done and practitioners on both the plaintiffs' side and defense side have submitted research to the subcommittee. A California state-court case-gathering mechanism may be worth study. He noted that initial proposals sought an absolute right to interlocutory review but proposals under consideration now are more nuanced. One member affirmed the difficulty of identifying the information sought. Concerning § 1292(b), this member suggested that generally district judges want to keep these MDLs moving and promote settlement. A district judge may effectively veto a § 1292 appeal; however, under Rule 23(f), parties can make their application to the court of appeals. Professor Marcus noted that materials in the agenda book reflected these varying models regarding the district judge's role. The member suggested that the subcommittee survey appellate judges on whether Rule 23(f) has been an effective or burdensome rule.

A judge member expressed wariness about rulemaking in the MDL context. She asked whether most of the input from judges has been from appellate judges or transferee judges, and who would be most helped by a rule providing for increased interlocutory review. Regarding settlement review, she questioned whether this is a rule issue or one more appropriately addressed by best practices. Another member opined that, of the issues discussed, the settlement review issue least warrants further study for rulemaking. Professor Marcus responded that even if the subcommittee's examination of these issues does not produce rules amendments, there is much to be gained. For example, current efforts may support best practices recommendations included in a future edition of the *Manual for Complex Litigation*. Judges Bates noted that the only area of focus that may not be addressed by a best practices approach is the issue of increased interlocutory review. A member agreed with Judge Bates. This member also raised a different issue – “opt outs”

– for the subcommittee to consider. In his MDL experience, both the defense lawyers and district judges often spend more time dealing with the opt-outs than the settlement.

A judge member emphasized that, in the interlocutory review area, the big question is whether existing avenues – mandamus, Rule 54(b), and § 1292(b) – are adequate. He suggested that § 1292(b) is a poor fit for interlocutory review in MDL cases. This member also shared that several defense lawyers have indicated hesitation to filing a § 1292(b) motion because the issue is not a controlling issue of law. Another judge member stated that the interlocutory review issue does not seem like a problem specific to MDLs. There are some non-MDL mass tort cases that raise similar key legal questions that could also benefit from some expedited interlocutory review. It is very clear that appellate judges do not want to be put in a position where they are expected to give expedited review. At the same time, district judges feel that they should have a voice in how issues fit into their complicated proceedings and whether appellate review would enhance the ultimate resolution of the case.

Another member suggested that the subcommittee look at what state courts are doing in this area. Some states have what are essentially MDLs by a different name. For example, in California, certification by the trial judge is not dispositive either way with respect to appellate review.

A judge member recalled the experience with Rule 23(f). The rule is beneficial, and its costs may not be as great as they seem. For instance, in many cases, the district court proceeding will carry on while the Rule 23(f) issue is under consideration. He also suggested that a court of appeals decision whether to grant interlocutory review can itself provide helpful feedback to the parties and district court. In his view, § 1292(b) is more a tool for the district court judge than it is for a party who believes the judge may have erred on a major issue in the case. He suggested a district court, even without a veto, could have input on the effect of delay on the case or the effect of a different ruling. Regarding the Rule 23(f) model, he pointed out that not all MDL proceedings have the same characteristics. If the subcommittee focused on a specific subset of issues likely to be pivotal but often not reviewed, perhaps the Rule 23(f) model would work in this context.

Another member stated that class certification decisions are always the subject of a Rule 23(f) petition in his experience. Only one petition has been granted, and none has changed the direction of the litigation. If this avenue for interlocutory appeal is opened, it will likely be used frequently. Absent a screening mechanism, the provision will not be invoked selectively.

Judge Campbell shared several comments. He stated his support for the subcommittee's consideration of a proposal submitted by Appellate Rules Advisory Committee member, Professor Steven Sachs, as reflected in the agenda book materials. Delay is one of the biggest issues in MDL cases in his experience. The issues that are most likely to go up on appeal are those that come up shortly before trial (e.g., *Daubert* or preemption motions). If there is a two-year delay, the case must be put on hold because, otherwise, the district court is ready to move forward with bellwether trials. He acknowledged that appellate judges do not relish the notion of expediting, but the importance of the issue could factor into their decision. If the issue is very important, they may find it justified to expedite an appeal. Professor Marcus observed that appellate decision times vary considerably among the circuits.

Judge Bates thanked the Standing Committee members for their feedback which reflects many of the discussions the subcommittee has had with judges and members of the bar. The subcommittee will continue to consider whether any of these issues merit rules amendments.

Suggestion Regarding Rule 4(c)(3) and Service by the U.S. Marshals Service in In Forma Pauperis Cases. The suggestion regarding Rule 4(c)(3) is still under review. There is a potential ambiguity with respect to service by the U.S. Marshals Service in *in forma pauperis* cases. The Advisory Committee is considering a possible amendment that would resolve the ambiguity.

Suggestion Regarding Rule 12(a) (Time to Serve a Responsive Pleading). The suggestion regarding Rules 12(a)(1), (2), and (3) is under assessment. Rules 12(a)(2) and (3) govern the time for the United States, or its agencies, officers, or employees, to respond. Rules 12(a)(2) and (3) set the time at 60 days, but some statutes set the time at 30 days. There is some concern among Advisory Committee members as to whether a rule amendment is warranted.

Suggestion Regarding Rule 17(d) (Public Officer's Title and Name). The Advisory Committee continues to consider a suggestion regarding Rule 17(d). Judge Bates explained that potential advantages exist to amending Rule 17(d) to require designation by official title rather than by name.

Judge Bates noted in closing that the agenda book reflects items removed from the Advisory Committee's agenda relating to Rules 7(b)(2), 10, and 16.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raymond Kethledge and Professors Beale and Nancy King presented the report of the Criminal Rules Advisory Committee, which met on May 5, 2020 by videoconference. The Advisory Committee presented one action item and one information item.

Action Items

Publication of Proposed Amendment to Rule 16 (Discovery Concerning Expert Reports and Testimony). Judge Kethledge introduced the proposed amendment to Rule 16. The core of the proposal does two things. First, it requires the district court to set a deadline for disclosure of expert testimony and includes a functional standard for when that deadline must be. Second, it requires more specific disclosures, including a complete statement of all opinions. This proposal is a result of a two-year process which included, at Judge Campbell's suggestion, a miniconference. The miniconference was a watershed in the Advisory Committee's process and largely responsible for the consensus reached. Judge Kethledge explained that the DOJ has been exemplary in the process, recognizing the problems and vagueness in disclosures under the current rule. He thanked the DOJ representatives who have been involved: Jonathan Wroblewski, Andrew Goldsmith, and Elizabeth Shapiro.

There have been changes to the proposal since the last Standing Committee meeting. The draft that the Advisory Committee presented in January required both the government and the

defense to disclose expert testimony it would present in its “case-in-chief.” Following Judge Campbell’s suggestion at the last meeting, the Advisory Committee considered whether the rule should refer to evidence “at trial” or in a party’s “case-in-chief.” The Advisory Committee concluded that “case-in-chief” was best because that phrase is used throughout Rule 16. But the Advisory Committee added language requiring the government to disclose testimony it intends to use “during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C).” Additionally, the Advisory Committee made several changes to the committee note. One, suggested by Judge Campbell, clarifies that Rule 16 does not require a verbatim recitation of expert opinion. The Advisory Committee does not seek to import Civil Rule 26’s much more detailed disclosure requirements into criminal practice. In response to a point previously raised by a Standing Committee member, the Advisory Committee revised the committee note to reflect that there may be instances in which the government or a party does not know the identity (but does know the opinions) of the expert whose testimony will be presented. In those situations, the note encourages that party to seek a modification of the discovery requirement under Rule 16(d) to allow a partial disclosure. Judge Kethledge explained that the Advisory Committee did not want to establish an exception in the rule language to account for these situations.

Professor Beale described other revisions to the committee note. New language was added to make clear that the government has an obligation to disclose rebuttal expert evidence that is intended to respond to expert evidence that the defense timely disclosed. The note language emphasizes that the government and defense obligations generally mirror one another. The Advisory Committee also added a parenthetical in the note clarifying that where a party has already disclosed information in an examination or test report (and accompanying documents), the party need not repeat that information in its expert disclosure so long as it identifies the information and the prior report. Finally, the committee note was restructured to follow the order of the proposed amendment.

A judge member commended the Advisory Committee on the proposal. She also raised a question regarding committee note language referring to “prompt notice” of any “modification, expansion, or contraction” of the party’s expert testimony. She suggested that “contraction” might be beyond what is required by Rule 16(c), which the note language refers to. Professor King responded that the committee note includes that language because Rule 16(c) does not speak to correction or contraction but only to addition. The Advisory Committee believed it was important to address all three circumstances. Subdivision (c) is cross-referenced in the note because it provides the procedure for such modifications. Professor Beale emphasized that the key language in the note is “correction.” The rule is intended to cover fundamental modifications. Professor King added that the issue of contraction came up at the miniconference. Some defense attorneys shared experiences where expert disclosures led them to prepare for multiple experts, but the government only presented one. The judge member observed that the “contraction” language could lead to a party being penalized for disclosing too much. This member recommended removing “contraction” from the note, unless something in the rule text explicitly instructs parties of their duty to take things out of their expert disclosures. Judge Kethledge suggested the word “modification,” which encapsulates contraction and expansion, be substituted in the committee note language. He added that some concern was expressed regarding the supplementation requirement and the potential for parties to intentionally delay supplementation to gain an advantage. The Advisory Committee will be alert to any public comments raising this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 16.**

Information Items

Proposals to Amend Rule 6 (The Grand Jury). The Advisory Committee received two suggestions to modify the secrecy provisions in Rule 6(e) to allow greater disclosure for grand jury materials, particularly for cases of historical interest. The two suggestions – one from Public Citizen Litigation Group and one from Reporters Committee for Freedom of the Press – are very different. Public Citizen proposes a limited rule with concrete requirements. The Reporters Committee identifies nine factors that should inform the disclosure decision.

Judge Kethledge explained that Justice Breyer previously suggested that the Rules Committees examine the issue, and a circuit split exists. A subcommittee, chaired by Judge Michael Garcia, has been formed to consider the issue. Judge Kethledge noted that the DOJ will submit its formal position on the issue to the subcommittee. One question that came up in 2012 may be relevant now: whether the district court has inherent authority to order disclosure. Judge Kethledge advised against the Advisory Committee opining on the issue, which he described as an Article III question rather than a procedural issue.

Judge Campbell agreed that it is not the Advisory Committee’s role to provide advisory opinions on what a court’s power is. He stated that it may be relevant, however, for a court to know whether Rule 6 was intended to set forth an exclusive list of exceptions. Judge Kethledge observed that if the Advisory Committee states its intention for the Rule to “occupy the field” or not, that in itself could constitute taking a position on the inherent-power question. In response, Judge Campbell noted that under the Rules Enabling Act, the rules have the effect of a statute and supersede existing statutes on procedural matters. It may be relevant to a court in addressing its inherent power, in an area where Congress has legislated, to ask whether Congress intended to leave room for courts to develop common law or intended to occupy the field. When Civil Rule 37(e) was adopted in 2015 to deal with spoliation, the intent was to resolve a circuit split in the case law. The committee note stated that the rule amendment intended to foreclose a court from relying on inherent power in that area. Judge Campbell emphasized that the Advisory Committee’s intent will likely be a relevant consideration in the future. Professor Coquillette added that if the Advisory Committee addresses exclusivity of the grand jury secrecy exceptions, that should be stated in the rule text rather than in a committee note. A DOJ representative explained that the core of the circuit split is whether courts have inherent authority to deviate from the list of exceptions in Rule 6(e), so avoiding the inherent authority issue in addressing the rule might be impossible.

Judge Kethledge suggested that the Advisory Committee can decide whether the disclosure of historical material is lawful without opining on the existence of inherent authority. He interpreted Justice Breyer’s previous statement as encouraging the Advisory Committee to state whether the rule provides for disclosure of historical material, not necessarily whether the courts have inherent authority to do so. Judge Kethledge added that this discussion provides good food for thought as the Advisory Committee considers the Rule 6 proposals.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met on October 25, 2019, in Nashville, Tennessee. The Advisory Committee did not hold a spring 2020 meeting. Judge Livingston thanked everyone for the opportunity to be a part of the rulemaking process. Professor Capra thanked both Judge Livingston and Judge Campbell for their leadership and counsel over the years.

Judge Livingston noted that the proposed amendment to Rule 404(b) is now before Congress and scheduled to take effect on December 1, 2020, absent congressional action. The Advisory Committee will decide soon whether to bring to the Standing Committee for publication any proposed amendments to Rules 106, 615 or 702.

Judge Livingston indicated that the Advisory Committee continues to seek consensus on a possible amendment to Rule 106, the rule of completeness. The question is whether to propose a narrow or broad revision to Rule 106. Professor Capra added that the Advisory Committee has discussed for years how far an amendment to Rule 106 should go.

Consideration of possible amendments to Rule 615 on excluding witnesses remains ongoing. Professor Capra explained the uncertainty reflected in caselaw concerning whether Rule 615 empowers judges to go beyond simply excluding witnesses from the courtroom. Clarity would benefit all litigants. Professor Capra noted the potential application of the rule to remote trials. Extending a sequestration order beyond the confines of the courtroom raises issues concerning lawyer conduct and professional responsibility. The committee note to any proposed rule amendment would acknowledge that the rule does not address that question.

The Advisory Committee continues its consideration of possible amendments to Rule 702 concerning expert testimony. Judge Livingston noted that the DOJ asked the Advisory Committee to delay any proposed rule amendments to Rule 702 to allow the Department to demonstrate the effectiveness of its recent reforms concerning forensic feature evidence.

The Advisory Committee frequently hears the complaints that many courts treat Rule 702's requirements of sufficient basis and reliable application as questions of weight rather than admissibility, and that courts do not look for these requirements to be proved by a preponderance of the evidence under Rule 104(a). The Advisory Committee has received numerous submissions from the defense bar with citations to cases in which some courts do not apply Rule 702 admissibility standards. Judge Livingston noted that at the symposium held by the Advisory Committee in October 2019, several judges expressed concern regarding potential amendments to Rule 702.

Judge Campbell commented that the Advisory Committee's discussion of *Daubert* motions requiring consideration of the Rule 702 requisites under the Rule 104(a) preponderance-of-the-evidence standard made *Daubert* determinations easier for him. He suggested that clarification of that process – whether in rule text, committee note, or practice guide – will result in clearer *Daubert* briefing and decisions. It was suggested that Rule 702 could be amended to add a cross-reference to Rule 104(a). Judge Livingston responded that the Advisory Committee worries

whether such an amendment would carry a negative inference vis-à-vis other evidence rules (given that there are many rules with requirements that should be analyzed under Rule 104(a)). But perhaps the committee note could explain why a cross-reference to Rule 104(a) would be added in Rule 702 and not in other rules.

OTHER COMMITTEE BUSINESS

Judge Campbell reported on the five-year update to the *Strategic Plan for the Federal Judiciary*, which is presented in the agenda book as a redlined version of the *Strategic Plan* and is being revised under the leadership of Judge Carl Stewart. Suggestions for improvement are encouraged and will be passed on to Judge Stewart.

Ms. Wilson reported on several legislative developments (in addition to the CARES Act issues that had been discussed at length earlier in the meeting). Ms. Wilson directed the Committee to the legislative tracking chart in the agenda book. Ms. Wilson highlighted that the Due Process Protections Act (S. 1380) would directly amend Criminal Rule 5. Since the last meeting of the Standing Committee, the Senate passed the bill, but the House has taken no action. In anticipation of the House taking up the bill, Judges Campbell and Kethledge submitted a letter to House leadership on May 28 expressing the Rules Committees' preference that any rule amendment occur through the Rules Enabling Act process. The letter also detailed the Criminal Rules Advisory Committee's prior consideration of this issue. In 2012, when legislation on this topic was being considered, the then-Chair of the Criminal Rules Advisory Committee, Judge Reena Raggi, submitted 900 pages of materials reflecting the Criminal Rules Advisory Committee's consideration of the question of prosecutors' discovery obligations.

Ms. Wilson also reported on the Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2019 (H.R. 2426), which would create an Article I tribunal for copyright claims valued at \$30,000 or less. Proceedings would be streamlined, and judicial review would be strictly limited. This is similar to the Federal Arbitration Act. The legislation has been passed by the House and a companion bill (S. 1273) has been reported out of the Senate Judiciary Committee. The Office of Legislative Affairs at the Administrative Office expects some movement in the future. The Committee on Federal-State Jurisdiction (Fed-State Committee) has been tracking the CASE Act and has asked the Rules Committees to stay involved. The Fed-State Committee may ultimately recommend that the Judicial Conference adopt a formal position opposing the legislation and, with input from the Rules Committees, suggest alternatives to the creation of a separate tribunal for copyright claims.

Ms. Wilson noted that on June 25, the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and the Internet will hold a hearing titled "Federal Courts During the COVID-19 Pandemic: Best Practices, Opportunities for Innovation, and Lessons for the Future." Judge Campbell will be the federal judiciary's witness at the hearing. His testimony will include a rules portion that details the Rules Committees' work on emergency rules.

Judge Campbell pointed to the agenda book materials summarizing efforts of federal courts and the Administrative Office to deal with the pandemic. Professor Marcus noted that the report mentions an emergency management staff at the Administrative Office and asked what other types

of emergency situations that staff has focused on in the past. Ms. Womeldorf explained that past efforts have focused on weather-related events, and she will continue to monitor the work of the Administrative Office’s COVID-19 Task Force to inform the future work of this Committee.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee’s members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on January 5, 2021.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

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TAB 2

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SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

1. Approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 2-4

2. Approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 5-8

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

- Federal Rules of Appellate Procedure pp. 4-5
- Federal Rules of Bankruptcy Procedure pp. 8-15
- Federal Rules of Civil Procedure..... pp. 15-18
- Federal Rules of Criminal Procedure..... pp. 18-20
- Federal Rules of Evidence pp. 20-21
- Other Items pp. 21-22

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on June 23, 2020, due to the Coronavirus Disease 2019 (COVID-19) pandemic. All members participated.

Representing the advisory committees were Judge Michael A. Chagares, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; Judge Debra Ann Livingston, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Allison Bruff, Law Clerk to the Standing Committee; and John S.

NOTICE

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

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC).

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

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

FEDERAL RULES OF APPELLATE PROCEDURE

Rules and Forms Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3 and 6, and Forms 1 and 2, with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were published for public comment in August 2019.

Rule 3 (Appeal as of Right—How Taken), Rule 6 (Appeal in a Bankruptcy Case), Form 1 (Notice of Appeal to a Court of Appeals From a Judgment or Order of a District Court), and Form 2 (Notice of Appeal to a Court of Appeals From a Decision of the United States Tax Court)

The proposed amendment to Rule 3 revises the requirements for a notice of appeal. Some courts of appeals, using an *expressio unius* rationale, have treated a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that

order, rather than reaching all of the interlocutory orders that merge into the judgment. In order to reduce the loss of appellate rights that can result from such a holding, and to provide other clarifying changes, the proposed amendment changes the language in Rule 3(c)(1)(B) to require the notice of appeal to “designate the judgment—or the appealable order—from which the appeal is taken.” The proposed amendment further provides that “[t]he notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” The proposal also accounts for situations in which a case is decided by a series of orders over time and for situations in which the notice is filed after entry of judgment but designates only an order that merged into the judgment. Finally, the proposed amendment explains how an appellant may limit the scope of a notice of appeal if it chooses to do so. The proposed amendments to Forms 1 and 2 reflect the proposed changes to Rule 3. The proposed amendment to Rule 6 is a conforming amendment.

The comments received regarding Rule 3 were split, with five comments supporting the proposal (with some suggestions for change) and two comments criticizing the proposal. No comments were filed regarding the proposed amendments to Rule 6, and the only comments regarding Forms 1 and 2 were style suggestions. Most issues raised in the comments had been considered by the Advisory Committee during its previous deliberations. The Advisory Committee added language in proposed Rule 3(c)(7) to address instances where a notice of appeal filed after entry of judgment designates only a prior order merged into the judgment and added a corresponding explanation to the committee note. The Advisory Committee also expanded the committee note to clarify two issues and made minor stylistic changes to Rule 3 and Forms 1 and 2.

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendments to Rules 3 and 6, and Forms 1 and 2, be approved and transmitted to the Judicial Conference.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 3 and 6, and Forms 1 and 2 as set forth in Appendix A, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 25 (Filing and Service), with a request that it be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendment to Rule 25(a)(5) responds to a suggestion regarding privacy concerns for cases under the Railroad Retirement Act. The proposed amendment would extend the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases. The Advisory Committee will identify specific stakeholder groups and seek their comments on the proposed rule amendment.

Information Items

The Advisory Committee met by videoconference on April 3, 2020. Agenda items included continued consideration of potential amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) in an effort to harmonize the rules. The Advisory Committee decided not to pursue rulemaking to address appellate decisions based on unbriefed grounds. It tabled a suggestion to amend Rule 43 (Substitution of Parties) to require the use of titles rather than names in cases seeking relief against officers in their official capacities, pending inquiry into the practice of circuit clerks. The Advisory Committee also decided to establish two new subcommittees to consider suggestions to regularize the standards and procedures governing

in forma pauperis status and to amend Rule 4(a)(2), the rule that addresses the filing of a notice of appeal before entry of judgment, to more broadly allow the relation forward of notices of appeal.

The Advisory Committee will reconsider a potential amendment to Rule 42 (Voluntary Dismissal) following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 42 was published in August 2019. As published, the proposed amendment would have required the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. (The amendment would accomplish this by replacing the word “may” in the current rule with “must.”) The proposed amendment would have also added a new paragraph (a)(3) providing that a court order is required for any relief beyond the dismissal of an appeal, and a new subdivision (c) providing that Rule 42 does not alter the legal requirements governing court approval of a settlement, payment, or other consideration. At the Standing Committee meeting, a question was raised concerning the proposed amendment’s effect on local circuit rules that impose additional requirements before an appeal can be dismissed. The Advisory Committee will continue to study Rule 42, with a particular focus on the question concerning local rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2005, 3007, 7007.1, and 9036. The amendments were published for public comment in August 2019.

Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination)

The proposed amendment to Rule 2005(c) replaces the current reference to “the provisions and policies of title 18, U.S.C., § 3146(a) and (b)” – sections that have been repealed

– with a reference to “the relevant provisions and policies of title 18 U.S.C. § 3142” – the section that now deals with the topic of conditions of release. The only comment addressing the proposal supported it. Accordingly, the Advisory Committee unanimously approved the amendment as published.

Rule 3007 (Objections to Claims)

The proposed amendment to Rule 3007(a)(2)(A)(ii) clarifies that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. The clarification addresses a possible reading of the rule that would extend such special service not just to banks, but to credit unions as well. The only relevant comment supported the proposed amendment and the Advisory Committee recommended final approval of the rule as published.

Rule 7007.1 (Corporate Ownership Statement)

The proposed amendment extends Rule 7007.1(a)’s corporate-disclosure requirement to would-be intervenors. The proposed amendment also makes conforming and stylistic changes to Rule 7007.1(b). The changes parallel the recent amendment to Appellate Rule 26.1 (effective December 1, 2019), and the proposed amendments to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020) and Civil Rule 7.1 (published for public comment in August 2019).

The Advisory Committee made one change in response to the comments. It agreed to retain the terminology “corporate ownership statement” because “disclosure statement” is a bankruptcy term of art with a different meaning. With that change, it recommended final approval of the rule.

Rule 9036 (Notice and Service Generally)

The proposed amendment to Rule 9036 would encourage the use of electronic noticing and service in several ways. The proposed amendment recognizes a court’s authority to provide notice or make service through the Bankruptcy Noticing Center (“BNC”) to entities that currently receive a high volume of paper notices from the bankruptcy courts. The proposed amendment also reorganizes Rule 9036 to separate methods of electronic noticing and service available to courts from those available to parties. Under the amended rule, both courts and parties may serve or provide notice to registered users of the court’s electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. But only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program.

The proposed amendment differs from the version previously published for comment. The published version was premised in part on proposed amendments to Rule 2002(g) and Official Form 410. As discussed below, the Advisory Committee decided not to proceed with the proposed amendments to Rule 2002(g) and Official Form 410.

The Advisory Committee received seven comments regarding the proposed amendments, mostly from court clerks or their staff. In general, the comments expressed great support for the program to encourage high-volume paper-notice recipients to register for electronic bankruptcy noticing. But commenters opposed several other aspects of the proposed amendment. The concerns fell into three categories: clerk monitoring of email bounce-backs; administrative burden of a proof-of-claim opt-in for email noticing and service; and the interplay of the proposed amendments to Rules 2002(g) and 9036.

The Advisory Committee addressed concerns about clerk monitoring of email bounce-backs by adding a sentence to Rule 9036(d): “It is the recipient’s responsibility to keep its electronic address current with the clerk.”

The Advisory Committee was persuaded by clerk office concerns that the administrative burden of a proof-of-claim opt-in outweighed any benefits, and therefore decided not to go forward with the earlier proposed amendments to Rule 2002(g) and Official Form 410 and removed references to that option that were in the published version of Rule 9036. This decision also eliminated the concerns raised in the comments about the interplay between the proposed amendments to Rules 2002(g) and 9036. With those changes, the Advisory Committee recommended final approval of Rule 9036.

The Standing Committee unanimously approved the Advisory Committee’s recommendation that the proposed amendments to Rules 2005, 3007, 7007.1, and 9036 be approved and transmitted to the Judicial Conference

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 2005, 3007, 7007.1, and 9036 as set forth in Appendix B, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules and Official Forms Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to three categories of rules and forms with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee’s request.

The three categories are: (1) proposed restyled versions of Parts I and II of the Bankruptcy Rules; (2) republication of the Interim Rule and Official Form amendments previously approved to implement the Small Business Reorganization Act of 2019 (SBRA); and (3) proposed amendments to Rules 3002(c)(6), 5005, 7004, and 8023.

Restyled Rules, Parts I and II

At its fall 2018 meeting, after an extensive outreach to bankruptcy judges, clerks, lawyers and organizations, the Advisory Committee began the process of restyling the bankruptcy rules. This endeavor follows similar projects that produced comprehensive restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. The Advisory Committee now proposes publication of restyled drafts of approximately one third of the full bankruptcy rules set consisting of the 1000 series and 2000 series of rules. The proposed restyled rules are the product of intensive and collaborative work between the style consultants who produced the initial drafts, and the reporters and the Restyling Subcommittee who provided comments to the style consultants on those drafts. In considering the subcommittee's recommendations, the Advisory Committee endorsed the following basic principles to guide the restyling project:

1. *Make No Substantive Changes.* Most of the comments the reporters and the subcommittee made on the drafts were aimed at preventing an inadvertent substantive change in meaning by the use of a different word or phrase than in the existing rule. The rules are being restyled from the version in effect at the time of publication. Future rule changes unrelated to restyling will be incorporated before the restyled rules are finalized.
2. *Respect Defined Terms.* Any word or phrase that is defined in the Code should appear in the restyled rules exactly as it appears in the Code definition without restyling, despite any possible flaws from a stylistic standpoint. Examples include the unhyphenated terms “equity security holder,” “small business case,” “small business debtor,” “health care business,” and “bankruptcy petition preparer.” On the other hand, when terms are used in the Code but are not defined, they may be restyled in the rules, such as “personal financial-management course,” “credit-counseling statement,” and “patient-care ombudsman.”
3. *Preserve Terms of Art.* When a phrase is used commonly in bankruptcy practice, the Advisory Committee recommended that it not be restyled. Such a phrase that was often used in Part I of the rules was “meeting of creditors.”

4. *Remain Open to New Ideas.* The style consultants suggested some different approaches in the rules, which the Advisory Committee has embraced, including making references to specific forms by form number, and listing recipients of notices by bullet points.
5. *Defer on Matters of Pure Style.* Although the subcommittee made many suggestions to improve the drafting of the restyled rules, on matters of pure style the Advisory Committee committed to deferring to the style consultants when they have different views.

The Advisory Committee also decided not to attempt to restyle rules that were enacted by Congress. As a result, the restyled rules will designate current Rule 2002(o) (Notice of Order for Relief in Consumer Case) as 2002(n) as set forth in Section 321 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 357, and the Advisory Committee will not recommend restyling the wording as it was set forth in the Act. Other bankruptcy rules that were enacted by Congress in whole or in part are Rule 2002(f), 3001(g), and 7004(h).

Although the Advisory Committee requested that the Part I and II restyled rules be published for public comment in August 2020, those proposed amendments will not be sent forward for final approval until the remaining portions of the Bankruptcy Rules have been restyled. Work has already begun on a group of rules expected to be published in 2021, and the Advisory Committee anticipates that the final batch of rules will be published for comment in 2022. After all the rules have been restyled, published, and given final approval by the Standing Committee, the Rules Committees hope to present the full set of restyled Bankruptcy Rules to the Judicial Conference for approval at its fall 2023 meeting.

SBRA Rules and Forms

On August 23, 2019, the President signed into law the Small Business Reorganization Act of 2019, Pub. L. No. 116-54, which creates a new subchapter V of chapter 11 for the reorganization of small business debtors, an alternative procedure that small business debtors can elect to use. Upon recommendation of the Standing Committee, on December 16, 2019, the

Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, authorized the distribution of Interim Rules of Bankruptcy Procedure 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2, 3018, and 3019 to the courts so they could be adopted locally, prior to the February 19, 2020 effective date of the SBRA, to facilitate uniformity of practice until the Bankruptcy Rules can be revised in accordance with the Rules Enabling Act. The Advisory Committee has now begun the process of promulgating national rules governing cases under subchapter V of chapter 11 by seeking publication of the amended and new rules for comment in August 2020, along with the SBRA form amendments.

The SBRA rules consist of the following:

- Rule 1007 (Lists, Schedules, Statements, and Other Documents; Time Limits),
- Rule 1020 (Small Business Chapter 11 Reorganization Case),
- Rule 2009 (Trustees for Estates When Joint Administration Ordered),
- Rule 2012 (Substitution of Trustee or Successor Trustee; Accounting),
- Rule 2015 (Duty to Keep Records, Make Reports, and Give Notice of Case or Change of Status),
- Rule 3010 (Small Dividends and Payments in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3011 (Unclaimed Funds in Cases Under Chapter 7, Subchapter V of Chapter 11, Chapter 12, and Chapter 13),
- Rule 3014 (Election Under § 1111(b) by Secured Creditor in Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3016 (Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case),
- Rule 3017.1 (Court Consideration of Disclosure Statement in a Small Business Case),
- new Rule 3017.2 (Fixing of Dates by the Court in Subchapter V Cases in Which There Is No Disclosure Statement),
- Rule 3018 (Acceptance or Rejection of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case), and
- Rule 3019 (Modification of Accepted Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case).

The Advisory Committee recommended publishing the SBRA rules as they were recommended to the courts for use as interim rules with some minor stylistic changes to Rule 3017.2.

Unlike the SBRA interim rules, the SBRA Official Forms were issued on an expedited basis under the Advisory Committee’s delegated authority to make conforming and technical amendments to official forms (subject to subsequent approval by the Standing Committee and notice to the Judicial Conference, (JCUS-MAR 16, p. 24)). Nevertheless, the Advisory Committee committed to publishing the forms for comment in August 2020, along with the SBRA rule amendments, in order to ensure that the public has an opportunity to review the rules and forms together.

The SBRA Official Forms consist of the following:

- Official Form 101 (Voluntary Petition for Individuals Filing for Bankruptcy),
- Official Form 201 (Voluntary Petition for Non-Individuals Filing for Bankruptcy),
- Official Form 309E-1 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors)),
- Official Form 309E-2 (Notice of Chapter 11 Bankruptcy Case (For Individuals or Joint Debtors under Subchapter V)),
- Official Form 309F-1 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships)),
- Official Form 309F-2 (Notice of Chapter 11 Bankruptcy Case (For Corporations or Partnerships under Subchapter V)),
- Official Form 314 (Ballot for Accepting or Rejecting Plan),
- Official Form 315 (Order Confirming Plan), and
- Official Form 425A (Plan of Reorganization for Small Business Under Chapter 11).

In addition, the Advisory Committee recommends one additional SBRA-related form amendment to Official Form 122B (Chapter 11 Statement of Your Current Monthly Income).

The instructions to that form currently require that it be filed “if you are an individual and are filing for bankruptcy under Chapter 11.” This statement is not accurate if the debtor is an individual filing under subchapter V of Chapter 11. The proposed amendment to the form clarifies that it is not applicable to subchapter V cases.

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

Rule 3002 (Filing Proof of Claim or Interest). Under Rule 3002(c)(6)(B), an extension of time to file proofs of claim may be granted to foreign creditors if “the notice was insufficient

under the circumstances to give the creditor a reasonable time to file a proof of claim.” The Advisory Committee recommended an amendment that would allow a domestic creditor to obtain an extension under the same circumstances.

Rule 5005 (Filing and Transmittal of Papers). The Advisory Committee recommended publication of an amendment to Rule 5005(b) that would allow papers to be transmitted to the U.S. trustee by electronic means and would eliminate the requirement that the filed statement evidencing transmittal be verified.

Rule 7004 (Process; Service of Summons, Complaint). The Advisory Committee recommended publication of a new subsection (i) to clarify that Rule 7004(b)(3) and Rule 7004(h) permit use of a title rather than a specific name in serving a corporation or partnership, unincorporated association or insured depository institution. Service on a corporation or partnership, unincorporated association or insured depository institution at its proper address directed to the attention of the “Chief Executive Officer,” “President,” “Officer for Receiving Service of Process,” or “Officer” (or other similar titles) or, in the case of Rule 7004(b)(3), directed to the attention of the “Managing Agent,” “General Agent,” or “Agent” (or other similar titles) suffices, whether or not a name is also used or such name is correct.

Rule 8023 (Voluntary Dismissal). The proposed amendment to Rule 8023 would conform the rule to changes currently under consideration for Appellate Rule 42(b). As noted earlier in this report, the proposed amendment to Appellate Rule 42 was published for comment in August 2019, but the amendment is not yet moving forward for final approval because the Advisory Committee will study further the amendments’ implications for local circuit provisions that impose additional requirements for dismissal of an appeal. The proposed amendment to Rule 8023 will be published for comment in the meantime.

Information Items

The Advisory Committee met by videoconference on April 2, 2020. In addition to its recommendations for final approval and for public comment discussed above, it recommended five official form amendments and one interim rule amendment in response to the CARES Act. [Notice of Conforming Changes to Official Forms 101, 201, 122A-1, 122B, and 122C-1](#)

The CARES Act made several changes to the Bankruptcy Code, most of them temporary, to provide financial assistance during the COVID-19 pandemic. For the one-year period after enactment, the definition of “debtor” for subchapter V cases is changed, requiring conforming changes to Official Forms 101 and 201. For the same one-year time period, the definitions of “current monthly income” and “disposable” income are amended to exclude certain payments made under the CARES Act. These changes required conforming amendments to Official Forms 122A-1, 122B, and 122C-1. The Advisory Committee approved the necessary changes at its April 2, 2020 meeting pursuant to its authority to make conforming and technical changes to Official Forms subject to retroactive approval by the Standing Committee and notice to the Judicial Conference. The Standing Committee approved the amendments at its June 23, 2020 meeting, and notice is hereby provided to the Judicial Conference. The amended forms are included in Appendix B. These amendments have a duration of one year after the effective date of the CARES Act, at which time the former version of these forms will go back into effect.

[Interim Rule 1020 \(Chapter 11 Reorganization Case for Small Business Debtors or Debtors Under Subchapter V\)](#)

One of the interim rules that was adopted by courts to implement the SBRA, Interim Rule 1020, required a temporary amendment due to the new definition of a Chapter 11, subchapter V debtor that was introduced by the CARES Act.

The Advisory Committee voted unanimously at its spring meeting to approve the proposed amendment to Interim Rule 1020 for issuance as an interim rule for adoption by each

judicial district. By email vote concluding on April 11, the Standing Committee unanimously approved the Advisory Committee’s recommendation, and, on April 14, the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference, approved the request. Because the CARES Act definition of a subchapter V debtor will expire in 2021, the temporary amendment to Interim Rule 1020 is not incorporated into the proposed amendments to Rule 1020 that are recommended for public comment (under the Rules Enabling Act, permanent amendments to Rule 1020 to address the SBRA would not take effect before December 1, 2022).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee submitted a proposed amendment to Rule 12, as well as new Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), with a request that they be published for public comment in August 2020. The Standing Committee unanimously approved the Advisory Committee’s request.

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

The proposed amendment to Rule 12(a)(4) extends the time to respond (after denial of a Rule 12 motion) when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States’ behalf. Under the current rule, the time to serve a responsive pleading after notice that the court has denied a Rule 12 motion or has postponed its disposition until trial is 14 days. The DOJ, which often represents federal employees or officers sued in an individual capacity, submitted a suggestion urging that the rule be amended to extend the time to respond in these types of actions to 60 days.

The Advisory Committee agreed that the current 14-day time period is too short. First, personal liability suits against federal officials are subject to immunity defenses, and a denial of a

qualified or absolute immunity defense at the Rule 12 motion-to-dismiss stage can be appealed immediately. The appeal time in such circumstances is 60 days, the same as in suits against the federal government itself. In its suggestion, the DOJ points out that, under the current rule, when a district court rejects an immunity defense, a responsive pleading must be filed before the government has determined whether to appeal the immunity decision.

The suggestion is a logical extension of the concerns that led to the adoption several years ago of Rule 12(a)(3), which sets the time to serve a responsive pleading in such individual-capacity actions at 60 days, and Appellate Rule 4(a)(1)(B)(iv), which sets the time to file an appeal in such actions at 60 days.

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

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) is the result of three years of extensive study by the Advisory Committee.

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

A subcommittee was formed to consider the suggestion. The subcommittee’s first tasks were to gather additional data and information from the various stakeholders and to determine whether the issues revealed by the Administrative Conference’s study could – or should – be

corrected by rulemaking. With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules for discussion.

Over time, the draft rules were revised and simplified. During this process, the subcommittee continued to discuss whether a better approach might be to develop model local rules or best practices. Ultimately, with feedback from the Advisory Committee, the Standing Committee, and district and magistrate judges, the subcommittee determined to press forward with developing proposed rules for publication. A continuing question that has been the focus of discussion in both the Advisory Committee and the Standing Committee is whether the benefits of the proposed supplemental rules would outweigh the costs of departing from the usual presumption against substance-specific rulemaking. The federal rules are generally trans-substantive and the Rules Committees have, with limited exceptions, avoided promulgating rules applicable to only a particular type of action.

The proposed supplemental rules – eight in total – are modest and drafted to reflect the unique character of § 405(g) actions. The proposed rules set out simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of presenting the actions as appeals to be decided on the briefs and the administrative record. While trans-substantivity concerns remain, the Advisory Committee believes the draft rules are an improvement over the current lack of uniform procedures and looks forward to receiving comments in what will likely be a robust public comment period.

Information Items

The Advisory Committee met by videoconference on April 1, 2020. In addition to the action items discussed above, the agenda included a report by the Multidistrict Litigation (MDL) Subcommittee and consideration of suggestions that specific rules be developed for MDL

proceedings. As previously reported, the subcommittee has engaged in a substantial amount of fact gathering, with valuable assistance from the Judicial Panel on Multidistrict Litigation and the FJC. Subcommittee members have also participated in numerous conferences hosted by different constituencies, most recently a virtual conference focused on interlocutory appeal issues in MDLs hosted by the Institute for Complex Litigation and Mass Claims at Emory University School of Law. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

The Advisory Committee will continue to consider a potential amendment to Rule 7.1, the disclosure rule, following discussion and comments at the June 23, 2020 Standing Committee meeting. The proposed amendment to Rule 7.1(a) was published for public comment in August 2019. The proposed amendment to Rule 7.1(b) is a technical and conforming amendment and was not published for public comment. The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene, a change that would conform the rule to the recent amendment to Appellate Rule 26.1 (effective December 1, 2019) and the proposed amendment to Bankruptcy Rule 8012 (adopted by the Supreme Court and transmitted to Congress on April 27, 2020). The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity that is attributed to a party.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted a proposed amendment to Criminal Rule 16 (Discovery and Inspection), with a request that it be published for public

comment in August 2020. The Standing Committee unanimously approved the Advisory Committee's request.

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

In considering the suggestions and developing a proposed amendment, the Advisory Committee drew upon two informational sessions. First, at the Advisory Committee's fall 2018 meeting, representatives from the DOJ updated the Advisory Committee on the DOJ's development and implementation of policies governing disclosure of forensic and non-forensic evidence. Second, in May 2019, the Rule 16 Subcommittee convened a miniconference to explore the issue with stakeholders. Participants included defense attorneys, prosecutors, and DOJ representatives who have extensive personal experience with pretrial disclosures and the use of experts in criminal cases. At the miniconference, defense attorneys identified two problems with the current rule: (1) the lack of a timing requirement; and (2) the lack of detail in the disclosures provided by prosecutors.

Over the next year, the subcommittee worked on drafting a proposed amendment. Drafts were discussed at Advisory Committee meetings and at the Standing Committee's January 2020 meeting. The proposed amendment approved for publication addresses the two shortcomings in the current rule identified at the miniconference – the lack of timing and the lack of specificity – while maintaining the reciprocal structure of the current rule. It is intended to facilitate trial preparation by allowing the parties a fair opportunity to prepare to cross-examine expert witnesses who testify at trial and to secure opposing expert testimony if needed.

Information Item

The Advisory Committee met by videoconference on May 5, 2020. In addition to finalizing for publication the proposed amendment to Rule 16, the Advisory Committee formed a subcommittee to consider suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee’s agenda in 2012.

The Advisory Committee has received two suggestions that the secrecy provisions in Rule 6(e) be amended to allow for disclosure of grand jury materials under limited circumstances. A group of historians and archivists seeks, in part, an amendment adding records of “historical importance” to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended “to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public.” In addition to these two suggestions, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in “appropriate cases” outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that “[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit.” *Id.*

FEDERAL RULES OF EVIDENCE

Information Items

The Advisory Committee did not hold a spring 2020 meeting, but is continuing its consideration of several issues, including: various alternatives for an amendment to Rule 106 (the rule of completeness); Rule 615 and the problems raised in case law and in practice

regarding the scope of a Rule 615 order; and forensic expert evidence, *Daubert*, and possible amendments to Rule 702. The DOJ has asked that the Rules Committees hold off on amending Rule 702 in order to allow time for the DOJ's new policies regarding forensic expert evidence to take effect. The Advisory Committee will discuss this request along with other issues related to Rule 702 at its upcoming meetings.

OTHER ITEMS

An additional action item before the Committee was a request by the Judiciary Planning Coordinator that the Committee review a draft update to the *Strategic Plan for the Federal Judiciary* for the years 2020-2025. The Committee did so and had no changes to suggest.

The Committee was also updated on the work of two joint subcommittees: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day, such as when the clerk's office closes in the court's respective time zone; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

Finally, the Committee discussed the CARES Act, including its impact on criminal proceedings and its directive to consider the need for court rules to address future emergencies. On March 29, 2020, on the joint recommendation of the chairs of this Committee and the Committee on Court Administration and Case Management, the Judicial Conference found that emergency conditions due to the national emergency declared by the President under the National Emergencies Act, 50 U.S.C. §§ 1601-1651, with respect to the COVID-19 pandemic will materially affect the functioning of the federal courts. Under § 15002(b) of the CARES Act,

this finding allows courts, under certain circumstances, to temporarily authorize the use of video or telephone conferencing for certain criminal proceedings.

Section 15002(b)(6) of the CARES Act directs the Judicial Conference to develop measures for the courts to address future emergencies. In response to that directive, the Committee heard reports on the subcommittees formed by each advisory committee to consider possible rules amendments that would provide for procedures during future emergencies. As a starting point, the advisory committees solicited public comments on challenges encountered during the COVID-19 pandemic in state and federal courts from lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. Over 60 substantive comments were received. The Standing Committee asked each advisory committee to identify rules that should be amended to account for emergency situations and to develop discussion drafts of proposed amendments at the committees' fall meetings for consideration by the Standing Committee at its January 2021 meeting.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	Carolyn B. Kuhl
Daniel C. Girard	Patricia A. Millett
Robert J. Giuffra Jr.	Gene E.K. Pratter
Frank M. Hull	Jeffrey A. Rosen
William J. Kayatta Jr.	Kosta Stojilkovic
Peter D. Keisler	Jennifer G. Zippis

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TAB 3

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NEWLY EFFECTIVE AMENDMENTS TO THE FEDERAL RULES

Effective December 1, 2019

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2019)
- Approved by Judicial Conference (Sept 2018) and transmitted to Supreme Court (Oct 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changed the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 amended to change the disclosure requirements, and Rules 28 and 32 amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in amended Rule 26.1.	
AP 25(d)(1)	Eliminated unnecessary proofs of service in light of electronic filing.	
AP 5.21, 26, 32, 39	Technical amendment that removed the term "proof of service."	AP 25
BK 9036	Amended to allow the clerk or any other person to notice or serve registered users by use of the court's electronic filing system and to serve or notice other persons by electronic means that the person consented to in writing.	
BK 4001	Amended to add subdivision (c) governing the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	Amended subsection (b) to track language of subsection (a) and clarified the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	Amended to add subdivision (h) providing a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	New rule regarding pretrial discovery and disclosure. Subsection (a) requires that, no more than 14 days after the arraignment, the attorneys are to confer and agree on the timing and procedures for disclosure in every case. Subsection (b) emphasizes that the parties may seek a determination or modification from the court to facilitate preparation for trial.	
EV 807	Residual exception to the hearsay rule; clarifies the standard of trustworthiness.	
2254 R 5	Makes clear that petitioner has an absolute right to file a reply.	
2255 R 5	Makes clear that movant has an absolute right to file a reply.	

INTERIM BANKRUPTCY RULES

Effective February 19, 2020

The Interim Rules listed below were published for comment in the fall of 2019 outside the normal REA process and approved by the Judicial Conference for distribution to Bankruptcy Courts to be adopted as local rules to conform procedure to changes in the Bankruptcy Code – adding a subchapter V to chapter 11 – made by the Small Business Reorganization Act of 2019

Rule	Summary of Proposal	Related or Coordinated Amendments
BK 1007	The amendments exclude a small business debtor in subchapter V case from the requirements of the rule.	
BK 1020	The amendments require a small business debtor electing to proceed on the subchapter V to state its intention on the bankruptcy petition or within 14 days after the order for relief is entered.	
BK 2009	2009(a) and (b) are amended to exclude subchapter V debtors and 2009(c) is amended to add subchapter V debtors.	
BK 2012	2012(a) is amended to include chapter V cases in which the debtor is removed as the debtor in possession.	
BK 2015	The rule is revised to describe the duties of a debtor in possession, the trustee, and the debtor in a subchapter V case.	
BK 3010	The rule is amended to include subchapter V cases.	
BK 3011	The rule is amended to include subchapter V cases.	
BK 3014	The rule is amended to provide a deadline for making an election under 1111(b) of the Bankruptcy Code in a subchapter V case.	
BK 3016	The rule is amended to reflect that a disclosure statement is generally not required in a subchapter V case, and that official forms are available for a reorganization plan and - if required by the court - a disclosure statement.	
BK 3017.1	The rule is amended to apply to subchapter V cases where the court has ordered that the provisions of 1125 of the Bankruptcy Code applies.	
BK 3017.2	This is a new rule that fixes dates in subchapter V cases where there is no disclosure statement.	
BK 3018	The rule is amended to take account of the court's authority to set times under Rules 3017.1 and 3017.2 in small business cases and subchapter V cases.	
BK 3019	Subdivision (c) is added to the rule to govern requests to modify a plan after confirmation in a subchapter V case under 1193(b) or (c) of the Bankruptcy Code.	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2020

Current Step in REA Process:

- Adopted by Supreme Court and transmitted to Congress (Apr 2020)

REA History:

- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)
- Approved by Standing Committee (June 2019)
- Approved by relevant advisory committee (Spring 2019)
- Published for public comment (unless otherwise noted, Aug 2018-Feb 2019)
- Approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would: (1) require giving notice of the entry of an order confirming a chapter 13 plan; (2) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2021

Current Step in REA Process:

- Approved by Judicial Conference (Sept 2020)

REA History:

- Approved by Standing Committee (June 2020)
- Approved by relevant advisory committee (Apr/May 2020)
- Published for public comment (Aug 2019-Feb 2020)
- Unless otherwise noted, approved for publication (June 2019)

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

PENDING AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
AP 25	The proposed amendment to Rule 25 extends the privacy protections afforded in Social Security benefit cases to Railroad Retirement Act benefit cases.	
BK 3002	The proposed amendment would allow an extension of time to file proofs of claim for both domestic and foreign creditors if “the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.”	
BK 5005	The proposed changes would allow papers to be transmitted to the U.S. trustee by electronic means rather than by mail, and would eliminate the requirement that the filed statement evidencing transmittal be verified.	
BK 7004	The proposed amendments add a new Rule 7004(i) clarifying that service can be made under Rule 7004(b)(3) or Rule 7004(h) by position or title rather than specific name and, if the recipient is named, that the name need not be correct if service is made to the proper address and position or title.	
BK 8023	The proposed amendments conform the rule to pending amendments to Appellate Rule 42(b) that would make dismissal of an appeal mandatory upon agreement by the parties.	AP 42(b)
BK Restyled Rules (Parts I & II)	The proposed rules, approximately 1/3 of current bankruptcy rules, are restyled to provide greater clarity, consistency, and conciseness without changing practice and procedure. The remaining bankruptcy rules will be similarly restyled and published for comment in 2021 and 2022, with the full set of restyled rules expected to go into effect no earlier than December 1, 2024.	
SBRA Rules (BK 1007, 1020, 2009, 2012, 2015, 3010, 3011, 3014, 3016, 3017.1, 3017.2 (new), 3018, 3019)	The SBRA Rules would make necessary rule changes in response to the Small Business Reorganization Act of 2019. The SBRA Rules are based on Interim Bankruptcy Rules adopted by the courts as local rules in February 2020 in order to implement the SBRA which when into effect February 19, 2020.	
SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A)	The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment.	

NEWLY EFFECTIVE AMENDMENTS TO THE FEDERAL RULES

Effective (no earlier than) December 1, 2022

Current Step in REA Process:

- Published for public comment (Aug 2020-Feb 2021)

Rule	Summary of Proposal	Related or Coordinated Amendments
CV 12	The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf.	
CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g)	Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).	
CR 16	Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule.	

TAB 4

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**Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)**

Name	Sponsor/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	H.R. 76 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Bill Text: https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf Summary (authored by CRS): This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. Report: None.	<ul style="list-style-type: none"> 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	H.R. 77 <i>Sponsor:</i> Biggs (R-AZ) <i>Co-Sponsors:</i> Meadows (R-NC) Rose (R-TN) Roy (R-TX) Wright (R-TX)	CV	Bill Text: https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. Report: None.	<ul style="list-style-type: none"> 1/3/19: introduced in the House; referred to Judiciary Committee; Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security 2/25/20: hearing held by Senate Judiciary Committee on same issue ("Rule by District Judge: The Challenges of Universal Injunctions")
Litigation Funding Transparency Act of 2019	S. 471 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	Bill Text: https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf Summary: Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." Report: None.	<ul style="list-style-type: none"> 2/13/19: introduced in the Senate; referred to Judiciary Committee

**Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)**

<p>Due Process Protections Act</p>	<p>S. 1380</p> <p><i>Sponsor:</i> Sullivan (R-AK)</p> <p><i>Co-Sponsors:</i> Booker (D-NJ) Cornyn (R-TX) Durbin (D-IL) Lee (R-UT) Paul (R-KY) Whitehouse (D-RI)</p>	<p>CR 5</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1380/BILLS-116s1380es.pdf</p> <p>Summary: This bill would amend Criminal Rule 5 (Initial Appearance) by:</p> <ol style="list-style-type: none"> 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: “(f) Reminder Of Prosecutorial Obligation. -- (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.” <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/8/19: introduced in the Senate; referred to Judiciary Committee • 5/20/20: reported out of Judiciary Committee and passed Senate without amendment by unanimous consent • 5/22/20: received in the House • 5/28/20: letter from Rules Committee Chairs sent to Judiciary Committee Chairman and Ranking Member • 9/21/20: passed House without amendment by voice vote
<p>Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)</p>	<p>S. 1411</p> <p><i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Co-Sponsors:</i> Blumenthal (D-CT) Hirono (D-HI)</p>	<p>AP 29</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf</p> <p>Summary: In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/9/19: introduced in the Senate; referred to Judiciary Committee

**Legislation that Directly or Effectively Amends the Federal Rules
116th Congress
(January 3, 2019 – January 3, 2021)**

	<p>H.R. 3993</p> <p><i>Sponsor:</i> Johnson (D-GA)</p> <p><i>Co-Sponsors:</i> Cohen (D-TN) Lieu (D-CA)</p>	AP 29	Identical to Senate bill (see above)	<ul style="list-style-type: none"> • 7/25/19: introduced in the House; referred to Judiciary Committee • 8/28/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet
Back the Blue Act of 2019	<p>S. 1480</p> <p><i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)</p>	§ 2254 Rule 11	<p>Bill Text: https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf</p> <p>Summary: Section 4 of the bill is titled “Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers.” It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts -- the rule governing certificates of appealability and time to appeal -- by adding the following language to the end of that Rule: “Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code.”</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/15/19: introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 5395</p> <p><i>Sponsor:</i> Bacon (R-NE)</p> <p><i>Co-Sponsors:</i> Cook (R-CA) Graves (R-LA) Johnson (R-OH) Stivers (R-OH)</p>		Identical to Senate bill (see above).	<ul style="list-style-type: none"> • 12/11/19: introduced in House; referred to Judiciary Committee • 1/30/20: Judiciary Committee referred to its Subcommittee on Crime, Terrorism, and Homeland Security

Legislation that Directly or Effectively Amends the Federal Rules

116th Congress

(January 3, 2019 – January 3, 2021)

<p>Justice in Forensic Algorithms Act of 2019</p>	<p>H.R. 4368</p> <p><i>Sponsor:</i> Takano (D-CA)</p> <p><i>Co-Sponsors:</i> Evans (D-PA) Johnson (D-GA)</p>	<p>Bill Text: https://www.congress.gov/116/bills/hr4368/BILLS-116hr4368ih.pdf</p> <p>Summary: The stated purpose of the bill is, in part, “[t]o prohibit the use of trade secrets privileges to prevent defense access to evidence in criminal proceedings”</p> <p>The bill amends the Evidence Rules by adding two new rules and amends Criminal Rule 16(a)(1) by adding a new paragraph (H):</p> <ul style="list-style-type: none"> • Evidence Rule 107. Inadmissibility of Certain Evidence that is the Result of Analysis by Computational Forensic Software. In any criminal case, evidence that is the result of analysis by computational forensic software is admissible only if— <ul style="list-style-type: none"> (1) the computational forensic software used has been submitted to the Computational Forensic Algorithm Testing Program of the Director of the National Institute of Standards and Technology and there have been no material changes to that software since it was last tested; and (2) the developers and users of the computational forensic software agree to waive any and all legal claims against the defense or any member of its team for the purposes of the defense analyzing or testing the computational forensic software. • Evidence Rule 503. Protection of Trade Secrets in a Criminal Proceeding. In any criminal case, trade secrets protections do not apply when defendants would otherwise be entitled to obtain evidence. • Criminal Rule 16(a)(1)(H). Use of Computational Forensic Software. Any results or reports resulting from analysis by computational forensic software shall be provided to the defendant, and the defendant shall be accorded access to an executable copy of the version of the computational forensic software, as well as earlier versions of the software, 	<ul style="list-style-type: none"> • 9/17/19: introduced in the House; referred to Judiciary Committee and the Committee on Science, Space, and Technology • 10/2/19: Judiciary Committee referred to its Subcommittee on Courts, Intellectual Property, and the Internet
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Legislation that Directly or Effectively Amends the Federal Rules

116th Congress

(January 3, 2019 – January 3, 2021)

			<p>necessary instructions for use and interpretation of the results, and relevant files and data, used for analysis in the case and suitable for testing purposes. Such a report on the results shall include—</p> <ul style="list-style-type: none">(i) the name of the company that developed the software;(ii) the name of the lab where test was run;(iii) the version of the software that was used;(iv) the dates of the most recent changes to the software and record of changes made, including any bugs found in the software and what was done to address those bugs;(v) documentation of procedures followed based on procedures outlined in internal validation;(vi) documentation of conditions under which software was used relative to the conditions under which software was tested; and(vii) any other information specified by the Director of the National Institute of Standards and Technology in the Computational Forensic Algorithm Standards.	
			<p>Report: None.</p>	

Legislation that Directly or Effectively Amends the Federal Rules

116th Congress

(January 3, 2019 – January 3, 2021)

<p>CARES Act</p>	<p>H.R. 748</p>	<p>CR (multiple)</p>	<p>Bill Text (as enrolled): https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf</p> <p>Summary: Section 15002 applies to the federal judiciary. Subsection (b)(1)(5) authorizes videoconferencing for criminal proceedings if determined that emergency conditions due to COVID-19 will materially affect court. Proceedings include detention hearings, initial appearances, preliminary hearings, waivers of indictments, arraignments, revocation proceedings, felony pleas and sentencing.</p> <p>Subsection (b)(6) directs the Judicial Conference and the Supreme Court to consider rules amendments that address emergency measures courts can take when an emergency is declared under the National Emergencies Act.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/27/20: became Public Law No. 116-136 • Spring 2020: Advisory Committees form subcommittees to study rules amendments to address emergency situations
<p>Abuse of the Pardon Prevention Act</p>	<p>H.R. 7694</p> <p><i>Sponsor:</i> Schiff (D-CA)</p> <p><i>Co-Sponsor:</i> Nadler (D-NY)</p>	<p>CR 6</p>	<p>Bill text: https://www.congress.gov/116/bills/hr7694/BILLS-116hr7694ih.pdf</p> <p>Summary: Under Section 2, subsection (a), when the President grants an individual a pardon for a covered offense, within 30 days the Attorney General must provide Congress with “all materials obtained or prepared by the prosecution team, including the Attorney General and any United States Attorney, and all materials obtained or prepared by any investigative agency of the United States government, relating to the offense for which the individual was so pardoned.” Subsection (b) states that “Rule 6(e) [which addresses recording and disclosing of grand jury proceedings] of the Federal Rules of Criminal Procedure may not be construed to prohibit the disclosure of information required by subsection (a) of this section.”</p> <p>Report: None.</p> <p>Related Bills: H.R. 1627 (introduced 4/12/19) and S. 2090 (introduced 7/11/19)</p>	<ul style="list-style-type: none"> • 7/21/20: introduced in House; referred to Judiciary Committee • 7/23/20: mark-up session held; reported out of Judiciary Committee

TAB 5

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE
APRIL 1, 2020

1 The Civil Rules Advisory Committee met by Zoom teleconference
2 on April 1, 2020. The meeting was originally noticed for an in-
3 person meeting in West Palm Beach, Florida, but was renoticed in
4 the Federal Register for a remote meeting by Zoom, with the
5 opportunity for public access by audio feed. Participants included
6 Judge John D. Bates, Committee Chair, and Committee members Judge
7 Jennifer C. Boal; Judge Robert Michael Dow, Jr.; Judge Joan N.
8 Ericksen; Hon. Joseph H. Hunt; Judge Kent A. Jordan; Justice Thomas
9 R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L.
10 Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.;
11 Professor A. Benjamin Spencer; and Helen E. Witt, Esq. Professor
12 Edward H. Cooper participated as Reporter, and Professor Richard L.
13 Marcus participated as Associate Reporter. Judge David G. Campbell,
14 Chair; Catherine T. Struve, Reporter; Professor Daniel R.
15 Coquillet, Consultant; and Peter D. Keisler, Esq., represented
16 the Standing Committee. Judge A. Benjamin Goldgar participated as
17 liaison from the Bankruptcy Rules Committee. The Department of
18 Justice was further represented by Joshua E. Gardner, Esq. Rebecca
19 A. Womeldorf, Esq., Julie Wilson, Esq., Allison A. Bruff, Esq., S.
20 Scott Myers, Esq., and Bridget M. Healy, Esq., represented the
21 Administrative Office. Zachary Prorianda, Esq., staff of the
22 Committee on Court Administration and Case Management, also
23 attended. Dr. Emery G. Lee, Tim Reagan, Esq., and Bridget M. Healy,
24 Esq., represented the Federal Judicial Center. Seth Fortenberry,
25 Supreme Court fellow, also attended.

26 Observers are identified in the attached Zoom attendance list.

27 Judge Bates noted that more than fifty participants and
28 observers had joined the new adventure of meeting by Zoom, "a
29 platform made popular in these trying times." He expressed thanks
30 to the Administrative Office staff for the untiring efforts that
31 had set up the meeting and provided practice sessions to facilitate
32 easy participation by Committee members. He noted that Brittany
33 Bunting, a new member of the Administrative Office staff, had lead
34 responsibility for planning this meeting, and will be planning
35 future meetings.

36 Judge Bates also extended a welcome to Susan Y. Soong, Clerk
37 for the Northern District of California, Laura Briggs's successor
38 as clerk representative. She was unable to participate in this
39 meeting because of emergency demands at her court.

40 Judge Bates also noted the conclusion of rules committee terms
41 for several veterans. Judge Campbell served for many years as a
42 member and then Chair of the Civil Rules Committee, and this year
43 will conclude four years as Chair of the Standing Committee. "No
44 individual has had a greater impact on the Rules Enabling Act

45 process in the last 15 to 20 years." Judge Dow is completing his
46 second term. His work as chair of the class-action and then MDL
47 Subcommittees has made him perhaps the second most influential
48 member in this year's graduating class. Virginia Seitz, who has
49 served on several subcommittees and worked with the pilot projects
50 has been an essential member. Judge Goldgar, who is completing his
51 second term as a member of the Bankruptcy Rules Committee, has
52 helped with many aspects of the Civil Rules work, including e-
53 filing.

54 Finally, Judge Bates said that his term as Committee Chair is
55 concluding this year. He has greatly enjoyed working with all
56 members of the Committee and support staff, and will miss the work
57 and engaging company.

58 Judge Bates also noted that draft minutes for the Standing
59 Committee's January meeting are in the agenda materials, and
60 reflect a generally positive reaction to the prospect that this
61 Committee may advance a recommendation to publish for comment a set
62 of Supplemental Rules for Social Security Review Actions Under 42
63 U.S.C. § 405(g). The Judicial Conference held its March meeting by
64 remote means of communication, with no Civil Rules business on the
65 agenda.

66 Looking forward to new Civil Rules, amendments of Rule
67 30(b)(6) have been advanced from the Judicial Conference to the
68 Supreme Court. If the Court prescribes them and Congress does not
69 act, they will go into effect on December 1, 2020. Amendments of
70 Rule 7.1 are on today's agenda. If the Committee recommends them
71 for adoption and the Standing Committee approves, they will be on
72 track to take effect no earlier than December 1, 2021.

73 *October 2019 Minutes*

74 The draft Minutes for the October 29, 2019 Committee meeting
75 were approved without dissent, subject to correction of
76 typographical and similar errors.

77 *Legislative Report*

78 Judge Bates said that there is not much present action in
79 Congress on bills that would affect the Civil Rules. The CARES Act
80 includes some small funding for the judiciary. It also includes
81 provisions for video teleconferencing for some proceedings that
82 were much improved with the help of Judge Campbell and the Criminal
83 Rules Committee and its Reporters.

84 Judge Campbell prefaced his report on the CARES Act by saying
85 that he will miss participating in the Civil Rules work, recalling

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86 the observation made by Peter Keisler that although there are term
87 limits on committee membership, there are no limits on friendship.
88 He feels pride for all Committee members.

89 Involvement with the CARES Act began two weeks ago when the
90 Southern District of New York, and particularly Judge Furman – a
91 member of the Standing Committee – became concerned about how the
92 court could function in a time of pandemic. The CARES Act in its
93 original form would have inserted direct amendments of the Criminal
94 Rules that had no sunset provisions. The Criminal Rules Committee
95 worked with Judge Campbell, Judge Furman, and Judge Bates to
96 formulate statutory provisions, not Rules amendments, for video and
97 teleconferencing in twelve categories of criminal proceedings.
98 These provisions include "sunset" clauses. The provisions take
99 effect upon findings made by the Judicial Conference, and then take
100 effect in a particular district for ten categories of proceedings
101 on authorization of the chief judge. They take effect for felony
102 pleas and sentencing only if the chief judge finds a threat to
103 public health and safety, and the presiding judge finds that
104 sentencing cannot be deferred without injustice. An example of
105 injustice would be the prospect of a sentence to time served that
106 would result in immediate release. Consent of the defendant is
107 required for all twelve categories. Initial reports are that
108 defense counsel around the country are consenting. The Act also
109 directs the Judicial Conference and the Supreme Court to consider
110 rules provisions that would enable similar emergency measures in
111 the future.

112 Judge Bates said that the Civil Rules Committees and others
113 will be considering rules that would authorize emergency measures.
114 He will appoint a subcommittee, looking for progress that is
115 expedited by extending over a period of months, not years.
116 Volunteers are welcome. There will be technology issues, including
117 public access and the presence of a detained defendant.

118 *Social Security Disability Review Subcommittee*

119 Judge Bates introduced the report of the Social Security
120 Disability Review Subcommittee, noting that it had been working for
121 nearly three years with Judge Lioi as chair. They have produced a
122 modest but thoughtful draft of Supplemental Rules. The question at
123 this meeting is whether to recommend publication of these rules for
124 comment. The risks and problems tend to collect around issues that
125 are characterized as transsubstantivity. "This is not an easy
126 question. The views of the players are not uniform." But
127 encouragement may be found in the reactions of several Standing
128 Committee members that favored publication, at least as a means of
129 gathering more information.

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130 Judge Lioi introduced the Subcommittee Report. The
131 Subcommittee has received extensive input from the Social Security
132 Administration, representatives of the Administrative Conference,
133 the National Organization of Social Security Claimants
134 Representatives, the American Association for Justice, magistrate
135 judges and a few district judges, and academics. The Style
136 Consultants have reviewed the current draft.

137 The Subcommittee proceeded cautiously, working to develop
138 neutral rules that will be easy to understand and follow. Rule 1
139 defines the scope of the rules. Rule 2 establishes simplified
140 pleading standards for the complaint. Rule 3 adopts a procedure
141 that replaces Civil Rule 4 service of the summons and complaint
142 with electronic notice from the court. Rule 4 authorizes an answer
143 limited to the administrative record and any affirmative defenses,
144 and describes motion practice. Rule 5 is in many ways the central
145 feature, providing for an appeal-like procedure that presents the
146 action for decision on the briefs. Rules 6 through 8 address the
147 sequence of the briefs. The Subcommittee deliberately chose to omit
148 any page limits for the briefs.

149 The Committee decided at the meeting last October to ask for
150 Standing Committee discussion about the transsubstantivity
151 question. Several members suggested that it would be useful to
152 publish proposed rules as a means of gathering additional
153 information.

154 The Subcommittee decided that the transsubstantivity question
155 cannot be avoided by developing a set of rules for all
156 administrative review actions in the district courts. There is too
157 much variety of agencies and substantive law, and too many
158 different mixtures of reliance on an administrative record with
159 independent court proceedings. But the Committee Note for the
160 proposed rules observes that, apart from the Rule 3 provision for
161 electronic notice to SSA, a court might find it useful to adapt the
162 social security review practice to other administrative review
163 proceedings.

164 The Rules draft is nearly ready for publication. A few minor
165 drafting issues remain, and will be addressed by the Subcommittee.

166 The reasons for moving forward to publication should be
167 considered alongside the reasons for abandoning the work.

168 Good, nationally uniform rules for social security review
169 cases are intrinsically desirable. The project began with a request
170 addressed by the Administrative Conference of the United States to
171 the Judicial Conference, supported by an extensive empirical study
172 and analysis by Professors Jonah Gelbach and David Marcus. The

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173 Social Security Administration continues to offer strong support,
174 even after its proposed draft rules were ruthlessly revised and
175 trimmed back by the Subcommittee. SSA litigates these actions in
176 all district courts, and encounters difficulties both with attempts
177 to process them through the general Civil Rules and with some of
178 the local practices and local rules that have been adopted to
179 modify or displace the Civil Rules. The draft is neutral as between
180 claimants and SSA. The Department of Justice has developed a model
181 local rule that closely reflects earlier Subcommittee drafts and
182 recommends it for adoption by district courts. These review actions
183 are just that – proceedings for review on an administrative record
184 that should be recognized and treated as appeals, not original
185 trial proceedings. Judges who have reviewed successive Subcommittee
186 drafts have been receptive; some of them already adopt practices
187 closely similar to the draft rules, while others express
188 frustration with the effort to provide review within the framework
189 of the general Civil Rules. The sheer volume of these cases makes
190 it appropriate to adopt substance-specific rules; the common
191 figures are that they number between 17,000 and 18,00 actions a
192 year, accounting for 7% to 8% of the federal civil docket. Finally,
193 publishing the proposals does not commit the rules committees to
194 recommending adoption; it would provide additional information to
195 support the decision whether to recommend adoption.

196 The arguments against advancing to publication begin with the
197 tradition that the Civil Rules should be transsubstantive, designed
198 to apply equally to all actions. One of the concerns that underlie
199 this tradition is that substance-specific rules may favor one
200 identifiable set of interests over competing interests, or at least
201 be perceived in that light. These rules may be perceived in that
202 way, in part because one SSA hope is that the uniform and efficient
203 procedure they embody will provide some measure of relief to an
204 inadequately funded and overworked legal staff. Claimants'
205 representatives express a fear that district and magistrate judges
206 like the particular procedures they have worked out, and will be
207 unhappy and thus less efficient if forced into a uniform national
208 procedure. The affection for local practices, moreover, may present
209 an insurmountable obstacle in some districts that persist in their
210 established habits, ignoring new national rules. And the Department
211 of Justice fears that adopting this set of substance-specific rules
212 will prompt requests by special interest groups for their own
213 favorable sets of rules.

214 One way of framing these competing arguments is to recognize
215 a presumption against substance-specific rules. We have some
216 substance-specific rules now. There is no absolute prohibition. But
217 it is wise to adhere to something of a presumption that can be
218 overcome only by strong reasons for adopting a new set of
219 substance-specific rules. On this approach, the question is whether

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220 the reasons that support a set of supplemental rules for § 405(g)
221 review actions are strong enough to overcome the general
222 presumption as well as the specific negative arguments.

223 This initial presentation was followed by a reminder that the
224 Subcommittee is proposing publication. A potential recommendation
225 to adopt is not yet an issue. Publication will yield additional
226 information on the wisdom of adoption. It is reasonable to be
227 concerned that adding yet another and significant set of substance-
228 specific rules will be seen as a precedent supporting adoption of
229 still other sets under pressure from interest groups. But that
230 concern is offset by the fact that there are other specialized
231 rules, both broad and narrow. In a different direction, it is also
232 wise to remember the prospect that new national rules may not be
233 fully successful in driving out eccentric local practices. At a
234 minimum, local practices are likely to continue to regulate such
235 matters as the length of briefs. And some critics may believe that
236 the rules "were pushed by one side of the 'v,' and were pushed to
237 make life easier for SSA lawyers."

238 General discussion began with a reiteration of the Department
239 of Justice concerns that adoption of these rules would perhaps
240 influence others to seek specialized rules. A close parallel might
241 be found in arguing for rules for all Administrative Procedure Act
242 cases. That could be a real problem. And local rules will persist;
243 concerns about diverse practices will not be fully addressed.
244 Publication, moreover, "implies imprimatur," a thumb pushing the
245 scales toward eventual adoption.

246 Professor Coquilletta said that the Subcommittee has done a
247 great job. "I'm an apostle of transsubstantive rules." There have
248 been a number of efforts to get specialized rules. Fighting them
249 off at times is hard work – pressure in Congress for rules to
250 address perceived problems with "patent troll" litigation provides
251 a recent example. But the Subcommittee draft is really good work,
252 particularly in the choice to frame the rules as a new set of
253 Supplemental Rules, not as rules inserted into the body of general
254 Civil Rules. They are worthy of publication.

255 A committee member expressed continuing concern about
256 departing from transsubstantivity, but suggested that a further
257 articulation of the reasons why the general Civil Rules are not
258 well suited to § 405(g) actions would help. Might the Subcommittee
259 help?

260 Judge Lioi responded that it is significant that the proposal
261 originated in the Administrative Conference, an independent body
262 that has no self-interest in these questions, as well as winning
263 support from SSA.

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264 But it was observed that it may be better not to plead the
265 case in the Committee Note. There is often a temptation to draft a
266 Note as in part a work of advocacy during the publication process,
267 adding provisions that go beyond explaining the purpose and working
268 of new rules provisions. But that temptation is better resisted.
269 Carrying forward words of advocacy may generate a risk of over-
270 eager implementation as litigants and courts adjust to new
271 provisions.

272 It also was observed that many courts process § 405(g) review
273 actions through summary-judgment procedures. That can work well if
274 it means presentation through briefs that, in the manner of point-
275 counterpoint motions for summary judgment, present the positions of
276 the claimant and SSA through competing but specific references to
277 the administrative record. But Rule 56 itself does not fit. It
278 could generate confusion if a party is misdirected by an attempt to
279 follow the inapposite Rule 56(c) procedures for presenting
280 materials for decision. Far worse, it would be flat wrong to invoke
281 the standard for summary judgment, that there is no genuine dispute
282 of material fact. A genuine dispute defeats summary judgment, but
283 mandates affirmance of an SSA decision as supported by substantial
284 evidence on the record. Apart from Rule 56, SSA counts nine
285 districts that insist that the claimant and SSA provide a joint
286 statement of facts to provide a basis for decision. Claimants and
287 SSA alike agree that this procedure is at best a great deal of
288 unnecessary work, and at worst provides an unsatisfactory basis for
289 decision.

290 Another committee member provided a reminder that the summary-
291 judgment procedures of Rule 56 do not work well. And rather than
292 joint statements of fact, some courts demand individual statements
293 of fact in forms that also do not work well.

294 The committee member who asked for further advice found these
295 remarks helpful, but then asked how are § 405(g) review actions
296 different from other administrative proceedings that come to the
297 district courts? The fact that SSA supports the proposal is not of
298 itself sufficient to distinguish § 405(g) actions from other
299 administrative review actions.

300 A committee member responded that it is not only SSA that
301 supports the proposal. The project was initiated by the
302 Administrative Conference, a disinterested and neutral body. More
303 importantly, half of his court's docket is comprised of
304 administrative review actions. There is a great variety among those
305 cases, often involving specific substantive statutes. There are big
306 cases and small cases. There are cases that require something more
307 for decision than the administrative record. The Freedom of
308 Information Act is a source of many cases that are largely

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309 standardized in some dimensions, but that require processing before
310 they are ready for decision. A general rule for all administrative
311 review actions in the district courts "would be a big undertaking."

312 A different committee member recalled the volume of these
313 cases, rising to 17,000 or 18,000 a year and accounting for 7% to
314 8% of the federal civil docket. Can the fear of stimulating other
315 proposals for substance-specific rules be reduced by the lack of
316 any other category of administrative decisions that mount to like
317 numbers?

318 The first response was that the Department of Justice concern
319 is not limited to special rules for specific categories of
320 administrative review. It extends to all types of civil actions.
321 More narrowly, the Subcommittee considered this question but was
322 unable to identify any category of administrative review actions
323 with anything like comparable numbers. And reviewing the
324 Administrative Office annual accounting of the types of cases that
325 fill district-court dockets suggests that there is no room left for
326 anything like comparable numbers of any particular category of
327 administrative review actions.

328 Concerns returned about the reactions of some claimants'
329 attorneys who fear that the rules favor SSA. What basis is there
330 for these concerns? Judge Lioi responded that there is no basis.
331 The reaction seems to be based on no more than suspicions based on
332 the long and very detailed draft rules that SSA proposed at the
333 beginning of the project. Some provisions drew particular ire, such
334 as one that limited a claimant's brief to fifteen pages. Another
335 example was a proposed rule for determining awards of attorney fees
336 for services in the district court. The rule was long and complex,
337 addressing many details in ways that suggested an attempt to
338 resolve disputed matters by rule provisions that could be adopted,
339 if at all, only after deep inquiries into matters specific to
340 social security review actions. The Subcommittee has pared away all
341 of the complexities, leaving a compact set of rules that establish
342 efficient procedures for the core of an appellate review process.
343 All sides, claimants, SSA, and the courts will benefit from the
344 efficiencies.

345 Similar observations followed. There is not much more to
346 explain such suspicions as persist. The fact that SSA is pushing
347 the project makes some claimants reluctant, fearing that somehow
348 the rules will confer unintended benefits on SSA. These fears may
349 draw in part from the fact that one of SSA's hopes is that SSA will
350 achieve some efficiencies in the staff attorney resources devoted
351 to complying with the wide variety of local procedures.

352 Another committee member agreed that increased efficiency

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353 should not disadvantage claimants. It will work to the advantage of
354 all sides.

355 Discussion turned to more specific questions.

356 Rule 1(a) defines the scope of the supplemental rules. They
357 apply to a § 405(g) action "that presents only an individual
358 claim." An action that extends beyond this bare model falls outside
359 the supplemental rules and is governed in all matters by the
360 ordinary Civil Rules. But are there cases that present only an
361 individual claim where this is not the right model for the
362 procedure? A plaintiff is allowed to plead more than the bare bones
363 elements that identify the claimant and SSA proceeding. But may
364 there be a need for discovery? Rule 1(b) is intended to invoke all
365 of the Civil Rules, including discovery. Discovery is not
366 inconsistent with the provisions for pleading, motions, notice of
367 the action to the Commissioner, or presentation on the briefs. It
368 was suggested that the Committee Note should be expanded to explain
369 that discovery is available if needed, perhaps as an addition to
370 the paragraph that notes that the Civil Rules continue to apply.

371 Rule 1(b) says that the Civil Rules "also apply to a
372 proceeding under these rules, except to the extent that they are
373 inconsistent with these rules." Why does it say "also," and why
374 does the Committee note say that the Civil Rules "continue" to
375 apply? Why not just say that they apply? The wording of Rule 1(b)
376 was taken directly from Supplemental Admiralty Rule A(2), one of
377 the Supplemental Rules that has benefited from the style process
378 when it was amended. It has seemed appropriate to borrow this
379 language for a new set of supplemental rules; the different formula
380 in Civil Rule 71.1 – "except as this rule provides otherwise" –
381 might have been chosen if the social security rules were instead
382 framed as new Civil Rules. "also" will carry forward.

383 The question was renewed whether the provision of proposed
384 Rule 1(b) that the Civil Rules also apply except to the extent that
385 they are inconsistent with the Supplemental Rules permits resort to
386 the discovery rules? The answer was that discovery is almost never
387 used in § 405(g) actions. If the record is insufficient, the cure
388 is remand to SSA for further administrative proceedings, not adding
389 to the record in the district court. Remands, indeed, are quite
390 common. The Gelbach & Marcus study found wide variations in the
391 remand rate from one district to another, ranging from a low of
392 around 20% in some districts to a high of around 70% in some. But
393 discovery may be appropriate in some situations, and is permitted
394 under the general Civil Rules when not inconsistent with
395 administrative review practices. Examples that have been noted in
396 Subcommittee discussions include ex parte communications with an
397 administrative law judge, and one shocking example of routine

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398 bribery of an administrative law judge on a vast scale. Another
399 concern is that the record filed by the SSA at times is not
400 complete – an example often offered is failure to include materials
401 excluded from evidence by the administrative law judge. Discovery
402 may be necessary to compile a complete record. It was agreed that
403 the Subcommittee should consider adding to the Committee Note a
404 brief observation about the availability of discovery.

405 A second question asked why Rule 2.2(b) permits a plaintiff to
406 add to the required elements of the complaint "a short and plain
407 statement of the grounds for review." This formula tracks the
408 familiar language of Rule 8(a)(2), but substitutes "review" for
409 "relief." "[R]eview" was chosen because it emphasizes the appellate
410 character of a § 405(g) action, as compared to an action that seeks
411 independent adjudication on the merits including a remedy that at
412 times may be determined by a specific formula but often is more
413 open-ended than a determination of social security benefits. But
414 the reference to "review" might lead some readers to mistake this
415 as a provision for more elaborate pleading of jurisdiction. The
416 Committee agreed to change "review" to "relief."

417 A related question addressed the structure of Rule 2(b)(1). It
418 is divided as first (A), a statement that the action is brought
419 under § 405(g). That corresponds to a Rule 8(a)(1) statement of the
420 grounds for the court's jurisdiction. Then come (B)(i) and (ii),
421 identifying the person for whom benefits are claimed and the person
422 on whose wage record benefits are claimed. That corresponds to a
423 Rule 8(a)(2) statement of the grounds for relief. (C) comes last,
424 stating the type of benefits claimed, corresponding to a Rule
425 8(a)(3) demand for the relief sought. The correspondence of this
426 three subparagraph structure with the three-paragraph structure of
427 Rule 8(a) seemed an attractive contrast to remind the plaintiff of
428 both the familiar structure and the simplified requirements of Rule
429 2. But a few words could be saved by eliminating the items and
430 establishing a four-subparagraph structure, a change approved by
431 the Committee:

- 432 (1) The complaint must state:
433 (A) ~~state~~ that the action is brought under § 405(g) and
434 identify the final decision to be reviewed;
435 (B) ~~state~~ (i) the name, the county of residence, and the
436 last four digits of the social security number of
437 the person for whom benefits are claimed, ~~and~~;
438 (C) (ii) the name and last four digits of the social
439 security number of the person on whose wage record
440 benefits are claimed; and
441 (D) ~~state~~ the type of benefits claimed.

442 Rule 3 provides that the court must send electronic notice of

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443 the action to the Commissioner "and to the United States Attorney
444 for the district [in which the action is filed]." The final words
445 are set off by brackets to indicate that they are unnecessary – no
446 one would expect that the court would send notice to the United
447 States Attorney for a different district. But they were included to
448 see whether some observers would think them necessary. They will be
449 carried forward in brackets.

450 Brackets also were suggested to set off a new sentence that
451 the Subcommittee recently added to Rule 3: "If the complaint was
452 not filed electronically, the court must notify the plaintiff of
453 the transmission." This sentence was added in response to a fear
454 that a pro se plaintiff who is not allowed to file electronically
455 might not get notice that the required transmission actually
456 occurred. Adding this provision to rule text is designed to provoke
457 comment on the practical questions: Will CM/ECF systems
458 automatically generate a prompt for paper notice when the complaint
459 was filed on paper? If not, will clerks' offices develop protocols
460 to make that happen? It was agreed to add brackets as a means of
461 prompting public comment.

462 Another drafting question asked whether Rules 6, 7, and 8
463 should say only that plaintiff or Commissioner must serve a brief?
464 The Appellate Rules call for filing. Although Civil Rule 5(d)(1)(A)
465 directs filing within a reasonable time of any paper after the
466 complaint that must be served, it would be useful to provide a
467 reminder of the filing obligation. One drafting goal for the
468 Supplemental Rules has been to make them accessible to pro se
469 claimants. "File and serve" would help. The Committee adopted this
470 change.

471 Changes in the Committee Note also were explored.

472 The addition of a sentence stating that discovery is available
473 when appropriate is noted above.

474 Rule 5 provides that the action is presented for decision by
475 the parties' briefs. The Committee Note states that reliance on
476 Rule 56 summary-judgment procedures and directing submission of a
477 joint statement of facts are inconsistent with Rule 5. The problem,
478 however, is more general than these two specific and common
479 examples. The problem is that some districts love their own
480 district practices, and may persist in practices that thwart the
481 efficient appeal procedure embodied in Rule 5. The Committee agreed
482 that the Note should be expanded to include a statement that other
483 practices that thwart this appeal procedure also are inconsistent
484 with Rule 5.

485 The Committee voted 11 yes, one no, to recommend to the

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486 Standing Committee that the draft Supplemental Rules, as revised by
487 the Committee, and the Committee Note, also as revised, be
488 published for comment.

489 Judge Bates thanked all participants for a thorough and
490 helpful discussion.

491 *MDL Subcommittee Report*

492 Judge Bates introduced the report of the MDL Subcommittee
493 chaired by Judge Dow. He noted that the Subcommittee had returned
494 the topic of third party litigation financing to the full Committee
495 as a matter for ongoing study, without any immediate plan to
496 develop possible rules. Committee members who come across
497 interesting information should send it to Professor Marcus, who
498 will act as a clearing house and send the information on to the
499 Administrative Office.

500 Of the many items that the Subcommittee has considered, three
501 have become the focus of current deliberations.

502 Early Vetting. One ongoing topic is "early vetting." A recent
503 development has been characterized as an "initial census," a
504 concept that is evolving in practice. Plaintiffs and defendants may
505 hold different views of the purposes of an initial census, but they
506 are cooperating to develop this approach in big MDLs. It might be
507 seen as a device for plaintiffs to get a hand on efficient conduct
508 of the litigation; or as a device for defendants to weed out
509 unsupported claims; or as a means for the court to establish a
510 basis for managing the proceedings, including support for
511 designating leadership. The Subcommittee is exploring how judges
512 use the initial census, how lawyers use it, and whether the initial
513 favorable views endure. Professor Marcus noted that it is not clear
514 how long it will take to find out how this practice works as it
515 evolves.

516 Judge Rosenberg described her early experience with an initial
517 census in the Zantac MDL. Measures taken to combat the current
518 pandemic have forced some delay in organizing the proceedings as
519 communications switch from live hearings to remote means. A 2-page
520 initial census form has been put together that meets with agreement
521 by plaintiffs and a 4-lawyer initial defense firm. Professor Jaime
522 Dodge reports that the lawyers have worked well together. By April
523 30 the vendor will report on everything in the system. The initial
524 census form must be filled out for every case that has been filed.
525 All lawyers who apply for leadership positions must also fill out
526 census forms for cases not yet filed. That will help in managing
527 the proceedings, will provide a jump-start for discovery, and will
528 remove some cases. There also is a 5-page initial census "plus"

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529 form that may at least delay the need to follow up with a plaintiff
530 fact sheet process. This form will be due 60 days after appointment
531 of lead counsel, an event that is scheduled for April 30. On this
532 schedule, the time from the census order to receiving the census-
533 plus forms will be 90 days. The information will include how many
534 cases there are and who are prospective defendants, and perhaps
535 supply records. Tolling provisions also are included. The census-
536 plus form will include the case name and number; identify counsel;
537 provide plaintiff's personal information, including Zantac usage
538 information, where the drug was purchased, and the reasons that
539 prompted usage; and what type of cancer is alleged. The form must
540 be certified for truth and accuracy. A place is provided to attach
541 medical documents, or to explain why they are not attached. The
542 order provides that a plaintiff who attaches the documents need not
543 file a plaintiff fact sheet "at this time." The plaintiff must
544 attest to usage and to the injuries suffered.

545 The line between a plaintiff fact sheet and an initial census
546 form with this much detail may be wavering. Plaintiff fact sheets
547 have been tailored to the needs of individual MDLs, and are not
548 uniform. The purpose of the initial census has been quicker
549 development and responses because they seek less information than
550 many plaintiff fact sheets demand.

551 Professor Marcus reflected that this discussion shows how
552 difficult it would be to draft a rule that describes what an
553 initial census should look like. The Subcommittee has learned from
554 many sources, including rigorous research by the Federal Judicial
555 Center, that plaintiff fact sheets commonly are developed through
556 months of negotiation specific to a particular MDL, and seek a lot
557 of information, even though generally they do not include "Lone
558 Pine" orders to produce evidence to support the answers.

559 Judge Dow noted that the impetus is to get a consensus of
560 plaintiffs and defendants on a census form. "Not even plaintiffs
561 want bad cases" - it is not only MDL lead counsel that shun them.
562 Judge Fallon has observed that the first two pages of plaintiff
563 fact sheets are all that are needed to know how to organize an MDL.
564 It remains a question whether the census form should be designed to
565 winnow out unfounded cases as well as to support organization of
566 the proceeding. Further experience may show that initial census
567 practices are indeed desirable. If desirable, it will remain a
568 question whether to attempt to capture the practice in a Civil
569 Rule, or whether to leave it instead to the categories of best
570 practices that are fostered by the JPML, Federal Judicial Center
571 programs for judges, the Manual for Complex Litigation, and like
572 means. Judge Dow and Professor Marcus expressed favorable
573 impressions of what has been heard about initial census
574 developments and surprise at how fast the concept has evolved in

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575 practice.

576 Interlocutory Appeals. Judge Dow began discussion of the
577 Subcommittee's work on interlocutory appeals by expressing thanks
578 to the JPML and the FJC for providing useful data. It is difficult
579 to get full data on experience with interlocutory appeals and
580 attempted interlocutory appeals in MDL proceedings. And it is
581 likely impossible to develop reliable data on the phenomenon
582 described by lawyers who report that they do not even attempt to
583 win certification for what would be useful interlocutory appeals
584 because they fear antagonizing the MDL judge.

585 The inquiry has been narrowed. At the beginning, defendants
586 argued that appeals should be made available as a matter of right
587 from specified categories of orders. The questions that remain are
588 whether the MDL judge should have a "veto" by refusing to certify
589 an interlocutory appeal, or whether the judge should be either
590 permitted or required to offer advice to the court of appeals but
591 not to veto an attempted appeal; whether any new appeal rule should
592 be available in all MDLs, or only in a specified subset; whether
593 there is an advantage in developing new criteria for MDL appeals
594 that supplant the three criteria specified in 28 U.S.C. § 1292(b);
595 and whether there should be some direction that the court of
596 appeals must promptly decide any accepted appeal to address the
597 risk that substantial delay on appeal will disrupt ongoing progress
598 in the MDL court.

599 The Subcommittee has heard about appeal opportunities from
600 lawyers involved in "mega-MDLs." They remain divided. Defendants
601 insist there is a great need for immediate appeal on questions that
602 may resolve central issues that either simplify or even conclude
603 the proceedings. Plaintiffs respond that § 1292(b) appeals are
604 available, and that MDL judges recognize the need to apply the §
605 1292(b) criteria in light of the needs of complex MDL proceedings.
606 Experience shows that most orders reviewed on interlocutory appeal
607 are affirmed, as in other § 1292(b) appeals, and that § 1292(b)
608 appeals generally inflict long delays on the proceedings.

609 These questions were reviewed by suggesting that a central
610 question is whether to adopt the model of Civil Rule 23(f), which
611 provides for interlocutory appeal in the sole discretion of the
612 court of appeals. Rule 23(f) is focused on a narrowly defined
613 category of orders that grant or deny class certification. It would
614 be difficult, and probably counterproductive, to attempt to
615 identify categories of orders that alone are eligible for a new MDL
616 appeal rule. Still, placing sole discretion in the court of appeals
617 might reduce the reluctance of lawyers to offend the MDL judge by
618 asking for permission to appeal. If the MDL judge retains power to
619 veto an appeal, it remains possible that some help would be

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620 provided by establishing a new MDL-specific criterion for
621 certifying an appeal. Some judges may be deterred from certifying
622 an appeal by generally narrow circuit interpretations of the
623 criteria that ask for a controlling question of law as to which
624 there is substantial ground for difference of opinion and whose
625 resolution may materially advance ultimate disposition of the
626 litigation. A frequent example has been a Daubert ruling on the
627 admissibility of expert testimony that, if reversed, could
628 terminate the proceedings. Daubert rulings involve application of
629 settled law in the district court's discretion: how is there a
630 controlling question of law with substantial grounds for a
631 difference of opinion? A criterion that asks whether an immediate
632 appeal would advance the purposes of the MDL consolidation might
633 prove liberating. But that is an uncertain prospect. Eliminating
634 the MDL judge veto would at least create a possibility of more
635 frequent appeals. Even then, it will remain important to provide
636 for advice from the MDL judge on the desirability of an immediate
637 appeal, in light of the importance and uncertainty of the issues
638 underlying the challenged order and the impact that an appeal would
639 have on continuing MDL proceedings. The advice could include an
640 observation that an appeal might advance the proceedings if it is
641 promptly decided, but would disrupt the proceedings if much
642 delayed. The burden of providing advice ordinarily should not be
643 great, at least if permission to appeal is sought soon after the
644 ruling is made. And advice that an appeal would thwart orderly
645 progress is likely to defeat permission by the court of appeals in
646 most cases.

647 Judge Bates added that as with other MDL rules questions, the
648 scope of an appeal rule must be decided. An attempt could be made
649 to provide for appeals in some, but not all, MDLs. But it seems
650 likely that any rule would apply to all MDLs, relying on common-
651 sense application. "Changing § 1292(b) is a big step. We have
652 authority under § 1292(e), but we should be cautious." Expansion
653 seems attractive on its face, but careful examination is needed.

654 Judge Bates added that exploration of the appeal question will
655 require an expansion of the Subcommittee's work in gathering
656 information. So far we have heard only from lawyers and judges
657 involved in mass-tort MDLs.

658 A committee member said that delay is a major concern.
659 Plaintiffs are especially worried about delay, and suspect that
660 defendants may appeal for the purpose of winning delay. Some help
661 may be found in the MDL judge's advice about the desirability of an
662 immediate appeal, including the delay factor. "We should look for
663 other creative input."

664 Judge Dow agreed that the Subcommittee hopes for more input.

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665 Professor Dodge has agreed to arrange a conference that will bring
666 together lawyers and judges from MDL proceedings that do not
667 involve mass torts, and will add appellate judges. The conference
668 was scheduled for April 14, but has been postponed. The tentative
669 plan is to hold it in mid-June if travel and general distancing
670 protocols are relaxed soon enough to make final planning possible.
671 A committee member expressed approval of the plan to bring in the
672 perspective of appellate judges.

673 Settlement. Judge Dow began the discussion of settlement by noting
674 that a rule addressing MDL judges' involvement with settlement may
675 well be framed by addressing other issues as well. The origins of
676 this work lie in the protests of many academics that MDL
677 proceedings frequently evolve toward settlement through a process
678 that has the same effect as settlement of a class action but lacks
679 the safeguards that protect class members. In an MDL virtually all
680 plaintiffs are represented by a lawyer, but settlement terms often
681 are negotiated by a subset of plaintiffs' lawyers. The focus is on
682 negotiations by lawyers who have been formally appointed to
683 leadership positions, acting very much as class counsel appointed
684 under Rule 23. Defendants negotiate for terms and practices that
685 will bring "global peace" by winning settlement with at least a
686 very large swath of plaintiffs. Lawyers outside the leadership
687 structure may not fully understand what settlement alternatives may
688 be possible, and may encounter terms that make it difficult to
689 accept the settlement for some or many clients while rejecting it
690 for others.

691 One possibility would be to focus a rule solely on encouraging
692 MDL judges to be involved in settlements. Judicial involvement
693 happens now. Some judges justify their involvement by invoking
694 inherent authority, or by relying on authority implied by the
695 structure and purpose of § 1407 transfer and consolidation. But a
696 Civil Rule could provide a stronger foundation, and could encourage
697 greater involvement.

698 The first question is whether this is a solution in search of
699 a problem. It may be asked why there is any need for judicial
700 involvement when every plaintiff has a lawyer. And if there is a
701 need, it can be addressed, as it often is addressed, by detailed
702 provisions in the order appointing lead counsel. The order may
703 specify which lawyers can negotiate, and on whose behalf they
704 negotiate. But again, an explicit Civil Rule might encourage more
705 frequent use of detailed appointment orders, and perhaps greater
706 detail.

707 The Subcommittee explored these questions in some detail in
708 its March 10 conference call. The gist of the call is set out in
709 the original agenda materials, and detailed notes were circulated

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710 before today's meeting.

711 Judge Bates observed that both the plaintiffs' bar and the
712 defense bar have reported that they do not need help on
713 settlements. They assert that they can work out fair settlements
714 without the supposed help of any rule. MDL judges also report that
715 they do not need the support of any rule. They say they know what
716 to do. A rule would contribute nothing, and might interfere with
717 flexible and creative response to the needs of a particular MDL.
718 Only one or two of them – albeit an especially experienced one or
719 two – think a rule would provide useful guidance and support. But
720 the universe of MDL lawyers has been pretty much a closed club.
721 Deliberate efforts have been made by MDL judges in recent years to
722 increase the diversity of the MDL plaintiffs bar, with some success
723 and the prospect of increasing success. The world of MDL judges
724 also has been something of a closed club, but here too efforts have
725 been made to open the doors, even in the large-scale MDLs. The
726 academics continue to be the primary voices calling for
727 constraining the role of lead counsel by increased judicial
728 involvement.

729 Professor Marcus noted that Professor Burch has been prominent
730 in the ranks of those who protest the closed and cozy social
731 network of insiders who are content with the status quo, both in a
732 recent book and in law review writing.

733 Professor Marcus went on to recall that when the basic form of
734 current Rule 23 was adopted in 1966 there was no considerable
735 discussion of settlement. The rule required judicial approval for
736 settlement of a class action, but said nothing more. In 2003 Rule
737 23(e) expanded the provisions for settlement and Rules 23(g) and
738 (h) were added to address appointment of class counsel and attorney
739 fees. Rule 23(e) was further elaborated by amendments in 2018.

740 Nothing similar to the evolution of Rule 23 has occurred for
741 multidistrict proceedings. The lack of any formal rules most likely
742 stems from the conceptual difference between class actions and MDL
743 consolidations that are resolved without certifying a class. A
744 class-action settlement binds all members who remain in the class
745 at the time the settlement is approved. Settlement terms negotiated
746 by MDL leadership do not bind anyone – even clients of lead counsel
747 must consent to individual settlements. But informal pressures may
748 remain quite direct and powerful. Individually retained plaintiffs'
749 attorneys who are not part of the MDL leadership may feel powerless
750 to resist. And academics fear that leaders are feathering their own
751 nests, perhaps even by negotiating terms more favorable for their
752 own clients than the terms offered to others. Conceptual
753 distinctions may dissolve in the cold bath of reality.

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754 All of that leaves the question whether to attempt to embody
755 in a rule the creative things some judges are doing. How far should
756 judicial authority and responsibility extend? Is a rule helpful?

757 The direct question of settlement leads to other questions.
758 Many practices have grown up over the years since § 1407 was
759 enacted. Appointment of lead counsel and leadership teams has
760 become common, and indeed has roots extending far back before §
761 1407. These orders frequently restrict what individually retained
762 plaintiffs' attorneys (IRPAs) can do in the consolidated
763 proceedings. Appointment orders commonly establish common benefit
764 funds, seeking to compensate leadership for the time and money
765 devoted to conducting the litigation on behalf of all. Common
766 benefit funds usually are fed by "taxes" on the fees nonlead
767 counsel win under contracts with their individual clients. And a
768 court that fears that contract fees are unreasonable in light of
769 the limited effort and risk borne by nonlead counsel, even as
770 reduced by contributions to the common benefit fund, may cap
771 individual attorney fees. These are strong measures. Perhaps it is
772 useful, even important, to provide a secure foundation for these
773 practices in a civil rule.

774 The interdependence of these phenomena suggests that a rule
775 that addresses judicial involvement with settlement might best
776 begin by focusing on the court's role in appointing and supervising
777 lead counsel. The order can establish the roles of lawyers who are
778 in the leadership team and the roles of lawyers who are not. That
779 can include the establishment and terms of common benefit funds. It
780 can include regulation of fees for leadership lawyers and for all
781 other lawyers with cases in the MDL. And it can define roles in
782 negotiating for settlement terms to be extended to any plaintiff
783 that is not a client of a member of the negotiating team.

784 There are many pressure points for the lawyers involved in an
785 MDL. Lead lawyers put up a lot of cash and time. IRPAs want to
786 represent their clients, and may resist both paying a common-
787 benefit tax and having their fees further reduced in an effort to
788 protect against amounts that the court thinks unreasonable in light
789 of the court's perception of the risk and effort involved. As roles
790 become more complicated, and in some measures uncertain, questions
791 of professional responsibility arise that cannot be addressed
792 through the relatively less ambiguous questions that arise from the
793 role of class counsel who represent not only representative class
794 members but the entire class as well. There may be an increased
795 risk of professional liability claims against lead counsel or
796 IRPAs.

797 The March 10 Subcommittee meeting identified six questions
798 that will be a focus of its further work:

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799 (1) Is there a need for rules that formalize well established
800 practices?

801 (2) Do MDL judges refrain from taking steps they think would
802 advance the purposes of the proceeding because of uncertainty about
803 their authority?

804 (3) Is it important that any formal rulemaking would be
805 vigorously opposed by plaintiffs' and defense lawyers, and likely
806 would meet resistance among MDL judges?

807 (4) Can effective rules be crafted that do not improperly
808 interfere with attorney-client relationships?

809 (5) Would a rule that formalizes common benefit funds and
810 perhaps authorizes limitations on attorney fees for individual
811 representation modify substantive rights in ways that § 2072
812 prohibits? The fact that courts do this now, relying on inherent
813 authority and authority implied by § 1407 does not provide a
814 complete answer.

815 (6) Can we be confident that a rule for designating MDL lead
816 counsel would not impede the progress that is being made in
817 diversifying the ranks of lawyers who take on leadership roles?
818 This concern may relate to third-party funding: newcomers to
819 leadership positions may need to rely on outside funding to be able
820 to bear the investment required to support what often are years-
821 long commitments of money and time.

822 This set of questions prompted the observation that a rule
823 could be designed in ways that do not inhibit MDL-specific
824 flexibility and creativity in developing new practices. A rule that
825 firmly establishes the basic authority to do things that now rest
826 on uncertain concepts of inherent and § 1407-implied authority
827 could be authorizing and liberating, not confining. All details
828 would be avoided. Authority to appoint leadership entails authority
829 to define their roles in relation to counsel for other plaintiffs,
830 including their role in negotiating settlement terms to be offered
831 to plaintiffs not directly represented by leadership lawyers; to
832 establish a process for determining lead counsel fees and for
833 funding the fees; and to consider the often complicated ways in
834 which what may be quite limited roles left open for nonlead counsel
835 may bear on the reasonableness of fees charged to individual
836 plaintiffs.

837 A committee member found it striking that all the players,
838 lawyers on all sides and MDL judges, resist the idea of a formal
839 MDL rule. "That should make us very cautious." The idea deserves
840 continuing study, but we should respect the repeated pleas that

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841 formal rules should not interfere with the process by which things
842 are worked out by means that are exported by many practices that
843 keep both lawyers and judges at the leading edge of new and
844 successful practices.

845 A subcommittee member observed that the Subcommittee
846 recognizes that it has heard only from lawyers and judges in mass-
847 tort MDLs. "We want to hear from all the MDL bar." So far, Judge
848 Fallon is the only judge we have heard to say that a rule would be
849 welcome. It will help to hear more from him and from other MDL
850 judges.

851 Another subcommittee member expressed agreement with the MDL
852 judges who believe we do not need formal rules. This question was
853 explored with a number of MDL judges at the annual JPML conference.
854 They agreed unanimously that rules are not needed. The academic
855 concern about representation of plaintiffs whose lawyers are not
856 leaders can be addressed by care in establishing the structure of
857 the leadership. To the extent that the concern is that some
858 plaintiffs are represented by lawyers who are not competent, the
859 concern is common to all litigation, and is not something to be
860 addressed by rules of procedure. The JPML is good at advising MDL
861 judges on how to get non-lead counsel involved. Courts of appeals
862 have blessed what's going on. Oversight of settlement is blessed by
863 § 1407. Some statutes establish additional specific support. And we
864 should be reluctant to have judges step on attorney-client
865 relationships, even in the special structure of MDLs.

866 These views were echoed by another judge. Many of these issues
867 are magnified in MDL proceedings, but are not unique to them.
868 Across all litigation, judges confront questions of how far to
869 become involved in settlement – indeed one of the agenda items for
870 this meeting goes straight to those questions. In a large-scale MDL
871 in his court, his judicial assistant gets calls from plaintiffs
872 whose lawyers have forgotten about them, but clients of those firms
873 probably have the same problems in non-MDL actions. In this MDL he
874 gave notice to the parties of the point at which he would begin
875 remanding cases to the courts where they were filed. The defendants
876 reacted by retaining separate counsel to negotiate individual
877 settlements, a process that has worked well. "Settlements are being
878 reached."

879 Judge Bates agreed that these are difficult issues. And we
880 should remember that many MDLs include actions that were filed as
881 class actions. Settlement negotiations may produce agreement on
882 terms for a class-action settlement that are approved by the court
883 after certifying a class. The protections of Rule 23 are frequently
884 available.

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885 Judge Dow underscored the desire to expand Subcommittee
886 inquiries beyond mass-tort MDLs. His MDL proceedings have involved
887 at most 40 actions, not the thousands or more that are brought
888 together in some mega-MDLs.

889 Judge Dow went on to suggest that the Subcommittee's work has
890 already had an impact on MDL practices without even developing
891 rules proposals. Early vetting practices have evolved, including
892 the recent development of initial census orders. There is more
893 explicit recognition that the MDL context should be taken into
894 account in determining whether an interlocutory order is so
895 important to the further progress of proceedings that it should be
896 certified for appeal under § 1292(b). And the Subcommittee has seen
897 examples of lead-counsel appointment orders that provide excellent
898 models for other proceedings. These can be used to educate other
899 MDL judges. And "of course the in groups do not want to have rules
900 that may disrupt their good thing." The Subcommittee may, in the
901 end, conclude that there is no need to recommend a new Civil Rule.
902 But it will continue to work hard.

903 Judge Bates thanked the Subcommittee for its work, and also
904 thanked the JPML and FJC for contributing to the Subcommittee's
905 work.

906 *Appeals after Rule 42 Consolidation*

907 Judge Bates introduced the report of the joint Appellate-Civil
908 Rules Subcommittee that has been established to study the effects
909 of the decision in *Hall v. Hall*, 138 S.Ct. 1818 (2018). The Court
910 ruled that complete disposition of all claims among all parties in
911 what began life as an independent action is a final judgment that
912 can and must be appealed then even though the action was
913 consolidated under Rule 42 with another action that has not reached
914 final judgment. The Court also suggested that the rules committees
915 could suggest a different rule if this approach causes problems.

916 Judge Rosenberg chairs the Subcommittee. She explained that
917 the Subcommittee or smaller groups have held several calls to get
918 the work started. Dr. Emery Lee is leading a detailed study by the
919 FJC. He has established a data base of all 843,996 civil actions
920 filed in the 94 United States District Courts in the years 2015,
921 2016, and 2017. That count includes actions that have been
922 consolidated in MDL proceedings, but those actions will not be
923 included in counting Rule 42 consolidations. Among the non-MDL
924 proceedings, a total of 20,730 cases have been involved in Rule 42
925 consolidations. The total includes 5,953 "lead" cases; the rest are
926 "membership" cases. They account for 2.5% of the civil-action
927 total, and a greater share of the non-MDL cases. The data show that
928 ten nature-of-suit codes account for 58% of all Rule 42

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929 consolidations. Patent actions alone count for 13%, tracking on
930 down through consumer-credit cases at 3%.

931 The ways in which courts have disposed of the consolidated
932 actions have been counted. Eighty-four percent of the lead cases
933 have terminated in the district court. Thirty-two percent were
934 coded as settled. Another 22% were "other dismissal"; ten percent
935 were "voluntary dismissals," likely for the most part reflecting
936 settlements. Thirteen percent were dismissed on motion. Only 2%
937 were disposed of at trial.

938 The next step will be to determine how to sample this large
939 number of cases for detailed analysis. Some case types might be
940 deliberately under-sampled because they seem less likely to lead to
941 potential *Hall v. Hall* problems. Bankruptcy appeals, for example,
942 accounted for 6% of the cases, but they often involve proceedings
943 distinct from most civil actions and invoke special and more
944 expansive concepts of interlocutory and final-order appeals. The
945 means of disposing of the cases also may be distinguished.
946 Settlements, for example, are less likely to involve final-judgment
947 appeal problems than other dispositions.

948 Once the sample is established, the next steps will be to
949 identify dispositions that may lead to problems in applying the
950 *Hall v. Hall* rule. One problem may be confusion about the time to
951 appeal. Additional problems may be appeals taken at times that
952 disrupt trial-court proceedings or threaten to lead to multiple
953 appeals presenting similar or identical questions to the court of
954 appeals. How often is there a complete disposition of all of one of
955 the original actions in the consolidation without disposing of all
956 the others? How often is an appeal taken at that point? How often
957 is an untimely appeal taken at a later point? If an untimely appeal
958 is attempted, how often is untimeliness noticed and followed by
959 dismissal? And how often is untimeliness disregarded and followed
960 by decision of the appeal?

961 So many cases are involved in the years selected for study
962 that it will not be practicable to extend the study to include
963 actions first filed after the decision in *Hall v. Hall*. But looking
964 to cases filed before then has an advantage because it will include
965 cases filed in every circuit, and thus cases that for appeals
966 decided before *Hall v. Hall* were governed by the *Hall v. Hall* rule
967 in the few circuits that had already established that approach but,
968 in other circuits, were governed by one of the three other
969 approaches that had been adopted by different circuits.

970 The FJC work will proceed apace. The Subcommittee will resume
971 its deliberations when the work has reached a suitable point.

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e-Filing Deadline

973 Judge Bates reminded the Committee that Rule 6(a)(4) defines
974 the end of the last day for computing a time period for electronic
975 filing as midnight in the court's time zone. Identical provisions
976 appear in all but the Evidence Rules. A joint Subcommittee has been
977 established to study the question whether the end of the day might
978 be shortened to the time when the clerk's office closes. The FJC is
979 gathering a great deal of empirical information that bears on this
980 question, including actual filing practices under the current rule;
981 variations in filing times among types of firms, types of
982 litigation, courts, and other dimensions; the hours clerk's offices
983 are open, and the use of drop boxes for after-hours filings; the
984 experience of pro se litigants that are permitted to use e-filing;
985 problems confronting lawyers who file across multiple time zones;
986 and still other questions. "This is a big data project." The
987 Subcommittee will resume active work when the accumulation of data
988 supports further consideration.

989 *Rule 7.1: Intervenor Disclosure and*
990 *Diversity Jurisdiction*
991 *Disclosure*

992 Judge Bates described two proposed amendments to Rule 7.1 that
993 were published for comment in 2019. The questions now are whether
994 they should be recommended for adoption.

995 Intervenor Disclosure: The first amendment would expand present
996 Rule 7.1(a) to require disclosure by any nongovernmental
997 corporation that seeks to intervene on the same terms as the rule
998 requires for a nongovernmental corporate party. This amendment
999 conforms Rule 7.1 to recent similar amendments to Appellate Rule
1000 26.1 and Bankruptcy Rule 8012(a).

1001 Publication of the intervenor amendment drew three comments.
1002 Two expressed approval. The third suggested several expansions of
1003 the present disclosure requirement for parties and intervenors
1004 alike. These changes would require study and then publication for
1005 comment. The question whether disclosure statements should be
1006 expanded to include other information that may bear on recusal has
1007 been explored recently. The MDL Subcommittee has considered
1008 proposals by lawyer groups for disclosure of third-party litigation
1009 financing. Other committees have considered other expansions of
1010 disclosure. These explorations have not led to any recommendations
1011 for amendments.

1012 The Committee unanimously approved a recommendation that the
1013 Standing Committee approve the intervenor disclosure amendment for
1014 adoption.

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1015 Diversity Jurisdiction Disclosure: The second proposed amendment
1016 would add an entirely new provision that applies only in an action
1017 in which jurisdiction is based on diversity under 28 U.S.C. §
1018 1332(a). This provision requires a party to file a disclosure
1019 statement "that names – and identifies the citizenship of – every
1020 individual or entity whose citizenship is attributed to that party
1021 at the time the action is filed."

1022 Diversity disclosure was proposed to meet problems that arise
1023 in satisfying the complete diversity requirement. The problems have
1024 been multiplied by the emergence of limited liability companies as
1025 a common means of organizing business enterprise. The established
1026 rule attributes the citizenship of each owner to the LLC. If an
1027 owner is itself an LLC, the citizenship of all of its members is
1028 likewise attributed to it and through it to the LLC that is a party
1029 to the action. The chain of attribution can reach even higher.
1030 There is a real risk that a diversity-destroying citizenship exists
1031 somewhere. Prompt recognition that there is no diversity
1032 jurisdiction is important. If the case goes through to final
1033 judgment without recognizing the problem, the damage may seem
1034 conceptual, but remains a disruption of the allocation of authority
1035 for adjudicating state-law disputes with the attendant risk of a
1036 non-authoritative interpretation and application of state law. If
1037 the lack of diversity jurisdiction emerges while the action is
1038 still pending, perhaps after heavy investment by the parties and
1039 trial court or even for the first time on appeal, the required
1040 dismissal can impose heavy costs. Many federal judges respond to
1041 this problem now by requiring initial disclosure.

1042 The proposed rule extends beyond LLCs to require disclosure as
1043 to any other "entity" whose citizenship is attributed to a party.
1044 Some of these entities have played familiar roles in determining
1045 diversity for many years, including partnerships, limited
1046 partnerships, some forms of trusts, and the like. Others are more
1047 exotic, and include such vague concepts as "joint ventures" that
1048 may not have existence as an "entity" for any other purpose. What
1049 counts as an "entity" for disclosure is any thing that is not an
1050 individual but that must be examined in determining a party's
1051 citizenship.

1052 Public comments on this proposal were generally favorable. A
1053 substantial share of them observed that actions are often removed
1054 from state courts without adequate inquiry into the full details
1055 required to determine diversity jurisdiction. Some comments offered
1056 anecdotes about the misery created by belated discovery that
1057 diversity does not exist. Many offered an optimistic view that
1058 disclosure will impose only a small burden, a view that may well be
1059 true for most LLCs.

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1060 Other public comments opposed the proposal. Two of these
1061 comments came from groups that have participated frequently and
1062 helpfully in the Committee's work, the American College of Trial
1063 Lawyers and the New York City Bar. Both comments said, in different
1064 ways, that the better solution for LLC diversity problems would be
1065 for the Supreme Court or Congress to treat an LLC in the same way
1066 as a corporation.

1067 Beyond resisting the current attribution rule for LLCs, the
1068 negative comments suggested that expansive disclosure of ownership
1069 interests might prove overwhelming, distracting attention from the
1070 particular parts of the disclosure that should bear on judicial
1071 recusal. Rule 7.1 should continue to be confined to disclosure of
1072 information that bears on recusal. The comments also said that
1073 disclosure can impose heavy burdens of inquiry that should not be
1074 routinely imposed in all cases. The information can be obtained by
1075 targeted discovery in the subset of actions in which a party
1076 challenges diversity or seeks to establish a firm jurisdictional
1077 foundation at the outset. Disclosure also threatens interests in
1078 privacy that often account for establishing an LLC. A variation on
1079 the privacy concern addressed the privacy of "non-citizens."

1080 An added problem was noted. There may be circumstances in
1081 which a party is not able to identify and determine the citizenship
1082 of everyone whose citizenship may be attributed to it. Interests in
1083 some forms of entity may be traded in a market or pass through
1084 other channels that are difficult to trace.

1085 The comments also suggested a problem that may prove more
1086 difficult to resolve than it seems. The published proposal calls
1087 for disclosure of citizenship "at the time the action is filed."
1088 Those words were added to reflect that in most circumstances the
1089 citizenships that establish or defeat diversity jurisdiction are
1090 those set at the time the action is filed. The time of filing
1091 corresponds to that purpose, looking to the time the action is
1092 filed in federal court. If the action is removed from state court,
1093 citizenship is determined at the time the notice of removal is
1094 filed in the district court. These comments suggested this point
1095 should be made clear by adding "at the time the action is filed in,
1096 or removed to, the federal court." The difficulty with adding these
1097 words is that they may distract attention from the need to assess
1098 diversity jurisdiction anew if the parties are changed after the
1099 action is first filed or removed.

1100 Judge Bates followed this introduction by noting that many
1101 federal judges are requiring disclosure now, either on their own or
1102 under local rules. There is no burden in cases that do not involve
1103 attributed citizenships. When there is a burden, it is often
1104 encountered now. Establishing a uniform practice by a national rule

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1105 may not add much burden. And the difficulties that may arise in
1106 rare situations that make it impossible to determine all
1107 attributable citizenships seem likely to be rare enough that they
1108 should not stand in the way of a general rule.

1109 Initial discussion provided support for adding "filed in, or
1110 removed to, the federal court." A complication was noted. 28 U.S.C.
1111 § 1447(e) provides that if after removal a plaintiff seeks to join
1112 a party that would destroy diversity jurisdiction, the court may
1113 deny joinder or may permit joinder and remand to state court. But
1114 requiring disclosure of attributed citizenships at the time of
1115 removal does not stand in the way of this statute. If anything,
1116 implementing the statute is supported by providing better
1117 information to determine whether joinder would destroy diversity.
1118 A related observation suggested that complexities are added by the
1119 need to work through arguments about fraudulent joinder designed to
1120 defeat diversity removal.

1121 One suggestion was to add "at the time the court's
1122 jurisdiction is invoked." Concerns were expressed that litigants
1123 might not understand this. An alternative might be "at the time the
1124 disclosure is made," but that could be a time different from the
1125 controlling date for determining diversity. There are two separate
1126 concepts. One is the date that controls the determination of
1127 diversity, recognizing that some events may change the date –
1128 joining or dropping parties after the day the action is originally
1129 filed or is removed is a clear example. The other is the time for
1130 making the disclosure of citizenships as of the date that controls
1131 the existence or nonexistence of diversity jurisdiction. The time
1132 when the disclosure must be made is governed by Rule 7.1(b). A
1133 party that seeks to add another party has the usual burden of
1134 pleading jurisdiction, but the new party is responsible for making
1135 the diversity disclosure at the time directed by Rule 7.1(b).

1136 Another suggestion was "at the time [or times] relevant to the
1137 determination of the court's jurisdiction." A further variation was
1138 suggested: "at the time the action is filed in or removed to
1139 federal court, or at such other time as may be relevant to
1140 determine the court's jurisdiction." This gives better guidance.
1141 The time of filing in or removing to federal court will control the
1142 vast majority of diversity determinations. In removed cases the
1143 plaintiff who filed in state court will, after removal, become
1144 obliged to disclose attributed citizenships. A disclosure that
1145 defeats diversity may disappoint the removing defendant, and it may
1146 disappoint a plaintiff who would rather have concealed an
1147 attributed citizenship that destroys diversity, but that serves the
1148 need to enforce complete diversity. But another time may become
1149 relevant. It was pointed out that a state-court defendant who is a
1150 co-citizen of a plaintiff at the time the action is filed in state

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1151 court cannot manufacture diversity by establishing a diverse
1152 citizenship and then removing. The lack of diversity is then
1153 established by the time of filing in state court, not the time of
1154 removing to the federal court. The expanded language also conforms
1155 to another rule that permits a federal court to retain an action
1156 that was removed at a time when diversity was defeated by the
1157 citizenship of a party that is dropped from the action after
1158 removal. And, although "such other" often seems vague or
1159 indeterminate, it refers back to an antecedent time in this use and
1160 does not defeat the primacy of the time of original filing or the
1161 time of removal.

1162 The Committee voted to approve the longer version, subject to
1163 a final style determination whether to refer to a "federal" or the
1164 "district" court. The Rules regularly refer to a district court,
1165 but refer to a "federal" court in contexts that embrace both state
1166 and federal courts. Rules 32(a)(8) and 41(a)(1)(B) are examples.
1167 Because Rule 7.1(a)(2) involves a similar emphasis on both state
1168 and federal courts, "federal" seems the appropriate word. The rule
1169 will go forward with "in or removed to federal court, or at such
1170 other time as may be relevant to determine the court's
1171 jurisdiction."

1172 Attention turned to the problem of a party who finds it
1173 difficult or impossible to determine all attributed citizenships.
1174 An initial suggestion was that language should be added to the text
1175 of Rule 7.1(a)(2) to limit the disclosure to information that can
1176 be gathered without undue effort. An alternative suggestion was
1177 that the paragraph in the Committee Note describing the court's
1178 authority to "order otherwise" might be expanded to recognize that
1179 the court can order that a party that has exercised due diligence
1180 to uncover attributed citizenships need do no more. Tangential
1181 support was found in Rule 11(b), which sets a standard of an
1182 inquiry reasonable under the circumstances to support legal
1183 contentions and factual contentions in any paper submitted to the
1184 court. But the standard for avoiding sanctions does not carry
1185 directly over to the obligation that may be placed on a party to
1186 determine its own citizenship. Disclosure may be closer to
1187 discovery of jurisdictional facts, and to invoke the
1188 proportionality standard in Rule 26(b)(1). But that does not answer
1189 what discovery burden is proportional to the need to determine
1190 subject-matter jurisdiction. A judge opposed these suggestions as
1191 inconsistent with the command to insist on complete diversity.
1192 "People ask me all the time to assume jurisdiction because
1193 establishing the actual controlling facts is too difficult." We
1194 should not do anything in the rule that will encourage that
1195 approach. Neither the language of Rule 7.1(a)(2) nor the Committee
1196 Note will be changed on this account.

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1197 Other changes in the rule text were discussed. A motion to
1198 intervene should be brought within diversity disclosure,
1199 remembering the § 1367(b) limits on supplemental jurisdiction for
1200 claims by or against intervenors. So the text will read "a party or
1201 intervenor * * * must file * * * whose citizenship is attributed to
1202 that party or intervenor * * *." The tag line will be changed to
1203 conform: "Parties or Intervenors in a Diversity Case."

1204 The discussion of supplemental jurisdiction raised a question
1205 about Rule 7.1(b), which sets the time for making Rule 7.1(a)
1206 disclosures. Paragraph (b) requires that a disclosure be
1207 supplemented "if any required information changes." A concern was
1208 expressed that it may be important to require a supplemental
1209 diversity disclosure of facts that may defeat supplemental
1210 jurisdiction. Meaningful illustrations proved hard to come by,
1211 however, and this topic was dropped.

1212 Discussion of Rule 7.1(b) did lead to recognition that
1213 bringing intervenors into the text of Rule 7.1(a)(1) requires a
1214 parallel addition at the beginning of Rule 7.1(b): "A party or
1215 intervenor must: (1) file the disclosure statement * * *." The
1216 Committee agreed that this is a technical amendment that can be
1217 recommended for adoption without publication. It is consistent with
1218 what was published and ensures implementation without a technical
1219 gap in Rule 7.1(b).

1220 The Committee Note was discussed. The Federal Magistrate
1221 Judges Association Rules Committee suggested two additions. First,
1222 words would be added to this sentence: "The rule recognizes that
1223 the court may limit the disclosure upon motion of a party * * *." The
1224 purpose is to avoid any implication that the court has an
1225 independent duty to limit disclosure. But a nonparty may wish to
1226 limit disclosure, usually a nonparty whose citizenship is
1227 attributed to a party. And there is no apparent reason to limit the
1228 court's authority to act on its own. An obvious circumstance would
1229 be disclosure by one party of a diversity-destroying citizenship;
1230 the court could readily suspend further disclosures, pending a
1231 determination whether to dismiss the action or instead to allow a
1232 change of parties that might make further disclosures necessary.
1233 The Committee decided not to add these words.

1234 The second suggestion by the magistrate judges was to add
1235 words to ensure that the court may seal the disclosure: "the names
1236 * * * might be protected against disclosure to the public or to
1237 other parties * * *." On balance, this suggestion also was
1238 rejected. It is difficult to imagine circumstances in which a court
1239 might wish to permit disclosure to the public, or even a particular
1240 nonparty member of the public, and at the same time arrange
1241 measures that would prevent the disclosure from leaking back to a

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1242 party. In any event, the general authority to "order otherwise"
1243 does not require this degree of elaboration in the Note.

1244 The Committee Note will be changed to reflect the changes in
1245 the rule text. For Rule 7.1(a)(2) the Note will add "or intervenor"
1246 where appropriate after references to a party's duty to disclose.

1247 The final paragraph of the Committee Note on Rule 7.1(a)(2)
1248 will be expanded to describe the revised rule text that ties what
1249 must be disclosed both to the usual circumstances that determine
1250 diversity at the time of filing in, or removal to, the federal
1251 court and also to the unusual circumstances that may call for
1252 determining diversity at a different time.

1253 And one further paragraph will be added to the Committee Note
1254 to reflect expansion of Rule 7.1(b) to include intervenors as well
1255 as parties in the provisions governing the time to disclose.

1256 The Committee voted to recommend that the Standing Committee
1257 propose adoption of the Rule 7.1 text with the revisions adopted in
1258 this meeting, 10 yes and 1 no. It further agreed to consider the
1259 revisions that will be made in the Committee Note by electronic
1260 exchanges.

1261 *Rule 12(a)(1), (2), and (3): Statutory Times*

1262 Judge Bates described the question whether to recommend
1263 publication for comment of an amendment that would clarify the
1264 relationship between the times to respond set by Rules 12(a)(1),
1265 (2), and (3) and other times that may be set by statute.

1266 The question arises from what may be seen as an ambiguity in
1267 the text of Rule 12(a)(1):

1268 (a) TIME TO SERVE A RESPONSIVE PLEADING.

1269 (1) *In General.* Unless a different time is specified by this
1270 rule or a federal statute, the time for serving a
1271 responsive pleading is as follows * * *.

1272 The exception for times specified by this rule or a federal
1273 statute is not repeated in paragraphs (2) or (3). Paragraph (2)
1274 sets the time to respond at 60 days in an action against the United
1275 States, a United States agency, or a United States officer or
1276 employee sued only in an official capacity. Paragraph (3) sets the
1277 time at 60 days for a United States officer or employee sued in an
1278 individual capacity for an act or omission occurring in connection
1279 with duties performed on the United States' behalf.

1280 The problem called to the Committee's attention by a

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1281 frustrated lawyer is that at least two federal statutes, the
1282 Freedom of Information Act and the Sunshine Act, set a 30-day time
1283 to respond. Paragraph (2) does not seem to recognize the
1284 possibility that a different time is set by these, and perhaps
1285 other, statutes.

1286 It is possible to read the present rule to extend the
1287 "different time" provision from paragraph (1) to paragraphs (2) and
1288 (3). That is not an obvious reading. The Style Consultants agree
1289 that if it had been intended to recognize statutes that set a
1290 different time than paragraphs (2) and (3), the rule would have
1291 been structured differently as presented in the agenda materials:

1292 Unless another time is specified by a federal statute, the
1293 time for serving a responsive pleading is as follows:
1294 (1) * * *.
1295 (2) * * *.
1296 (3) * * *.

1297 The proposed amendment is surely free from ambiguity. It does
1298 present a question whether clarity is appropriate when the
1299 Committee does not yet know of any statute that sets a different
1300 time than the 60 days of paragraph (3) for an action against a
1301 United States employee sued in an individual capacity. But little
1302 harm is done if there is no such statute. At worst, it may
1303 sidetrack some parties into a futile quest for a statute that does
1304 not exist. Most lawyers for an employee sued in an individual
1305 capacity, however, are likely to rest content with any statute that
1306 may bear immediately on the particular claims. And at best, a form
1307 that includes paragraph (3) in the different time provision will
1308 include any statutory time period now on the books or that may be
1309 enacted in the future. There is no reason to wish to supersede
1310 either a present or a future statute.

1311 Discussion began with a report that the Department of Justice
1312 views the proposed amendment as "well intended," but there is no
1313 problem that needs to be addressed. The Department is capable of
1314 meeting deadlines, and of seeking extensions to align the times to
1315 respond when a single case advances claims that are governed by
1316 different times. Amending the rule might imply that the court
1317 should be reluctant to grant an extension even when warranted.

1318 The next comment suggested that the second paragraph of the
1319 draft Committee Note is confusing to anyone who does not understand
1320 the background. It attempts to explain the reason for including
1321 paragraph (3) even though there may not be any statutes that set a
1322 different time to respond when an official is sued in an individual
1323 capacity. But a reader pretty much has to know the answer to
1324 comprehend the explanation. Apart from that, Rule 12(a)(3) applies

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1325 both when the officer or employee is sued only in an individual
1326 capacity and also when sued in both an official and individual
1327 capacity. "only" should be deleted. A response was that this
1328 paragraph could be deleted entirely. The rule text gives a clear
1329 answer if there is a statute setting a different time to respond,
1330 and will not be invoked if there is no such statute.

1331 Two comments suggested that there is no indication that even
1332 paragraph (2) presents a real problem. The question was brought to
1333 the committee by a lawyer who was frustrated by the need to
1334 persuade a court clerk to issue a summons setting out the 30-day
1335 period to respond in the Freedom of Information Act. The problem
1336 was in fact resolved. There is no indication that this problem is
1337 widespread, nor that it cannot be resolved by pointing the clerk to
1338 the statute when it does arise. This is not reason enough to crank
1339 up the Enabling Act process.

1340 The absence of evidence of a practical problem was met by the
1341 reply that the rule is incorrect on its face, at least if it is
1342 given the more obvious reading supported by the Style Consultants.
1343 This reply rekindled the argument that the present rule can and
1344 should be read to recognize different times set by statute for all
1345 of (a) (1), (2), and (3).

1346 A distinct question was raised as to the relationship between
1347 all of Rule 12(a) (1), (2), and (3) and Rule 81(c) (2). The times for
1348 a defendant to answer after an action is removed from state court
1349 are independent of the times set in Rule 12. Rule 81(c) (2) does not
1350 on its face recognize any exceptions for different times set by
1351 statute or, for that matter, Rule 12. This possible tension between
1352 Rule 81 and Rule 12 will persist no matter whether Rule 12 is
1353 amended to provide a clear exception for different statutory
1354 response times in paragraphs (2) and (3). There seems little reason
1355 to add this complication to the project.

1356 The discussion concluded with a decision to carry these
1357 questions forward. Some committee members are attracted to the
1358 value of correcting rule text that at best is ambiguous and at
1359 worst is incorrect. There is no urgent need for action. Time for
1360 further consideration will be welcome.

1361 *Rule 12(a) (4)*

1362 Judge Bates introduced a suggestion by the Department of
1363 Justice that Rule 12(a) (4) should be revised to add time to respond
1364 when a United States officer or employee is sued in an individual
1365 capacity:

1366 (4) *Effect of a Motion.* Unless the court sets a different

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1367 time, serving a motion under this rule alters these
1368 periods as follows:
1369 (A)if the court denies the motion or postpones its
1370 disposition until trial, the responsive pleading
1371 must be served within 14 days after notice of the
1372 court's action, or within 60 days if the defendant
1373 is a United states officer or employee sued in an
1374 individual capacity for an act or omission
1375 occurring in connection with duties performed on
1376 the United States' behalf; or * * *

1377 This proposal rests in part on the same considerations that
1378 persuaded the Committee to adopt the 2000 amendment that
1379 established the Rule 12(a) (3) time to respond in such actions at 60
1380 days. These considerations persuaded the Appellate Rules Committee
1381 to adopt the 2011 amendment of Appellate Rule 4(a) (1) (B) (iv) that
1382 establishes the time to file a notice of appeal in such actions at
1383 60 days. The United States may or may not have been involved with
1384 defending its officer or employee at the time the Rule 12 motion
1385 was made, and may need the 60 days to respond just as much as it
1386 needs 60 days to frame an answer after the later of service on the
1387 officer or employee or service under Rule 4(i) (3) on the United
1388 States Attorney.

1389 The ordinary need for 60 days to respond is enhanced by the
1390 complications that arise when the officer or employee moves to
1391 dismiss on the ground of official immunity. Denial of the motion
1392 often provides a basis for an interlocutory appeal under the
1393 collateral-order doctrine. The determination whether to appeal must
1394 be made by the Solicitor General. Serious confusions and
1395 inconveniences can arise if the officer or employee is required to
1396 file an answer within 14 days after the motion is denied or
1397 postponed. The burden of filing an answer, moreover, is one of the
1398 burdens of litigation that official immunity and the opportunity
1399 for collateral-order appeal are meant to alleviate.

1400 The style consultants have reviewed the proposed rule text.

1401 It was pointed out that Rule 12(a) (4) allows a court to set a
1402 different time. If there is an urgent need to proceed, the court
1403 could set the time to respond at less than 60 days. Account also
1404 can be taken of the provisions in Appellate Rule 4(a) (4) that defer
1405 the moment when appeal time starts.

1406 The Committee voted, 11 yes and zero no, to recommend that the
1407 Standing Committee approve the proposed amendment of Rule 12(a) (4)
1408 for publication.

1409 *Rule 4(c) (3)*

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1410 Judge Bates pointed out that the perceived ambiguity in the
1411 Rule 4(c)(3) provision for service by the United States Marshal in
1412 cases brought in forma pauperis or by a seaman was first on the
1413 agenda a year ago.

1414 The question is whether the rule means that the plaintiff must
1415 request that the court "must so order," or whether the court must
1416 enter the order automatically in every i.f.p. or seaman case. The
1417 Style Consultants believe there is no ambiguity – the court must
1418 make the order even without a request by the plaintiff. But not
1419 every court has found the rule so clear.

1420 It is easy to eliminate any possible ambiguity. But it would
1421 remain necessary to decide what the clear provision should say. At
1422 least three choices are apparent: The plaintiff must request the
1423 order; the court must enter the order without a request; or the
1424 marshal is obliged to make service in every case without bothering
1425 with the formality of an automatically entered order, a formality
1426 that might accidentally be omitted in some cases. More
1427 adventuresome possibilities could be added, such as an experiment
1428 with electronic service in cases where the marshal believes that
1429 would be effective.

1430 The choice among these alternatives will depend on practical
1431 information. The Marshals Service has been consulted, but as yet
1432 has provided no clear guidance. It is clear that the marshals would
1433 prefer to avoid the burden of making service, particularly in
1434 sparsely populated districts that may require distant travel. But
1435 the forma pauperis statute imposes the duty. It also is clear that
1436 at least in cases where an i.f.p. plaintiff has counsel the
1437 plaintiff may prefer to make service without relying on the
1438 marshal. Service by the plaintiff seems fully consistent with Rule
1439 4(c)(3) as it stands, but if it is to be amended that point might
1440 be added.

1441 Discussion led to the conclusion that this subject should be
1442 carried forward to the October meeting, with the expectation that
1443 a decision will be made then. Efforts will be made to get
1444 additional advice from the Marshals Service.

1445 *Rule 17(d): Naming Public Official Sued in Official Capacity*

1446 Rule 17(d) has long provided that a public officer who sues or
1447 is sued in an official capacity may be designated by official title
1448 rather than name. Sai has proposed that permission should be
1449 changed to mandate: the officer must be designated by the relevant
1450 official title (or titles if the same officer holds two or more
1451 relevant offices) if the title is unique and capable of succession.

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1452 A major purpose of the proposal is to avoid the annoyance of
1453 remembering to substitute a successor official, even though Rule
1454 25(d) provides automatic substitution when the original officer
1455 ceases to hold office. A secondary purpose is to ease the task of
1456 following events in the action; Sai cites an action that has
1457 migrated through nineteen names for the United States Attorney
1458 General and remains active.

1459 Designating the party by title rather than the name of the
1460 incumbent office-holder has obvious advantages. That is why Rule
1461 17(d) authorizes this practice. But it is not clear that the rule
1462 should prevent a plaintiff officer from proceeding under a personal
1463 name, or prevent a plaintiff from naming an officer defendant by
1464 individual name.

1465 As a general problem, there may be cases in which it is not
1466 clear whether substantive law authorizes an action by or against a
1467 "title," or, more realistically, against the office that is
1468 designated by the title. That can easily hold true for countless
1469 numbers of federal employees, beginning with the question whether
1470 a particular employee is an "officer" within the meaning of Rule
1471 17(d), and then progressing to the question whether every "officer"
1472 occupies an office that is capable of being sued as an office.
1473 Titles proliferate, perhaps without pausing to consider whether the
1474 title is attached to an office.

1475 The difficulty of determining whether suit can be brought by
1476 or against a title or office is enhanced when the public officer is
1477 a state officer. It may be unwise to force litigants – and at times
1478 the courts – to wrestle with what may be obscure and uncertain
1479 questions of state law.

1480 State officials pose a still greater caution when they are
1481 sued as defendants. The fiction that permits actions against state
1482 officials as a way to circumvent the Eleventh Amendment is vital,
1483 but still a fiction. It may be better to avoid entangling Rule
1484 17(d) with disputes whether the official is a defendant in an
1485 individual capacity or an official capacity.

1486 The value of amending Rule 17(d) may turn in part on pragmatic
1487 considerations. How great are the burdens it imposes? How can the
1488 Committee gather useful information?

1489 Discussion began with a judge's observation that "the
1490 annoyance factor is a minor, but not a major, issue." Substitution
1491 is done routinely by law clerks or court clerks.

1492 The Department of Justice observed that substitution "works
1493 seamlessly," and often is accomplished by the court acting on its

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1494 own. Still, there is no harm in studying this proposal further.

1495 The Committee decided to carry this subject forward.

1496 *Consent Agenda*

1497 Judge Bates reported that the reporters for the several rules
1498 committees have launched a still incomplete discussion of the
1499 question whether the advisory committees might establish a practice
1500 of placing some business on a consent corner of the agenda.

1501 An analogy could be found in the consent calendar of the
1502 Judicial Conference. The Judicial Conference handles many matters,
1503 including many Enabling Act rules topics. The calendar is
1504 established by the Executive Committee, with advice from the
1505 Director and staff of the Administrative Office. But the work of
1506 the Judicial Conference comes from committees that have thoroughly
1507 prepared their recommendations. The rules advisory committees are
1508 the first line in Enabling Act work.

1509 Obvious questions go to defining the way in which a consent
1510 calendar would work. What would be the criteria for selecting
1511 consent-calendar subjects? Who would make the selection – most
1512 likely some combination of the advisory committee chair and the
1513 reporters? What would be required to move a subject from the
1514 consent calendar for plenary discussion? Most likely any single
1515 committee member could effect the transfer. What provision should
1516 be made to ensure adequate notice to facilitate thorough
1517 preparation of the subject by committee members?

1518 The agenda for this meeting includes three rules proposals
1519 that are offered to illustrate the variety of considerations that
1520 might point toward placing an item on a consent agenda. Discussion
1521 of the merits of these proposals may illuminate the general
1522 question.

1523 The first member to comment suggested that it would be better
1524 not to have a consent agenda. The items most likely to be placed on
1525 it would be some of those that come in from public suggestions. The
1526 need for committee consideration may begin with the prospect that
1527 some of these suggestions include useful kernels of information
1528 that may not be apparent when reviewed by only two or three persons
1529 responsible for constituting the agenda. And "we don't want to
1530 create an impression that some proposals receive 'short shrift'
1531 treatment."

1532 Another judge agreed that public perception is an important
1533 consideration. But the reporters and chair would look for items "on
1534 which no one would want discussion." If even a single member wants

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1535 discussion, full Committee treatment will be provided.

1536 Another judge observed that the Bankruptcy Rules Committee has
1537 maintained a consent agenda for a few years now. "It has worked
1538 well for us." Occasionally a committee member asks to take up an
1539 item from the consent calendar. The criteria for selecting consent
1540 agenda topics remain unclear, but revolve around a determination
1541 that the topic is unlikely to raise any interest.

1542 The possible advantages of a consent agenda were noted. It
1543 could reduce the amount of time committee members devote to some
1544 agenda topics, freeing time for topics that seem to demand greater
1545 attention. Advance notice that an item will be moved to the
1546 discussion agenda will ensure an opportunity to prepare for full
1547 deliberation. "Some proposals require a lot of digging. Some seem
1548 off the wall. We do not want to dilute consideration of the serious
1549 matters." Full consideration of all items could be too much work.
1550 Providing one week of advance notice that a topic has been moved to
1551 the discussion agenda reduces the value of the practice that seeks
1552 to provide agenda materials to committee members three weekends
1553 before the committee meeting, but it is not likely that more than
1554 one, at most a few, items would need to be studied a second time.

1555 A committee member suggested that "matters come up with twists
1556 and turns that are not foreseen" when preparing an agenda. It is
1557 better to keep all items on a single agenda, "hoping for discipline
1558 on matters that do not require a lot of time."

1559 Judge Bates suggested that this discussion provided a useful
1560 beginning, but that the question should be carried forward for
1561 further discussion at the October meeting. The three proposals
1562 offered to illustrate the general question remain for discussion.

1563 *Rule 16: Settlement Conferences*

1564 This topic suggests three changes with respect to settlement
1565 conferences, two in Rule 16 and a third evidently aimed at local
1566 rules or the Evidence Rules.

1567 The first suggestion is that trial judges should be excluded
1568 from participating in settlement conferences. The fears include the
1569 possibility that the parties will feel coerced, that parties will
1570 engage in strategic behavior by presenting incomplete and
1571 misleading information, and that the judge may imbibe wrong views
1572 of the case. The Committee considered these problems in depth in
1573 November, 2017, and concluded that judges are well aware of them.
1574 Federal Judicial Center programs regularly explore the problems.
1575 And different approaches may be appropriate for different judges
1576 and different cases.

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1577 The second suggestion is that objective standards should be
1578 established to protect against undue sanctions under Rule
1579 16(f) (1) (B), which authorizes sanctions "if a party or its attorney
1580 * * * is substantially unprepared to participate – or does not
1581 participate in good faith – in the conference." Examples are cited
1582 of sanctions imposed for "failing to bargain sufficiently, failing
1583 to make a reasonable offer, and failing to have a representative
1584 present at the settlement conference with 'sufficient settlement
1585 authority.'" Brief discussion suggested that although these
1586 examples sound extreme, it does not seem likely that there are
1587 widespread abuses of discretion, nor does it seem likely that
1588 amended rule language would be effective in constraining such
1589 abuses as are likely to occur.

1590 The third set of suggestions seek to add "substantive and
1591 procedural safeguards" to be included in district court local ADR
1592 rules, or in the Evidence Rules. Two of them address the topics
1593 suggested in the sanctions section.

1594 The Committee determined to remove these topics from the
1595 agenda.

1596 *Time Limits in Subpoena Enforcement Actions*

1597 This suggestion relies on impatience with the time courts take
1598 to decide actions brought by Congress to enforce subpoenas directed
1599 to executive officials. But the suggestion appears to be framed in
1600 general terms that would address all proceedings to enforce
1601 subpoenas of every type, including discovery subpoenas, trial
1602 subpoenas, and subpoenas or similar commands issued by
1603 administrative agencies.

1604 Brief discussion focused on congressional subpoenas.
1605 Consideration of this topic was thought ill-advised. There was some
1606 discussion of the uncertain status of present law on
1607 enforceability. There was no thought that the specific and very
1608 tight time limits proposed for action by district courts, the
1609 courts of appeals, and the Supreme Court were sensible.

1610 Discovery subpoenas also were noted. Not long ago the
1611 Committee devoted years of work to revising Rule 45. No problems
1612 were identified with respect to the time taken to reach decision on
1613 motions to enforce. At least as to discovery subpoenas, the
1614 proposal is a "nonstarter."

1615 The Committee determined to remove this topic from the agenda.

1616 *Rules 7(b) (2), 10*

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1617 This proposal suggests that Rules 7(b) (2) and 10 be amended to
1618 correct several "paradoxes" in their present relationship.

1619 The paradox is said to begin with Rule 7(b) (2)'s direction:
1620 "The rules governing captions and other matters of form in
1621 pleadings apply to motions and other papers." Rule 7(a) lists the
1622 only "pleadings" that may be allowed. Motions are not pleadings.

1623 Rule 10(a) directs that "Every pleading must have a caption
1624 with the court's name, a title, a file number, and a Rule 7(a)
1625 designation."

1626 How, the suggestion asks, can a motion bear a Rule 7(a)
1627 designation? It cannot be called a complaint, an answer to a third-
1628 party complaint, or by the name of any other pleading.

1629 And how, the suggestion asks, can it have any other name,
1630 since the "title" referred to in Rule 10(a) manifestly refers to
1631 the title of the action, not the name to be fixed to a motion?

1632 The examples proliferate. The submission recognizes that the
1633 problems are quite technical, and that "In practice, litigants and
1634 counsel simply ignore the problematic language, if they notice it
1635 at all."

1636 Brief discussion suggested that the relationship between Rules
1637 7(b) (2) and 10 "is a process of analogy, not literal reading."
1638 There is no practical problem, as the submission recognizes. There
1639 is no reason to undertake a revision project.

1640 Judge Bates closed the meeting by stating that his term as
1641 Committee Chair has been a good time, expressing thanks to all
1642 Committee members and the others who worked in the common
enterprise.

Respectfully submitted,

Edward H. Cooper
Reporter

June 17, 2020

TAB 6

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1 **PROPOSED AMENDMENT TO RULE 7.1**

2 *For Final Approval*

3 Two distinct proposals to amend Rule 7.1(a) were published in
4 August 2019. Further consideration of the proposal in light of the
5 public comments demonstrated the wisdom of making a conforming
6 amendment of Rule 7.1(b). Rule 7.1(a)(1) and the conforming
7 amendment to Rule 7.1(b) will be discussed first.

8 Proposed new Rule 7.1(a)(2) provides for a disclosure
9 statement that names and identifies the citizenship of every
10 individual or entity whose citizenship is attributed to a party in
11 an action in which jurisdiction is based on diversity. The several
12 versions that follow may seem complex. The questions that remain
13 arise from the occasional complications in the rules determining
14 the dates of the citizenships used to determine whether there is
15 complete diversity. A modest attempt to address these questions was
16 included in the published proposal: the parties must disclose
17 citizenships "at the time the action is filed." Public comments
18 suggested that defendants frequently remove actions filed in state
19 courts without adequately thinking about actual diversity. The
20 version initially discussed at the April Civil Rules Committee
21 meeting expanded this provision to "the time the action is filed
22 in, or removed to, the federal court." The discussion, as
23 summarized below, showed that diversity occasionally must be
24 determined at a time different from the initial filing or notice of
25 removal. New language was proposed to provide notice of this
26 possibility. The Standing Committee found the language was likely
27 to cause confusion and remanded for further consideration. The new
28 version set out below would eliminate any reference to time. The
29 rule text would require disclosure without any reference to the
30 rules that set the occasion, or plural occasions, for measuring the
31 citizenships that determine complete diversity. The revised
32 Committee Note simply notes that the diversity rules may be
33 complex, without attempting to sketch any of the complications.

34 The more complicated questions raised by Rule 7.1(a)(2) are
35 illustrated by the three versions set out below. First is the
36 proposal as published. Next is the revised text that was
37 recommended to the Standing Committee for adoption, marked to show
38 changes since publication in a complex format. Single underlining
39 is used for everything that is new to present Rule 7.1. Double
40 underlining indicates new provisions recommended to the Standing
41 Committee after reacting to public comments and further
42 consideration. Subparagraphs (A) and (B) would be deleted from the
43 version now recommended to advance for adoption. The third version
44 is the clean text now advanced for a recommendation for adoption.

45
46 **Rule 7.1. Disclosure Statement**

47 (a) WHO MUST FILE; CONTENTS.

48 (1) Nongovernmental Corporations. A nongovernmental
49 corporate party or any nongovernmental corporation
50 that seeks to intervene must file ~~2 copies~~ of a
51 ~~disclosure~~ statement that:

52 (1A) identifies any parent corporation and any
53 publicly held corporation owning 10% or more
54 of its stock; or

55 (2B) states that there is no such corporation.

56 (2) Parties in a Diversity Case. Unless the court
57 orders otherwise, a party in an action in which
58 jurisdiction is based on diversity under 28 U.S.C.
59 § 1332(a) must file a disclosure statement that
60 names—and identifies the citizenship of—every
61 individual or entity whose citizenship is
62 attributed to that party at the time the action is
63 filed.

64 * * * * *

65 *Version Recommended to Standing Committee in June 2020*

66 **Rule 7.1. Disclosure Statement**

67 (a) WHO MUST FILE; CONTENTS.

68 (1) Nongovernmental Corporations. A nongovernmental
69 corporate party or any nongovernmental corporation
70 that seeks to intervene must file ~~2 copies~~ of a
71 ~~disclosure~~ statement that:

72 (1A) identifies any parent corporation and any
73 publicly held corporation owning 10% or more
74 of its stock; or

75 (2B) states that there is no such corporation.

76 (2) Parties or Intervenors in a Diversity Case. ~~Unless~~
77 ~~the court orders otherwise,~~ a party ~~¶~~ In an action
78 in which jurisdiction is based on diversity under
79 28 U.S.C. § 1332(a), a party or intervenor must,
80 unless the court orders otherwise, file a
81 disclosure statement that names—and identifies the
82 citizenship of—every individual or entity whose
83 citizenship is attributed to that party or
84 intervenor:

85 (A) at the time the action is filed in or removed
86 to federal court; or

87 (B) at another time that may be relevant to
88 determining the court's jurisdiction.

89 * * * * *

90 (b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

91 (1) file the disclosure statement with * * *.

93 **Rule 7.1. Disclosure Statement**

94 (a) WHO MUST FILE; CONTENTS.

95 (1) *Nongovernmental Corporations.* A nongovernmental
96 corporate party or any nongovernmental corporation
97 that seeks to intervene must file a statement
98 that:99 (A) identifies any parent corporation and any
100 publicly held corporation owning 10% or more
101 of its stock; or

102 (B) states that there is no such corporation.

103 (2) *Parties or Intervenors in a Diversity Case.* In an
104 action in which jurisdiction is based on diversity
105 under 28 U.S.C. § 1332(a), a party or intervenor
106 must, unless the court orders otherwise, file a
107 disclosure statement that names—and identifies the
108 citizenship of—every individual or entity whose
109 citizenship is attributed to that party or
110 intervenor.

111 * * * * *

112 (b) TIME TO FILE: SUPPLEMENTAL FILING. A party or intervenor must:

113 (1) file the disclosure statement with * * *.

114 *Proposed Committee Note Showing Changes From April*115 Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure
116 statement by a nongovernmental corporation that seeks to intervene.
117 This amendment conforms Rule 7.1 to similar recent amendments to
118 Appellate Rule 26.1 and Bankruptcy Rule 8012(a).119 Rule 7.1(a)(2). Rule 7.1 is further amended to require a party
120 or intervenor in an action in which jurisdiction is based on
121 diversity under 28 U.S.C. § 1332(a) to name and disclose the
122 citizenship of every individual or entity whose citizenship is
123 attributed to that party or intervenor ~~at the time the action is~~
124 ~~filed in or removed to federal court, or at such other time as may~~
125 ~~be relevant to determining the court's jurisdiction. The disclosure~~
126 ~~does not relieve a party that asserts diversity jurisdiction from~~
127 ~~the Rule 8(a)(1) obligation to plead the grounds for jurisdiction,~~
128 ~~but is designed to facilitate an early and accurate determination~~
129 ~~of jurisdiction.~~130 Two examples of attributed citizenship are provided by §
131 1332(c)(1) and (2), addressing direct actions against liability
132 insurers and actions that include as parties a legal representative
133 of the estate of a decedent, an infant, or an incompetent.
134 Identifying citizenship in such actions is not likely to be
135 difficult, and ordinarily should be pleaded in the complaint. But
136 many examples of attributed citizenship arise from noncorporate
137 entities that sue or are sued as an entity. A familiar example is
138 a limited liability company, which takes on the citizenship of each
139 of its owners. A party suing an LLC may not have all the

140 information it needs to plead the LLC's citizenship. The same
141 difficulty may arise with respect to other forms of noncorporate
142 entities, some of them familiar — such as partnerships and limited
143 partnerships — and some of them more exotic, such as “joint
144 ventures.” Pleading on information and belief is acceptable at the
145 pleading stage, but disclosure is necessary both to ensure that
146 diversity jurisdiction exists and to protect against the waste that
147 may occur upon belated discovery of a diversity-destroying
148 citizenship. Disclosure is required by a plaintiff as well as all
149 other parties and intervenors.

150 What counts as an “entity” for purposes of Rule 7.1 is shaped
151 by the need to determine whether the court has diversity
152 jurisdiction under § 1332(a). It does not matter whether a
153 collection of individuals is recognized as an entity for any other
154 purpose, such as the capacity to sue or be sued in a common name,
155 or is treated as no more than a collection of individuals for all
156 other purposes. Every citizenship that is attributable to a party
157 or intervenor must be disclosed.

158 Discovery should not often be necessary after disclosures are
159 made. But discovery may be appropriate to test jurisdictional facts
160 by inquiring into such matters as the completeness of a
161 disclosure's list of persons or the accuracy of their described
162 citizenships. This rule does not address the questions that may
163 arise when a disclosure statement or discovery responses indicate
164 that the party or intervenor cannot ascertain the citizenship of
165 every individual or entity whose citizenship may be attributed to
166 it.

167 The rule recognizes that the court may limit the disclosure in
168 appropriate circumstances. Disclosure might be cut short when a
169 party reveals a citizenship that defeats diversity jurisdiction. Or
170 the names of identified persons might be protected against
171 disclosure to other parties when there are substantial interests in
172 privacy and when there is no apparent need to support discovery by
173 other parties to go behind the disclosure.

174 Disclosure is limited to individuals and entities whose
175 citizenship is attributed to a party or intervenor. The rules that
176 govern attribution, and the time that controls the determination of
177 complete diversity, are matters of subject-matter jurisdiction that
178 this rule does not address. If events in the litigation arising
179 after initial filing or removal change the time of the citizenship
180 that controls, a supplemental statement is required by Rule
181 7.1(b) (2). And even if the time that controls does not change, a
182 supplemental statement is required when additional relevant
183 information becomes known. at the time the action is filed in or
184 removed to federal court, or at another time that may be relevant
185 to determining the court's jurisdiction. In most actions diversity
186 will be determined by the citizenships that exist at the time the
187 action is initially filed in federal court, or at the time the
188 action is removed to federal court from a state court. But in some
189 circumstances diversity must be determined by looking to the

190 ~~citizenships that exist at some other time. Changes of parties are~~
191 ~~one example. More complicated examples may arise from the rules~~
192 ~~that determine diversity jurisdiction for actions removed from a~~
193 ~~state court.~~

194 Rule 7.1(b). Rule 7.1(b) is amended to reflect the provision in
195 Rule 7.1(a) (1) that extends the disclosure obligation to
196 intervenors.

197 *Rule 7.1(a) (1)*

198 The proposal to amend Rule 7.1(a) (1) published in August 2019
199 reads:

200 **Rule 7.1. Disclosure Statement**

201 (a) WHO MUST FILE; CONTENTS.

202 (1) Nongovernmental Corporations. A nongovernmental
203 corporate party or any nongovernmental corporation
204 that seeks to intervene must file ~~2 copies of a~~
205 ~~disclosure~~ statement that:

206 ~~(1)~~ (A) identifies any parent corporation and any
207 publicly held corporation owning 10% or
208 more of its stock; or

209 ~~(2)~~ (B) states that there is no such corporation.

210 This amendment conforms Rule 7.1 to recent similar amendments
211 to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three
212 public comments. Two approved the proposal. The third suggested
213 that the categories of parties that must file disclosure statements
214 should be expanded for both parties and intervenors, a subject that
215 has been considered periodically by the advisory committees without
216 yet leading to any proposals for amending the parallel rules.

217 The Committee recommended approval of the amendment to
218 Rule 7.1(a) (1) at the April meeting.

219 *Rule 7.1(b)*

220 Discussion of public comments on the time to make diversity
221 party disclosures under proposed Rule 7.1(a) (2) led the Advisory
222 Committee to recognize that the time provisions in Rule 7.1(b)
223 should be amended to conform to the new provision for intervenor
224 disclosures in Rule 7.1(a) (1):

225 (b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

226 (1) file the disclosure statement * * *.

227 * * * * *

228 This is a technical amendment to conform to adoption of
229 amended Rule 7.1(a) (1) and was recommended for adoption without
230 publication. The Standing Committee has voiced no concerns about
231 the amendments to Rules 7.1(a) (1) and 7.1(b).

233 Rule 7.1(a)(2) is a new disclosure provision designed to
234 establish a secure basis for determining whether there is complete
235 diversity to establish jurisdiction under 28 U.S.C. § 1332(a). Last
236 April, the Advisory Committee recommended that it be approved for
237 adoption with changes suggested by the public comments. The
238 Standing Committee remanded for further consideration of one of
239 those changes, which attempted to provide a reminder that diversity
240 is not in all circumstances determined at the time the action is
241 first filed in, or removed to, federal court. The recommendation to
242 omit any reference to the complicated rules that set the moment at
243 which complete diversity must exist is explained below after a
244 review of the core proposal.

245 The core of the diversity jurisdiction disclosure lies in the
246 requirement that every party or intervenor, including the
247 plaintiff, name and disclose the citizenship of every individual or
248 entity whose citizenship is attributed to that party or intervenor.

249 The citizenship of a natural person for diversity purposes is
250 readily established in most cases, although somewhat quirky
251 concepts of domicile may at times obscure the question. Section
252 1332(c)(1) codifies familiar rules for determining the citizenship
253 of a corporation without looking to the citizenships of its owners.

254 Noncorporate entities, on the other hand, commonly take on the
255 citizenships of all their owners. The rules are well settled for
256 many entities, including limited liability companies. The
257 citizenship of every owner is attributed to the LLC. If an owner is
258 itself an LLC, that LLC takes on the citizenships of all of its
259 owners. The chain of attribution reaches higher still through every
260 owner whose citizenship is attributed to an entity closer along the
261 chain of owners that connects to the party LLC. The great shift of
262 many business enterprises to the LLC form means that the diversity
263 question arises in an increasing number of actions filed in, or
264 removed to, federal court.

265 The challenges presented by the need to trace attributed
266 ownership are a function of factors beyond the mere proliferation
267 of LLCs. Many LLCs are not eager to identify their owners — the
268 negative comments on the published rule included those that
269 insisted that disclosure is an unwarranted invasion of the owners'
270 privacy. Beyond that, the more elaborate LLC ownership structures
271 may make it difficult, and at times impossible, for an LLC to
272 identify all of the individuals and entities whose citizenships are
273 attributed to it, let alone determine what those citizenships are.
274 But if it is difficult for an LLC party to identify all of its
275 attributed citizenships, it is more difficult for the other
276 parties, whose only likely source of information is the LLC party
277 itself.

278 As difficult as it may be to determine attributed citizenships
279 in some cases, the imperative of ensuring complete diversity

280 requires a determination of all of the citizenships attributed to
281 every party. Some courts require disclosure now, by local rule,
282 standard terms in a scheduling order, or more ad hoc means. And
283 there are cases in which inadvertence, indifference, or perhaps
284 strategic calculation have led to a belated realization that there
285 is no diversity jurisdiction, wasting extensive pretrial
286 proceedings or even a completed trial.

287 Disclosure by every party is a natural way to safeguard
288 complete diversity. Most of the public comments approve the
289 proposal, often suggesting that it will impose only negligible
290 burdens in most cases.

291 The public comments prompted Committee discussion of the rule
292 text that identifies the time that controls the existence of
293 complete diversity. Many of the comments supporting the proposal
294 suggested that defendants frequently remove actions from state
295 court without giving adequate thought to the actual existence of
296 complete diversity. Some of these comments feared that the
297 published rule text, which called for disclosing citizenships
298 attributed to a party "at the time the action is filed," did not
299 speak clearly to the need to distinguish between citizenship at the
300 time a complaint is filed in federal court and citizenship at the
301 time a complaint is filed in state court, to be followed by
302 removal. Removal, for example, may become possible only after a
303 diversity-destroying party is dropped from the action in state
304 court.

305 At least one comment suggested a specific addition to the rule
306 text to call for disclosure "at the time the action is filed in
307 federal court." Committee discussion of this proposal emphasized
308 the rules that require complete diversity at some other time,
309 notwithstanding the general proposition that jurisdiction is
310 determined at the time an action is filed. One example is changes
311 in the parties after an action is filed. These rules can become
312 arcane in some circumstances. An attempt to add a nondiverse party,
313 for example, may encounter an inquiry whether the original omission
314 was a ploy to evade complete diversity, whether the new party is a
315 Rule 19(b) "indispensable" party, and into the details of
316 supplemental jurisdiction. Other and more complex examples may
317 arise in determining removal jurisdiction.

318 Disclosure should aim at the direct and attributed
319 citizenships of each party at the time identified by the complete-
320 diversity rules. One of the challenges that arose from the
321 published rule's direction to disclose citizenships "at the time
322 the action is filed" was misreading the antecedent. Some readers
323 thought these words referred to the time for making the disclosure,
324 a matter governed by rule 7.1(b), rather than the time of the
325 citizenships that must be disclosed. That potential confusion might
326 well be one of the illustrations of the wisdom of redundant
327 drafting. It might be cured by something like "must, unless the
328 court orders otherwise, file at the time provided by Rule 7.1(b),
329 a disclosure statement * * *." That potential fix, however, does

330 not alleviate the erroneous implication in the published rule that
331 complete diversity is always determined "at the time the action is
332 filed."

333 These concerns led the Advisory Committee to revise the rule
334 text to read:

335 at the time the action is filed in or removed to federal
336 court, or at such other time as may be relevant to
337 determining the court's jurisdiction

338 This rule text was reviewed by the Style Consultants after the
339 Advisory Committee meeting. Their suggested revisions were accepted
340 by the Advisory Committee by post-meeting submission. This part of
341 the rule text proposed for adoption read:

- 342 (A) at the time the action is filed in or removed to
343 federal court; or
344 (B) at another time that may be relevant to determining
345 the court's jurisdiction.

346 This formulation provides accurate notice to the parties that
347 complete diversity may be controlled by citizenships as they exist
348 at a time different from the time of filing or removal. It makes no
349 attempt to describe what the different time, or even times, may be.
350 Rule text should not, and almost certainly could not, capture all
351 of the variations that have grown up over the centuries of
352 diversity jurisdiction. If notice is to be given, it must be as
353 vague as the "may be relevant" formulation, however it might be
354 varied.

355 The Standing Committee was uncomfortable with this vague
356 attempt to imply that the rules for determining diversity are not
357 limited to the basic concepts familiar to all lawyers. A range of
358 responses, good and not so good, could be triggered by the bare
359 suggestion that some other time may be relevant, without any clue
360 as to the circumstances that may complicate the inquiry. A good
361 response would be to research the diversity rules when an action is
362 complicated by events that occur after initial filing or removal.
363 Less good responses would be to ignore the hint or to engage in
364 unnecessary research in cases that are, after all, quite straight
365 forward.

366 It seems best to abandon the effort to provide rule text that
367 does not mislead and also provides warning that the diversity
368 calculation is not always determined by citizenships at the time
369 the action is filed or removed. It seems safe to predict that the
370 complications will not often arise, and will usually be identified
371 when they do. Rule 7.1(b) requires a supplemental statement "if any
372 required information changes." That should suffice to prompt
373 inquiry and, when appropriate, supplemental disclosures when events
374 in the litigation require that diversity be measured by
375 citizenships as they exist at a time after initial filing or
376 removal.

377 With this change, the disclosure rule can again be recommended
378 for adoption. It is not a perfect answer to the puzzles created by
379 the requirement of complete diversity. But it will go a long way
380 toward eliminating inadvertent exercise of federal jurisdiction in
381 cases that should be decided by state courts, and — at least as
382 important — toward protecting against tardy revelations of
383 diversity-destroying citizenships that lay waste to substantial
384 investments in federal litigation.

385 *Changes Since Publication*

386 Rule 7.1(a) was changed in these ways: (1) intervenors are
387 required to file a diversity disclosure statement; and (2) the time
388 of the citizenships and attributed citizenships that must be
389 disclosed is deleted.

390 Rule 7.1(b) governing the time for disclosure is amended
391 without publication to reflect the amendment of Rule 7.1(a) (1) that
392 requires disclosure by an intervenor.

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TAB 7

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RULE 12(a): FILING TIMES AND STATUTES
Suggestion 19-CV-0

395 The problem presented by this matter arises from the
396 uncertain drafting of Rule 12(a)(1) as it relates to paragraphs
397 (2) and (3). As explained in the agenda materials for the April
398 meeting, the natural reading of the three paragraphs together is
399 that the 60-day times to answer set by paragraphs (2) and (3) are
400 not subject to a federal statute that specifies another time. At
401 least two federal statutes set a 30-day time to answer in cases
402 otherwise within paragraph (2). No statute has yet been
403 identified that sets a different time for cases otherwise within
404 paragraph (3).

405 As reflected in the draft April minutes, discussion worked
406 toward several tentative conclusions. There is little reason to
407 believe that significant practical problems have been
408 encountered. The lawyer who suggested a clarifying amendment
409 encountered some initial difficulty, but eventually persuaded the
410 clerk to issue a summons that specified the statutory 30-day time
411 to answer. The Department of Justice has encountered no
412 difficulty; when different times are set by statute and rule, it
413 either complies with the shorter time or asks for an extension of
414 the shorter time. In addition, the Department expressed concern
415 that if the rule were amended to expressly accommodate different
416 statutory times courts might become more reluctant to extend
417 those times to match the longer times set by paragraphs (2) and
418 (3).

419 The lack of any apparent problems in practice moved some
420 participants to conclude that there is no sufficient need to
421 amend the rule.

422 Other participants, however, thought that it is embarrassing
423 to have a poorly drafted rule on the books. The amendment
424 suggested by the April agenda materials is clear. And it is
425 difficult to believe that many judges would be moved by clarity
426 to deny extensions of the time to answer. Current Department of
427 Justice practice focuses on the statutory periods, either by
428 honoring them or by requesting an extension. The statutes figure
429 in present practice.

430 It seems unlikely that deferring this question will yield
431 any new insights. The time may have come either to recommend
432 publication of the draft rule set out below or to remove this
433 matter from the agenda.

434 **Excerpt from April 2020 Agenda Book**

435 Rule 12 sets the time to serve a responsive
436 pleading. Rule 12(a)(1) sets the presumptive time at 21
437 days. Paragraph (2) sets the time at 60 days for "The
438 United States, a United States agency, or a United States
439 officer or employee sued only in an official capacity."

440 Paragraph (3) sets the time at 60 days for "A United
441 States officer or employee sued in an individual capacity
442 for an act or omission occurring in connection with
443 duties performed on the United States' behalf."

444 Rule 12(a)(1) begins with this qualification:
445 "Unless another time is specified by this rule or a
446 federal statute, the time for serving a responsive
447 pleading is as follows * * *." It is possible to read
448 this qualification as applying not only to the times set
449 by paragraph (1), but also to the times set by paragraphs
450 (2) and (3). (The Style Consultants reject this reading
451 of the rule text as it was revised in the Style Project.)
452 Many readers, however, will find it more natural to read
453 the exception for a statutory time to apply only within
454 paragraph (1). The exception for another time specified
455 by this rule appeared for the first time in the Style
456 Project, and seems to make explicit what had been only
457 implicit — that the 60-day periods in (2) and (3)
458 supersede the 21-day period in (1). If federal statutes
459 set times different than 60 days for cases covered by (2)
460 and (3), it seems desirable to make the rule clear.

461 Suggestion 19-CV-0 points to the 30-day response
462 time set by the Freedom of Information Act. The proponent
463 recounts experience with a clerk's office that initially
464 refused to issue a summons substituting the 30-day period
465 for the Rule 12(a)(2) 60-day period. Further discussion
466 persuaded the clerk to incorporate the 30-day period, but
467 the incident demonstrates the opportunity for confusion.

468 The Department of Justice complies with the 30-day
469 time set by the Freedom of Information Act, but asks for
470 an extension in cases that combine FOIA claims with other
471 claims that are governed by the 60-day period in Rule
472 12(a)(2).

473 The Freedom of Information Act is, of itself, reason
474 to amend Rule 12(a)(2) to bring it into parallel with
475 (a)(1) by adding: "Unless another time is specified by a
476 federal statute, * * *."

477 The Advisory Committee has not yet found any statute
478 that sets another time for actions against a United
479 States officer or employee sued in an individual
480 capacity. If such a statute is found, Rule 12(a)(3)
481 should be amended to make it parallel to (1) and (2). If
482 no statute is found, the amendment might make sense as a
483 precaution to protect against later discovery of a
484 current statute or future enactment of a statute. There
485 is a risk that the amendment might be not only
486 unnecessary but a source of confusion for litigants who
487 go about searching for possible statutory exceptions. But
488 failing to make the amendment could lead to an

489 implication that, because of the contrast with paragraphs
490 (1) and (2), paragraph (3) is intended to supersede
491 different statutory provisions. There is no reason to
492 attempt to supersede statutes enacted before the rule is
493 amended, much less to create a patchwork scheme in which
494 the rule is in turn superseded by later-enacted statutes.
495

496 There seems to be an effective resolution of the
497 problem posed by paragraph (3). Amendment can be achieved
498 with a minimal shift in the structure of present Rule
499 12(a), moving the "unless" clause up to become a preface
500 for the three separately numbered paragraphs:

501 **Rule 12. * * ***

502 (a) TIME TO SERVE A RESPONSIVE PLEADING. Unless another time
503 is specified by this rule or¹ a federal statute, the
504 time for serving a responsive pleading is as
505 follows:

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

- 510 (A) A defendant must serve an answer:
511 (I) within 21 days after being
512 served with the summons and
513 complaint; or
514 (ii) if it has timely waived service
515 under Rule 4(d), within 60 days
516 after the request for a waiver
517 was sent, or within 90 days
518 after it was sent to the
519 defendant outside any judicial
520 district of the United States.
521 (B) A party must serve an answer to a
522 counterclaim or crossclaim within 21
523 days after being served with the
524 pleading that states the
525 counterclaim or crossclaim.
526 (C) A party must serve a reply to an
527 answer within 21 days after being
528 served with an order to reply,
529 unless the court specifies a
530 different time.

531 (2) *United States and its Agencies, Officers,*
532 *or Employees Sued in an Official*
533 *Capacity. The United States, a United*
534 *States agency, or a United States officer*
535 *or employee sued only in an official*
536 *capacity must serve an answer to a*

¹ The new structure clearly separates paragraphs (1), (2), and (3).
"[B]y this rule" is no longer needed.

537 complaint, counterclaim, or crossclaim
538 within 60 days after service on the
539 United States Attorney.
540 (3) *United States Officers or Employees Sued*
541 *in an Individual Capacity.* A United
542 States officer or employee sued in an
543 individual capacity for an act or
544 omission occurring in connection with
545 duties performed on the United States'
546 behalf must serve an answer to a
547 complaint, counterclaim, or crossclaim
548 within 60 days after service on the
549 officer or employee or service on the
550 United States Attorney, whichever is
551 later.

552 * * *

553 **Committee Note**

554 Rule 12(a) is amended to make it clear that the
555 times set for serving a responsive pleading in all of
556 paragraphs (1), (2), and (3) are subject to different
557 times set by statute. Provisions in the Freedom of
558 Information Act and the Government in the Sunshine Act
559 supply examples. See 5 U.S.C. §§ 552(a)(4)(c) and
560 552b(h)(1).

TAB 8

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MULTIDISTRICT LITIGATION SUBCOMMITTEE

562 The MDL Subcommittee has been busy since the full Committee's
563 last meeting. It has had conference calls on September 10, 2020 and
564 August 18, 2020. Notes on these conference calls are attached as an
565 appendix to this report.

566 The subcommittee has recently had three issues pending before
567 it. One of them — screening claims — is still under study, and
568 awaiting further information. The second issue was whether to
569 provide by rule for expanded interlocutory appellate review in MDL
570 proceedings. On this issue, after much study, the subcommittee has
571 come to a consensus that rulemaking should not be pursued at this
572 time. The third issue — judicial supervision of the selection of
573 leadership counsel and of settlement in MDL proceedings — remains
574 under study.

575 (1) *Screening and the "Census" Idea*

576 The subcommittee's consideration of the "screening" issue
577 began in response to assertions that often a considerable portion
578 of the claims asserted in MDL mass tort situations were
579 unsupportable. Problems with these claims included that the
580 claimant in question did not use the drug or the medical device
581 involved in the litigation, or that the claimant did not have the
582 health condition allegedly caused by the product, or that the
583 claimant used the product too briefly for it to cause the problem,
584 or that the claimant developed symptoms too long after
585 discontinuing the product for the product to be a cause of the
586 symptoms. It seemed generally agreed that such unsupportable claims
587 were presented, though there was debate about whether they often
588 constituted a large proportion of the cases. In addition, there was
589 debate about why such claims would appear in MDL proceedings.

590 The initial proposal was that the court impose a rigorous
591 automatic requirement that every claimant submit proof of use of
592 the product and development of pertinent symptoms promptly at the
593 commencement of litigation. For example, under the Fairness in
594 Class Action Litigation Act passed by the House of Representatives
595 in 2017 but not acted on in the Senate, not only would each
596 claimant be required to provide proof of use and injury shortly
597 after filing the suit, but the court would itself have the duty
598 within a brief period to scrutinize each such submission on its own
599 initiative (not in response to a motion by a defendant). If it
600 determined that certain submissions were not sufficient, the court
601 would then have to direct that the claimant either submit augmented
602 disclosures or suffer dismissal with prejudice. For courts
603 presiding over MDLs containing hundreds or thousands of claims,
604 that could have been a major burden had it been adopted.

605 But early conferences showed that often Plaintiff Fact Sheets
606 (PFSS) were obtained in the early stages of MDL proceedings. The
607 subcommittee obtained research assistance from the FJC that
608 indicated that in almost all very large MDLs the court did in fact

609 employ a PFS, and that courts also often required Defendant Fact
610 Sheets (DFSs) as well. But unlike the proposal that such early
611 submissions all adhere to a form prescribed in a rule, in fact
612 these fact sheets were ordinarily keyed to the case before the
613 court and took a good deal of time to draft. So it was not clear
614 that any rule could meaningfully prescribe what should be in each
615 one. And some of these documents became fairly elaborate, meaning
616 that providing responses was often burdensome. Some experienced
617 transferee judges questioned the utility of these detailed
618 documents, commenting that the first page or few pages of a PFS or
619 a DFS often will suffice. Moreover, courts did not undertake to
620 review the submissions on their own motion, but defendants could
621 call to the court's attention deficiencies in some submissions, and
622 dismissal could result with little investment of court time if the
623 deficiencies were not cured. Given the divergences among PFS
624 regimes for differing MDLs, it seemed difficult to devise a rule
625 formula that would improve practice generally.

626 As these discussions moved forward, parties in various cases
627 began to develop a simplified alternative to a PFS that came to be
628 called a "census" of claims pending in the MDL court. Variations of
629 that method are in use in as many as four major MDL matters,
630 including one pending before Judge Rosenberg, a member of the
631 subcommittee.² The "census" technique may serve several

² The four proceedings are:

In re Juul (Judge Orrick, N.D. CA.): In October 2019, Judge Orrick directed counsel involved in the MDL proceeding *In re Juul Labs, Inc., Marketing, Sales Practices, and Product Liability Litigation* (MDL 2913) to develop a plan to "generat[e] an initial census in this litigation," with the assistance of Prof. Jaime Dodge of Emory Law School, who has organized several events attended by members of the MDL Subcommittee. The census requirements applied to all counsel who sought appointment to leadership positions. It appears that relatively complete responses were submitted in December 2019, after which the judge appointed leadership counsel. Disclosures from defendants were due during January. The census method can provide plaintiff-side counsel with a uniform set of questions to ask prospective clients. The census requirements under Judge Orrick's order apply not only to cases on file but also any other clients with whom aspiring leadership counsel had entered into retention agreements. Discussions are under way on the next steps in the litigation, which may involve plaintiff profile sheets or a PFS. The census in this case was not primarily designed as a vetting device, but it is possible that having in hand a list of the sorts of information the court expects from claimants may prompt some counsel to be more focused in evaluating potential claims than would otherwise occur.

In re 3M (Judge Rodgers, N.D. FL): The claims relate to alleged hearing damages related to earplugs that were largely distributed by the military. After appointment of leadership counsel, the judge had counsel design an initial census. But that undertaking involved obtaining military records, an effort that added a layer of

632 purposes in mass tort MDLs, including organizing the proceedings,
633 providing a "jump start" to discovery, and possibly contributing to
634 the designation of leadership counsel.

635 **It remains unclear how effective the "census" technique has**
636 **been in serving any of those purposes.** When more is known about it,

complexity to the census. In addition, the due date for census responses was different depending on whether the case had been formally filed or was entered into an "administrative docket" the judge had created. As a general matter, the census was completed in December 2019.

In re Zantac (Judge Rosenberg, S.D. FL): This litigation involves a product designed for treatment of heartburn. The MDL includes class claims and individual personal injury claims, and some may go back decades. The Panel order for transfer was entered in February 2020. The litigation is still in the early stages of organization, but much has been done, particularly with regard to the use of census methods. There are 645 filed cases, of which 27 are putative class actions, and a substantial number (in the thousands) of unfiled cases on a registry. The court ordered an initial census including all filed claims and any unfiled claims represented by an applicant for a leadership position. There were 63 applicants for leadership positions. The court received initial census forms for all of the filed cases, including personal injury, consumer, medical monitoring claims among other claims. The Court indicated that this was helpful to her consideration of leadership applicants, which have since been appointed. The Court also created a registry, which allowed for the filing of a 4-page "census plus" form for unfiled claimants; in broad terms, registry claimants received tolling of the statute of limitations from participating defendants and certain assistance with medical/ purchase records. The census plus form, which was also required for all filed plaintiffs, required information on which product(s) were used, the injuries alleged, and a certification by the plaintiff/claimant. In addition, the form required plaintiffs/claimants to either attach documents showing proof of use and injury, state that they were already ordered privately or through the registry but not yet received, or indicate that no records are expected to exist. The census plus forms are due on a rolling basis, with the first due date (for filed plaintiffs) having passed in July; the second tranche of forms were due in August, but this was extended for certain claimants due to a technical error with a private vendor to September, and will be followed by the third main tranche in November.

In re Allergan (Judge Martinotti, D.N.J.): This litigation involves medical implant devices alleged to cause a very specific harmful medical condition in some users. Initial phases of the litigation have focused on selection of leadership counsel. It is possible, but not certain, that a census will be used once leadership counsel are appointed. In this litigation, it may be that records of implants and development of the signature medical consequence would be suitable subjects for a census. Judge Martinotti had extensive experience with complex litigation while on the New Jersey state court before appointment to the federal bench.

637 it may appear that it is not something appropriately included in a
638 rule, but instead a management technique that could be included in
639 the Manual for Complex Litigation, or disseminated by the Judicial
640 Panel. So this first topic remains under study.

641 *(2) Interlocutory Appellate Review —*
642 *Recommendation Not to Pursue at This Time*

643 The original proposal for a rule providing an additional route
644 to interlocutory review in MDL proceedings, perhaps limited to mass
645 tort proceedings, called for a right to immediate review without
646 the “veto” that 28 U.S.C. § 1292(b) provides the district court by
647 permitting review only when the district judge certifies that the
648 three criteria specified in the statute are met. Under § 1292(b),
649 the court of appeals has discretion whether to accept the appeal.
650 But the original proposal was to remove that discretion with regard
651 to interlocutory appeals in MDL proceedings, and require the court
652 of appeals to accept the appeal.

653 From that beginning, the discussion evolved. The notion of
654 mandatory review was dropped relatively early on, and proponents of
655 a rule instead urged something like Rule 23(f), giving the court of
656 appeals sole discretion whether to accept the appeal, and including
657 no provision for input from the transferee district judge on
658 whether an immediate appeal would be desirable. In addition,
659 proponents of a new rule made considerable efforts to provide
660 guidance on distinguishing among MDL proceedings (limiting the new
661 appellate opportunity to only certain MDLs), and on distinguishing
662 among orders, to focus the additional opportunity for interlocutory
663 review on the situations in which it was supposedly needed.

664 The proponents of expanded interlocutory review came mainly
665 from the defense side, and principally from those involved in
666 defense of pharmaceutical or medical device litigation. The basic
667 thrust of those favoring an additional route for interlocutory
668 review was that interlocutory orders can sometimes have much
669 greater importance in MDL proceedings, which may involve thousands
670 of claims, than in individual litigation. So there might be greater
671 urgency to get key issues resolved, particularly if they were
672 “cross-cutting” issues that might dispose of many or most of the
673 pending cases. One example of such issues was the possibility of
674 preemption of state law tort claims.

675 Another concern was that some transferee judges might resist
676 § 1292(b) certification when it was justified in order to promote
677 settlement. On the other hand, some suggested that permitting
678 expanded interlocutory review might actually further settlement;
679 defendants unwilling to make a substantial (sometime very
680 substantial) settlement based on one district judge’s resolution of
681 an issue like preemption might have an entirely different attitude
682 if a court of appeals affirmed the adverse ruling.

683 In addition, it was urged that the final judgment rule leads
684 to inequality of treatment. Should defendants prevail on an issue

685 such as preemption, or succeed in excluding critical expert
686 testimony under *Daubert*, plaintiffs often could appeal immediately
687 because that would lead to entry of a final judgment in defendants'
688 favor. But when they failed to obtain complete dismissal of
689 plaintiffs' claims, defendants urged, they would not get a similar
690 immediate route to appellate review.

691 There was strong opposition from plaintiff-side lawyers. One
692 argument was that the existing routes to interlocutory review
693 suffice in MDL proceedings. There are already multiple routes to
694 appellate review, particularly under 28 U.S.C. § 1292(b), via
695 mandamus and, sometimes, pursuant to Rule 54(b). For recent
696 examples of interlocutory review sought or obtained in MDL
697 proceedings, see *In re National Opiate Litig.*, 2020 WL 1875174 (6th
698 Cir., Apr. 15, 2020) (granting writ of mandamus on defendants'
699 petition); *In re General Motors LLC Ignition Switch Litig.*, 427 F.
700 Supp. 3d 374 (S.D.N.Y. 2019) (certifying issue for appeal under
701 § 1292(b) on plaintiffs' motion); *In re Blue Cross Blue Shield*
702 *Antitrust Litig.*, 2018 WL 3326850 (N.D. Ala., June 12, 2018)
703 (certifying issue for appeal under § 1292(b) on defendants'
704 motion). Expanding review would lead to a broad increase in appeals
705 and produce major delays without any significant benefit,
706 particularly when the order is ultimately affirmed after extended
707 proceedings in the court of appeals. And, of course, the
708 "inequality" of treatment complained of is a feature of our system
709 for all civil cases, not just MDLs.

710 Both sides provided the subcommittee with extensive
711 submissions, including considerable research on actual experience
712 with interlocutory review in MDL proceedings. There was very
713 serious concern, including among judges, about the delay
714 consequences of such review.

715 In addition, the Rules Law Clerk provided the subcommittee
716 with a memorandum. Some conclusions seem to follow from these
717 materials:

- 718 1. There are not many § 1292(b) certifications in MDL
719 proceedings.
- 720
- 721 2. The reversal rate when review is granted is relatively
722 low (about the same as in civil cases generally).
- 723
- 724 3. A substantial time (nearly two years) on average passes
725 before the court of appeals rules.
- 726
- 727 4. The courts of appeals (and district courts) appear to
728 acknowledge that there may be stronger reasons for
729 allowing interlocutory review because MDL proceedings are
involved.

730 The subcommittee has received a great deal of input and help
731 in evaluating these issues. Representatives of the subcommittee
732 have attended (and often spoken at) at least fifteen conferences

733 around the country (and one in Israel) dealing with issues the
734 subcommittee was considering. Two of them were full-day events
735 organized by Emory Law School to focus entirely on the
736 interlocutory review issues.

737 The most recent conference — on June 19, 2020 — involved
738 lawyers and judges with extensive experience in MDL proceedings
739 more generally, not only “mass tort” litigation. In particular, it
740 included ten district judges and four court of appeals judges. Both
741 the current Chair of the Judicial Panel and the previous Chair
742 participated. Two former Chairs of the Standing Committee
743 participated, as well as a number of other judges with experience
744 on rules committees. There were also two judicial officers from the
745 California state courts — a Superior Court judge who is in the
746 Complex Litigation Department of Los Angeles Superior Court (and is
747 presently a member of the Standing Committee) and a Justice of the
748 California Court of Appeal who provided the Subcommittee with a
749 memorandum on a 2002 statute adopted in California that provided
750 for interlocutory review on grounds very similar to those in
751 § 1292(b).

752 On August 18, the subcommittee met by conference call to
753 discuss its recommendation to the full Committee on whether to
754 pursue a rule for expanded interlocutory review. The discussions
755 are reflected in the extensive notes on that conference call, which
756 are included in this agenda book, with an Appendix listing the
757 participants in the June 19 online conference on these issues.

758 The many events attended by members of the subcommittee,
759 entirely or largely addressed to the appellate review question,
760 have provided a thorough examination of the subject. And the
761 starting point for the subject was that the existing routes to
762 interlocutory review provide meaningful review in at least some
763 cases, as illustrated recently by the Sixth Circuit’s mandamus
764 ruling in the opioids MDL and Judge Furman’s certification in the
765 *GM Ignition Switch* litigation (at plaintiffs’ request) which was
766 accepted by the Second Circuit. Particularly in light of the low
767 rate of reversal when review is granted, it is difficult to
768 conclude that there is evidence of a serious problem to be solved
769 by expanding interlocutory review.

770 Against this background, all subcommittee members concluded
771 that proceeding further with this idea was not warranted in light
772 of the many difficulties with doing so (some of which are mentioned
773 below, as they would remain important were the subcommittee to
774 continue down this path). The various reasons articulated by
775 different members of the subcommittee are reflected in the notes of
776 the August 18 call. Some of the reasons mentioned by subcommittee
777 members can be summarized as follows:

778 Delay: There is clearly a significant issue with delay, and in
779 some circuits it may be more substantial than in others. Though
780 allowing expanded avenues for review need not be linked to a stay
781 of proceedings in the district court, the more that one focuses

782 review on “cross-cutting” issues, the greater the impulse to pause
783 proceedings until that issue is resolved.

784 Broad judicial opposition: Though there are some judges who
785 have participated in events attended by members of the subcommittee
786 who expressed willingness to consider expanded interlocutory
787 review, by and large judges were opposed. Court of appeals judges
788 often resisted any idea of “expedited” treatment on appeal of MDL
789 matters (suggested as an antidote to the delay problem), and many
790 regarded existing avenues for interlocutory review as sufficient to
791 deal with real needs for review.

792 Undercutting the federal court’s potential “leadership” role
793 when there is parallel litigation in state courts: When there is
794 federal MDL proceedings, particularly “mass tort” litigation, it
795 often happens that there is also parallel state court litigation,
796 and the federal MDL court can provide something of a “leadership”
797 role and coordinate with the state court judges. But if the
798 progress of the federal MDL were stalled by an interlocutory
799 appeal, at least some of the state courts likely would not be
800 willing to wait for the resolution of a potentially lengthy period
801 of appellate review. Resulting fragmentation of the overall
802 litigation would be undesirable and inconsistent with the overall
803 objective of § 1407, which seeks consistent management and judicial
804 efficiency. That would be an unintended consequence, but still
805 could be serious; indeed, a judge who participated in the June 19
806 event called it the “Achilles heel of MDL.”

807 Difficulties defining the kinds of MDL proceedings in which
808 the new avenue for appeal would apply: Originally, the proposal for
809 expanding interlocutory review focused on “mass tort” MDLs. That
810 category does seem to include most of the MDLs with very large
811 claimant populations. But it’s not clear that it would include all
812 of them. The *VW Diesel* litigation, for example, involved tens of
813 thousands of claimants, but was mainly claiming economic rather
814 than personal injury damages. And data breach MDLs may become more
815 common, raising potentially difficult issues about what is a
816 “personal injury” claim.

817 An additional difficulty is to determine whether there should
818 be a numerical cutoff to trigger the opportunity for review.
819 Whatever number were chosen to trigger the right to expanded review
820 (e.g., 500 claimants, 1,000 claimants), there could be difficulties
821 determining when that milestone was passed. Some research suggests
822 that some MDL proceedings receive huge numbers of new entrants long
823 after the centralized proceedings were begun. Triggering a new
824 interlocutory review opportunity then would not seem productive.
825 Moreover, there could sometimes be a question about whether one
826 should “count” the unfiled claims on a registry, as in the *Zantac*
827 litigation.

828 Finally, if the new appellate route were available in all MDLs
829 (perhaps because no sensible line of demarcation among MDL
830 proceedings could be articulated in a rule), rather than only some

831 of them, there might be questions about why an MDL centralization
832 order would expand the opportunity for interlocutory review when
833 individual cases, consolidated actions or class actions in a given
834 district might involve many more claimants (perhaps hundreds or
835 thousands) but not be eligible for expanded interlocutory review.

836 Difficulties defining the kind of rulings that could be
837 reviewed, and burdening the court of appeals: Another narrowing
838 idea that was proposed was to limit the new route to review to
839 rulings on certain legal issues — e.g., preemption motions or
840 *Daubert* decisions or jurisdictional rulings — but none of those
841 limitations appeared easy to administer, and these rulings did not
842 seem so distinctive as to support a special route to immediate
843 review.

844 Another idea was to focus on “cross-cutting” rulings, those
845 that are “central” to a “significant” proportion of the cases
846 pending in the district court. That determination could be
847 particularly challenging for a court of appeals, as it might mean
848 that the appellate court would need to become sufficiently familiar
849 with all the litigation before the district court to determine
850 whether the rule’s criteria were satisfied. A Rule 23(f) petition
851 for review, by way of contrast, would not require consideration of
852 such varied issues dependent on the overall and individual
853 characteristics of what is often sprawling litigation.

854 Undercutting the district court: As noted below, the
855 subcommittee has concluded that if it is to proceed further along
856 this path, it is important to ensure a central role for the
857 district court, if not a “veto” as provided in § 1292(b). Only the
858 district court will be sufficiently familiar with the overall
859 litigation to advise the court of appeals on the role of the ruling
860 under challenge in the overall progress of the litigation. Though
861 one might rewrite § 1292(b) to change the “materially advance the
862 ultimate termination of the litigation” standard in the statute to
863 take account of the limits of § 1407 to “pretrial” proceedings, the
864 existing standard does not seem to have deterred transferee judges
865 from certifying issues for interlocutory review. Any new rule would
866 have to ensure that the district court’s perspective was included,
867 not only to assist the court of appeals but also to recognize the
868 need to avoid unnecessary disruption of proceedings in the district
869 court.

870 In sum, for these reasons and others, the entire subcommittee
871 recommends to the Advisory Committee that further efforts on
872 expanding interlocutory review not be pursued at this time.

873 *Subcommittee Views on Other Issues*
874 *that Would Have to be Faced Moving Forward*

875 In case the full Advisory Committee concludes that further
876 efforts are justified regarding interlocutory review, the
877 subcommittee explored the extent to which it has reached consensus
878 on a number of points that would need to be considered going

879 forward. Here is a summary of those points, provided here for the
880 full Advisory Committee's information:

881 Appeal as of right: The original proposal was for a right to
882 appeal from any ruling falling within a defined category in any MDL
883 proceedings involving "personal injury" claims. The subcommittee
884 has reached consensus that no rule should command that the court of
885 appeals entertain such an appeal. Any rule would have to provide
886 the court of appeals discretion to decide whether to accept a
887 petition for review.

888 Expedited treatment of an appeal in the court of appeals:
889 Another suggestion was that a Civil Rule direct that the court of
890 appeals "expedite" the resolution of appeals it has decided to
891 accept under the hypothetical new rule. It is not clear how a Civil
892 Rule could require such action by a court of appeals. Putting that
893 issue aside, the subcommittee has reached consensus that there is
894 no persuasive reason for requiring that the court of appeals alter
895 the sequence of decisionmaking it would otherwise adopt and advance
896 these appeals ahead of other matters, such as criminal cases,
897 broad-based (even national) injunctions regarding governmental
898 activity, cases accepted for review under existing § 1292(b) or
899 Rule 23(f), or ordinary appeals after final judgment.

900 Ensuring a role for district court: As noted above, the
901 subcommittee is committed to ensuring a role for the district court
902 in advising the court of appeals on whether to grant review. Not
903 only is that advice likely critical to provide the court of appeals
904 with sufficient information to permit it to make a sensible
905 determination whether to grant review, but it is also critical to
906 safeguarding against disrupting the district court's handling of
907 the centralized litigation. The goal of § 1407 transfer is to
908 provide a method for coordinated and disciplined supervision of
909 multiple cases (perhaps inclining state courts to follow federal
910 "leadership" with regard to cases pending in state courts) and, as
911 noted above, the delays that can attend interlocutory review could
912 disrupt that coordinated supervision.

913 Devising a method for the district court's input to be
914 provided: The best method for providing a district court role
915 likely would present drafting challenges, however. Numerous models
916 already exist, including § 1292(b) (district court certification
917 required); Appellate Rule 21(b) (4) (the court of appeals may invite
918 or order the district judge to address a petition for mandamus);
919 Cal. Code Civ. Pro. §166.1 (permitting any party to request, or the
920 trial court judge to provide without a request, an indication
921 whether the trial court judge believes immediate review would
922 materially advance the conclusion of the litigation).
923 Alternatively, a rule could give the district court a period of
924 time (say 30 days) to express its views on the value of immediate
925 review, perhaps including specifically the question whether
926 immediate review would be useful only if the appeal were resolved
927 within a specified period of time. The subcommittee has not reached
928 consensus on which method would be best to ensure a role for the

929 district court should this effort continue.

930 Scope of a rule — types of MDL cases: As noted above,
931 limiting a rule to “personal injury” MDL proceedings seems unlikely
932 to work. Similarly, the prospect of limiting a rule to a certain
933 kind of ruling (e.g., preemption or a “cross-cutting” issue) seems
934 unpromising. It may be, then, that interlocutory review under the
935 rule would have to be available in all MDL proceedings and as to
936 any type of ruling. But that might prompt a question: Why should
937 there be a special route to review in an MDL proceeding with eight
938 cases, but not in a single-district consolidated proceeding with
939 800 claimants? Moving toward a rule that applied to all cases (as
940 does the Cal. Code Civ. Pro. § 166.1, mentioned above) could raise
941 questions about whether the rulemaking process really is authorized
942 to relax the statutory criteria in § 1292(b) for all cases. True,
943 § 1292(e) says that rulemaking may provide for interlocutory
944 appeals not otherwise provided under existing sub-sections of the
945 statute, but a rule that in effect could be said to relax one or
946 more requirements of § 1292(b) in all cases might be resisted on
947 the ground it really goes beyond the rulemaking power authorized by
948 § 1292(e).

949 If further work is done on the interlocutory appeal idea, it
950 may be that additional issues will emerge, but at present at least
951 the issues described above are likely to be raised.

952 *(3) Court Role in Supervision of Leadership*
953 *Counsel and Reviewing Global Settlements*

954 The third and final issue presently on the subcommittee’s
955 agenda is the possibility of developing a rule addressing
956 appointment of leadership counsel, judicial supervision of
957 compensation of leadership counsel, and judicial oversight of
958 “global” settlements sometimes negotiated by leadership counsel.
959 This set of issues appears in important ways to be the most
960 challenging of the questions the subcommittee has confronted.

961 Owing to the attention focused on the two other issues that
962 the subcommittee has been reviewing, little attention has focused
963 on this topic so far. On September 10, 2020, the subcommittee met
964 by conference call to discuss ways forward on this topic. The
965 consensus view was that the subcommittee needed more information
966 about these issues. Though it has had the benefit of important FJC
967 research on the use of the PFS method to organize MDL mass tort
968 litigation, and of numerous conferences and submissions about the
969 possibility of a rule expanding interlocutory review, it has not
970 received comparable input on this third topic.

971 The method identified for providing the needed perspective is
972 to convene a conference involving experienced participants who
973 present a variety of perspectives. The objective would be to make
974 certain that there is diversity among the invitees, not only in
975 terms of defense-side and plaintiff-side lawyers, but also
976 emphasizing the need for diversity in race, gender, age, and other

977 ways. One thing emphasized was involving lawyers who had sought
978 leadership appointment but not been selected. Academic participants
979 should also be included, hopefully representing a range of
980 attitudes on this subject. And of course, it will be critical to
981 involve experienced judges.

982 The subcommittee invites the full Advisory Committee's help in
983 identifying suitable participants for this planned event. The goal
984 will be to hold the event well in advance of the Advisory
985 Committee's Spring 2021 meeting, and perhaps be able to report then
986 with more definite views on how and whether to proceed along these
987 lines.

988 Because less work has been done on this subject than others,
989 the following introduction is similar to previous presentations to
990 the Committee on this subject, but it identifies the issues and
991 challenges of this part of the project.

992 A starting point is to recognize that, fairly often, it seems
993 that the gathering power of MDL proceedings might on occasion bear
994 a significant resemblance to the class action device, perhaps to
995 approach being a de facto class action from the perspective of
996 claimants. But the history of rules for these two semi-parallel
997 devices has differed considerably, particularly regarding
998 supervision of counsel, attorney's fees for leadership counsel, and
999 settlement review.

1000 The class action settlement review procedures were recently
1001 revised by amendments that became effective on December 1, 2018,
1002 which fortified and clarified the courts' approach to determining
1003 whether to approve a proposed settlement. Earlier, in 2003,
1004 Rule 23(e) was expanded beyond a simple requirement for court
1005 approval of class-action settlements or dismissals, and Rules 23(g)
1006 and (h) were also added to guide the court in appointing class
1007 counsel and awarding attorney's fees and costs to class counsel.
1008 Together, these additions to Rule 23 provide a framework for courts
1009 to follow that was not included in the original 1966 revision of
1010 Rule 23.

1011 In class actions, a judicial role approving settlements flows
1012 from the binding effect Rule 23 prescribes for a class-action
1013 judgment. Absent a court order certifying the class, there would be
1014 no binding effect. After the rule was extensively amended in 1966,
1015 settlement became normal for resolution of class actions, and
1016 certification solely for purposes of settlement also became common.
1017 Courts began to see themselves as having a "fiduciary" role to
1018 protect the interests of the unnamed (and otherwise effectively
1019 unrepresented) members of the class certified by the court.

1020 Part of that responsibility connects with Rule 23(g) on
1021 appointment of class counsel, which requires class counsel to
1022 pursue the best interests of the class as a whole, even if not
1023 favored by the designated class representatives. The court may
1024 approve a settlement opposed by class members who have not opted

1025 out. The objectors may then appeal to overturn that approval;
1026 otherwise they are bound despite their dissent. Now, under amended
1027 Rule 23(e), there are specific directions for counsel and the court
1028 to follow in the approval process.

1029 MDL proceedings are different. True, sometimes class
1030 certification is a method for resolving an MDL, therefore invoking
1031 the provisions of Rule 23. But if that happens it often does not
1032 occur until the end of the MDL proceeding. Meanwhile, all of the
1033 claimants ordinarily have their own lawyers. Section 1407 only
1034 authorizes transfer of pending cases, so claimants must first file
1035 a case to be included. ("Direct filing" in the transferee court has
1036 become fairly widespread, but that still requires a filing, usually
1037 by a lawyer.) As a consequence, there is no direct analogue to the
1038 appointment of class counsel to represent unnamed class members
1039 (who may not be aware they are part of the class, much less that
1040 the lawyer selected by the court is "their" lawyer). The transferee
1041 court cannot command any claimant to accept a settlement accepted
1042 by other claimants, whether or not the court regards the proposed
1043 settlement as fair and reasonable or even generous. And the
1044 transferee court's authority is limited, under the statute, to
1045 "pretrial" activities, so it cannot hold a trial unless that
1046 authority comes from something beyond a JPML transfer order.

1047 Notwithstanding these structural differences between class
1048 actions and MDL proceedings, one could also say that the actual
1049 evolution of MDL proceedings over recent decades — perhaps
1050 particularly "mass tort" MDL proceedings — has somewhat paralleled
1051 the emergence since the 1960s of settlement as the common outcome
1052 of class actions. Whether or not this outcome was foreseen in the
1053 1960s when the transfer statute was adopted, it seems to be the
1054 norm today.

1055 This evolution has involved substantial court participation.
1056 Almost invariably in MDL proceedings involving a substantial number
1057 of individual actions, the transferee court appoints "lead counsel"
1058 or "liaison counsel" and directs that other lawyers be supervised
1059 by these court-appointed lawyers. The *Manual for Complex Litigation*
1060 (4th ed. 2004) contains extensive directives about this activity:

- 1061 § 10.22. Coordination in Multiparty Litigation —
- 1062 Lead/Liaison Counsel and Committees
- 1063 § 10.221. Organizational Structures
- 1064 § 10.222. Powers and Responsibilities
- 1065 § 10.223. Compensation

1066 So sometimes — again perhaps particularly in "mass tort" MDLs
1067 — the actual evolution and management of the proceedings may
1068 resemble a class action. Though claimants have their own lawyers
1069 (sometimes called IRPAs [individually represented plaintiffs'
1070 attorneys]), they may have a limited role in managing the course of
1071 the MDL proceedings. A court order may forbid the IRPAs to initiate
1072 discovery, file motions, etc., unless they obtain the approval of
1073 the attorneys appointed by the court as leadership counsel. In

1074 class actions, a court order appointing "interim counsel" under
1075 Rule 23(g) even before class certification may have a similar
1076 consequence of limiting settlement negotiation (potentially later
1077 presented to the court for approval under Rule 23(e)), which might
1078 be likened to the role of the court in appointing counsel to
1079 represent one side or the other in MDL proceedings.

1080 At the same time, it may appear that at least some IRPAs have
1081 gotten something of a "free ride" because leadership counsel have
1082 done extensive work and incurred large costs for liability
1083 discovery and preparation of expert presentations. The *Manual for*
1084 *Complex Litigation (4th)* § 14.215 provides: "Early in the
1085 litigation, the court should define designated counsel's functions,
1086 determine the method of compensation, specify the records to be
1087 kept, and establish the arrangements for their compensation,
1088 including setting up a fund to which designated parties should
1089 contribute in specified proportions."

1090 One method of doing what the *Manual* directs is to set up a
1091 common benefit fund and direct that in the event of individual
1092 settlements a portion of the settlement proceeds (usually from the
1093 IRPA's attorney's fee share) be deposited into the fund for future
1094 disposition by order of the transferee court. And in light of the
1095 "free rider" concern, the court may also place limits on the
1096 percentage of the recovery that non-leadership counsel may charge
1097 their clients, sometimes reducing what their contracts with their
1098 clients provide.

1099 The predominance of leadership counsel can carry over into
1100 settlement. One possibility is that individual claimants will reach
1101 individual settlements with one or more defendants. But sometimes
1102 MDL proceedings produce aggregate settlements. Defendants
1103 frequently are not willing to fund such aggregate settlements
1104 unless they offer something like "global peace." That outcome can
1105 be guaranteed by court rule in class actions, because preclusion is
1106 a consequence of judicial approval of the classwide settlement, but
1107 there is no comparable rule for MDL proceedings.

1108 Nonetheless, various provisions of proposed settlements may
1109 exert considerable pressure on IRPAs to persuade their clients to
1110 accept the overall settlement. On occasion, transferee courts may
1111 also be involved in the discussions or negotiations that lead to
1112 agreement to such overall settlements. For some transferee judges,
1113 achieving such settlements may appear to be a significant objective
1114 of the centralized proceedings. At the same time, some have
1115 wondered whether the growth of "mass" MDL practice is in part due
1116 to a desire to avoid the greater judicial authority over and
1117 scrutiny of class actions and the settlement process under Rule 23.

1118 The absence of clear authority or constraint for such judicial
1119 activity in MDL proceedings has produced much uneasiness among
1120 academics. One illustration is Prof. Burch's recent book *Mass Tort*
1121 *Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge
1122 U. Press, 2019), which provides a wealth of information about

1123 recent MDL mass tort proceedings. In brief, Prof. Burch urges that
1124 it would be desirable if something like Rules 23(e), 23(g), and
1125 23(h) applied in these aggregate litigations. In somewhat the same
1126 vein, Prof. Mullenix has written that “[t]he non-class aggregate
1127 settlement, precisely because it is accomplished apart from Rule 23
1128 requirements and constraints, represents a paradigm-shifting means
1129 for resolving complex litigation.” Mullenix, *Policing MDL Non-Class*
1130 *Settlements: Empowering Judges Through the All Writs Act*, 37 Rev.
1131 Lit. 129, 135 (2018). Her recommendation: “[B]etter authority for
1132 MDL judicial power might be accomplished through amendment of the
1133 MDL statute or through authority conferred by a liberal
1134 construction of the All Writs Act.” *Id.* at 183.

1135 Achieving a similar goal via a rule amendment might be
1136 possible by focusing on the court’s authority to appoint and
1137 supervise leadership counsel. That could at least invoke criteria
1138 like those in Rule 23(g) and (h) on selection and compensation of
1139 such attorneys. It might also regard oversight of settlement
1140 activities as a feature of such judicial supervision. However, it
1141 would not likely include specific requirements for settlement
1142 approval like those in Rule 23(e).

1143 But it is not clear that judges who have been handling these
1144 issues feel a need for either rules-based authority or further
1145 direction on how to wield authority already widely recognized.
1146 Research has found that judges do not express a need for greater or
1147 clarified authority in this area. And the subcommittee has not, to
1148 date, been presented with arguments from experienced counsel in
1149 favor of proceeding along this line. All participants — transferee
1150 judges, plaintiffs’ counsel and defendants’ counsel — seem to
1151 prefer avoiding a rule amendment that would require greater
1152 judicial involvement in MDL settlements.³

1153 For the present, the subcommittee has begun discussing this
1154 subject. This very preliminary discussion has identified a number
1155 of issues that could be presented if serious work on possible rule
1156 proposals occurs. These issues include the following:

1157 Scope: Appointment of leadership counsel and consolidation of
1158 cases long antedate the passage of the Multidistrict Litigation Act
1159 in 1968. As with the PFS/census topic and the possible additional
1160 interlocutory appeal provisions, a question on this topic would be
1161 whether it applies only to some MDLs, to all MDLs, or also to other
1162 cases consolidated under Rule 42. The Manual for Complex Litigation

³ One more recent development deserves mention. On September 11, 2019, Judge Polster used Rule 23 to certify a “negotiation class” to negotiate a settlement on behalf of local governmental entities with claims involved in the Opioids MDL. See *In re National Prescription Opiate Litigation*, 2019 WL 4307851 (N.D. Ohio, Sept. 11, 2019). On November 8, 2019, the Sixth Circuit granted a petition under Rule 23(f) to review Judge Polster’s certification order. See *In re National Opiate Litigation*, Sixth Cir. Nos. 19-305 and 19-306.

1163 has pertinent provisions, and has been applied to litigation not
1164 subject to an MDL transfer order. Its predecessor, the *Handbook of*
1165 *Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D.
1166 351 (1960), antedated Chief Justice Warren's appointment of an ad
1167 hoc committee of judges to coordinate the handling of the outburst
1168 of Electrical Equipment antitrust cases, which proved successful
1169 and led to the enactment of § 1407.

1170 Standards for appointment to leadership positions: Section
1171 10.224 of the *Manual for Complex Litigation 4th* contains a list of
1172 considerations for a judge appointing leadership counsel. Rule
1173 23(g) has a set of criteria for appointment of class counsel.
1174 Though similar, these provisions are not identical. Any rule could
1175 opt for one or another of those models, or offer a third template.
1176 When an MDL includes putative class actions, it would seem that
1177 Rule 23(g) is a reasonable starting place, however.

1178 Interim lead counsel: Rule 23(g) explicitly authorizes
1179 appointment of interim class counsel. The goal is that the person
1180 or persons so appointed would be subject to the requirements of
1181 Rule 23(g) (4) that counsel act in the best interests of the class
1182 as a whole, not only those with whom counsel has a retainer
1183 agreement. In some MDL proceedings, an initial census or other
1184 activity may precede the formal appointment of leadership counsel.
1185 Whether such interim leadership counsel can negotiate a proposed
1186 global settlement (as interim class counsel can negotiate before
1187 certification about a pre-certification classwide settlement) could
1188 raise issues not pertinent in class actions. It may be that the
1189 more appropriate assignment of such interim counsel should be — as
1190 seems to be true of the MDL proceedings where this has occurred —
1191 to provide effective management of such tasks as an initial census
1192 of claims.

1193 Duties of leadership counsel: Appointment orders in MDL
1194 proceedings sometimes specify in considerable detail what
1195 leadership counsel are (and perhaps are not) authorized to do. Such
1196 orders may also restrict the actions of other counsel. Significant
1197 concerns have arisen about whether leadership counsel owe a duty of
1198 loyalty, etc., to claimants who have retained other lawyers (the
1199 IRPAs). Some suggest that detailed specification of duties of
1200 leadership counsel from the outset would facilitate avoiding
1201 "ethical" problems later on. The subcommittee has heard that some
1202 recent appointment orders productively address these issues.

1203 It seems true that the ordinary rules of professional
1204 responsibility do not easily fit such situations. Regarding class
1205 actions, at least, Restatement (Third) of the Law Governing Lawyers
1206 § 128 recognized that a different approach to attorney loyalty had
1207 been taken in class actions. It may be that similar issues inhere
1208 in the role of leadership counsel in MDL proceedings. Both the
1209 wisdom of rules addressing these issues, and the scope of such
1210 rules (on topics ordinarily thought to be governed by state rules
1211 of professional responsibility) are under discussion. Given that
1212 most (or all) claimants involved in an MDL actually have their own

1213 lawyers (not ordinarily true of most unnamed class members), it may
1214 be that rule provisions ought not seek to regulate these matters.

1215 Common benefit funds: Leadership counsel are obliged to do
1216 extra work and incur extra expenses. In many MDLs, judges have
1217 directed the creation of "common benefit funds" to compensate
1218 leadership counsel for undertaking these extra duties. A frequent
1219 source of the funds for such compensation is a share of the
1220 attorney fees generated by settlements, whether "global" or
1221 individual. In some instances, MDL transferee courts have sought
1222 thus to "tax" even the settlements achieved in state-court cases
1223 not formally before the federal judge. From the judicial
1224 perspective, it may appear that the IRPAs are getting a "free
1225 ride," and that they should contribute a portion of their fees to
1226 pay for that ride.

1227 Capping fees: Somewhat in keeping with the "free ride" idea,
1228 judges have sometimes imposed caps on fees due to IRPAs at a lower
1229 level than what is specified in the retainer agreements these
1230 lawyers have with their clients. The rules of professional
1231 responsibility direct that counsel not charge "unreasonable" fees,
1232 and sometimes authorize judges to determine that a fee exceeds that
1233 level. It is not clear whether this "capping" activity is as common
1234 as orders creating common benefit funds. Whether a rule should
1235 address, or try to regulate, this topic is uncertain.

1236 Judicial settlement review: As some courts put it, the court's
1237 role under Rule 23(e) is a "fiduciary" one, designed to protect
1238 unnamed class members against being bound by a bad deal. But
1239 ordinarily in an MDL each claimant has his or her own lawyer. There
1240 is no enthusiasm for a rule that interferes with individual
1241 settlements, or calls for judicial review of them (although those
1242 settlements may result in a required payment into a common benefit
1243 fund, as noted above).

1244 So it may seem that a rule for judicial review of settlement
1245 provisions in MDL proceedings is not appropriate. But it does
1246 happen that "global" settlements negotiated by leadership counsel
1247 are offered to claimants, with very strong inducements to them or
1248 their lawyers to accept the agreed-upon terms. In such instances,
1249 it may seem that sometimes the difference from actual class action
1250 settlements is fairly modest. Indeed, in some instances there may
1251 be class actions included in the MDL, and they may become a vehicle
1252 for effecting settlement.

1253 As noted above, it appears that some leadership appointment
1254 orders include negotiating a "global" settlement as among the
1255 authorities conferred on leadership counsel. Even if that is not
1256 so, it may be that leadership counsel actually do pursue settlement
1257 negotiations of this sort. To the extent that judicial appointment
1258 of leadership can produce this situation, then, it may also be
1259 appropriate for the court to have something akin to a "fiduciary"
1260 role regarding the details of such a "global" settlement.

1261 Ensuring that any MDL rules mesh with Rule 23: As noted, MDLs
1262 include class actions with some frequency. So sometimes Rules
1263 23(e), (g) and (h) would apply. But it is certainly possible that
1264 in some MDLs there are both claims included in class actions and
1265 other claims that are not. If the MDL rules for the topics
1266 discussed above do not mesh with Rule 23, that could be a source of
1267 difficulty. Perhaps that is unavoidable; this potential dissonance
1268 presumably already exists in some MDL proceedings. But the
1269 possibility of tensions or even conflicts between MDL rules and
1270 Rule 23 merits ongoing attention.

1271 At present, the basic question is whether there should be some
1272 formal statement of many practices that have been adopted — and
1273 sometimes become widespread — in managing MDL proceedings. Whether
1274 such a statement ought to be in the rules is not clear. There are
1275 alternative locations, including the Manual for Complex Litigation,
1276 the annual conference the Judicial Panel puts on for transferee
1277 judges, and the JPML’s website. Perhaps it could be sufficient to
1278 expect that experienced MDL litigators will carry the issues and
1279 related practices from one proceeding to another, and experienced
1280 MDL transferee judges will communicate among themselves and with
1281 those new to the fold.

1282 Relying on informal circulation prompted a repeated concern
1283 — there is good reason to make efforts to expand and diversify the
1284 ranks of lawyers who take on leadership positions. That is one of
1285 the reasons why the subcommittee conference call on September 10
1286 included emphasis on involving younger lawyers and, perhaps
1287 particularly, those who had sought but not yet received appointment
1288 to a leadership position. Anything that formalizes best practices
1289 should not impede progress on this important effort. On the other
1290 hand, some formal statement might be advantageous by making these
1291 practices known more widely and more accessible to those not
1292 steeped in this realm of practice.

1293 Another consideration is the possibility that some judges or
1294 litigators might entertain doubts about the courts’ authority to do
1295 the sorts of things that have commonly been done to manage MDL
1296 proceedings. Though Rule 23 is a secure basis for judicial
1297 authority to review the terms of proposed settlements, in MDL
1298 proceedings not involving Rule 23 the judicial role is more
1299 advisory or supervisory. There may be serious questions about
1300 whether a rule can authorize a judge to “approve” or perhaps even
1301 comment on the terms of a proposed settlement in MDL proceedings.
1302 There seems scant basis for judicial authority to bind individual
1303 parties to a proposed settlement simply because they have been
1304 aggregated, sometimes unwillingly, under § 1407.

1305 So it may be that if more formalized provisions are needed the
1306 anchor could be the court’s authority to designate a leadership
1307 structure, something that has been widely recognized. The reality
1308 is that judges may prescribe specific duties for leadership counsel
1309 (and also on occasion restrict the authority of non-leadership
1310 lawyers to act for their clients). A judge’s authority to appoint

1311 and prescribe responsibilities for leadership counsel might also
1312 include continuing authority to supervise the performance of the
1313 leadership lawyers, including in connection with settlement
1314 negotiation. This undertaking could introduce further complexity in
1315 addressing the nature of possible responsibilities leadership
1316 counsel have to claimants who are not their direct clients.

1317 In the background, then, are questions about whether the mere
1318 creation of an MDL proceeding provides authority for a federal
1319 judge to regulate matters of attorney-client contracts, ordinarily
1320 governed by state law. One thought is that establishing a
1321 leadership structure is a matter of procedure that can properly be
1322 addressed by a Civil Rule. Establishing the structure in turn
1323 requires definition of leadership roles and responsibilities, and
1324 also requires providing financial support for the added work and
1325 attendant risks and responsibilities assumed by leadership counsel.
1326 Even accepting these structural elements, however, does not
1327 automatically carry over to creating a role for the MDL court in
1328 reviewing proposed terms for settlements, particularly of
1329 individual claims. Judges have differing views on the appropriate
1330 judicial role in providing settlement advice. Even in terms of
1331 broader "global" settlements, a wary approach would be required in
1332 considering an attempt to regularize a role for judges in working
1333 toward settlements in MDL proceedings.

1334 At least the following questions have already emerged:

- 1335 1. Is there any need to formalize rules of practice —
1336 whether in structuring management of MDL proceedings or
1337 in working toward settlement — that are already familiar
1338 and that continue to evolve as experience accumulates?
1339
- 1340 2. Do MDL judges actually hold back from taking steps that
1341 they think would be useful because of doubts about their
1342 authority?
1343
- 1344 3. There are indications that any formal rulemaking would
1345 initially be resisted by all sides of the MDL bar and by
1346 experienced MDL judges. Is that an important concern that
1347 should call for caution? Or is it a good reason to look
1348 further into the arguments of some academics that it is
1349 important to regularize the insider practices that
1350 characterize a world free of formal rules?
1351
- 1352 4. Even apart from concerns about the reach of Enabling Act
1353 authority, would many or even all aspects of possible
1354 rules interfere improperly with attorney-client
1355 relationships?
1356
- 1357 5. Would rules in this area unwisely curtail the flexibility
1358 transferee judges need in managing MDL proceedings?
- 1359 6. Would providing for common-benefit fund contributions,
1360 and for limiting fees for representing individual

1361 clients, impermissibly modify substantive rights, even
1362 though courts are often enforcing such provisions without
1363 any formal authority now?

1364 7. Would formal rules for designating members of the
1365 leadership somehow impede efforts to bring new and more
1366 diverse attorneys into these roles?

1367 During the Advisory Committee's October 2020 discussion, other
1368 issues may come to the fore, and there may be consensus about some
1369 of the issues described above. Nonetheless, this outline should
1370 provide a starting point for that full Committee discussion. The
1371 question going forward is whether this effort holds promise of
1372 generating useful results, even if not in a formal rule amendment.

1373 In order to facilitate discussion, not to suggest that the
1374 subcommittee has resolved to pursue rulemaking on any of these
1375 topics, Appendix A presents an informal sketch of a possible
1376 approach to a rule addressing some of these issues, along with
1377 notations of questions that would be presented.

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APPENDIX A
Sketch of Possible Rule Approach

1380 The sketch below is offered solely to provide a concrete
1381 example of how the topics discussed under (3) above might be
1382 addressed in a rule. As emphasized in this agenda memo, the
1383 subcommittee has not made any decision about whether to recommend
1384 attempting to draft a rule. Indeed, even if some provisions
1385 regarding these matters would be useful, it need not follow that
1386 they should be embodied in a rule, as opposed to a manual or
1387 instructional materials for the Judicial Panel.

1388 **Rule 23.3. Multidistrict Litigation Counsel**

1389 (a) (1) **Appointing Counsel.** When actions have been
1390 transferred for coordinated or consolidated
1391 pretrial proceedings under 28 U.S.C. § 1407, the
1392 court may appoint [lead]⁴ counsel to perform
1393 designated [acts][responsibilities] on behalf of⁵
1394 all counsel who have appeared for similarly aligned
1395 parties.⁶ In appointing [lead] counsel the court:
1396 (A) must consider:
1397 (i) the work counsel has done in preparing
1398 and filing individual actions;
1399 (ii) counsel's experience in handling complex
1400 litigation, multidistrict litigation, and
1401 the types of claims asserted in the
1402 proceedings;
1403 (iii) counsel's knowledge of the applicable
1404 law; and
1405 (iv) the resources that counsel will commit to

⁴ It may work to leave the many tiers of counsel to the committee note. There may or may not be a single "lead" counsel – it is at least possible to designate an executive committee or some such without identifying a single lead counsel. In addition to lead counsel, there may or may not be a steering or executive committee, subcommittees for discovery or whatever, liaison counsel to work with other counsel in the MDL proceeding, liaison counsel to work with lawyers and actions in state courts, and so on through the needs of a particular MDL. The court may or may not want to be involved in appointing all of these various roles.

⁵ I doubt that we want to designate class counsel to represent parties other than their own clients. Probably we cannot say "to represent" other lawyers who represent clients in the MDL proceeding. "Manage" the proceedings might imply too much authority. "Coordinate" addresses the basic purpose. "Coordinate the efforts of all counsel [on a side]" might work, but it may leave the way open to disruption by individual lawyers not appointed to any role.

⁶ This is an elastic concept, but perhaps better than "[all] plaintiffs" or "[all] defendants." Large numbers of third-party defendants have not appeared in our discussions, but the more general phrase may be better.

- 1406 the proceedings;
- 1407 (B) may consider any other matter pertinent to
- 1408 counsel's ability to perform the designated
- 1409 [acts][responsibilities];
- 1410 (C) may order potential [lead] counsel to provide
- 1411 information on any subject pertinent to the
- 1412 appointment and to propose terms for
- 1413 attorney's fees and taxable costs;
- 1414 (D) may include in the appointing order provisions
- 1415 about the role of lead counsel and the
- 1416 structure of leadership, the creation and
- 1417 disposition of common benefit funds under Rule
- 1418 23.3(b), discussion of settlement terms [for
- 1419 parties not represented by lead counsel] under
- 1420 Rule 23.3(c), and matters bearing on
- 1421 attorney's fees and nontaxable costs [for lead
- 1422 counsel and other counsel] under Rule 23.3(d);
- 1423 and
- 1424 (E) may make further orders in connection with the
- 1425 appointment[, including modification of the
- 1426 terms or termination].
- 1427 (2) *Standard for Appointing Lead Counsel.* The court
- 1428 must appoint as lead counsel one or more counsel
- 1429 best able to perform the designated
- 1430 responsibilities.
- 1431 (3) *Interim Lead Counsel.* The court may designate
- 1432 interim lead counsel to report on the ways in which
- 1433 an appointment of lead counsel might advance the
- 1434 purposes of the proceedings.
- 1435 (4) *Duties of Lead Counsel.* Lead counsel must fairly
- 1436 and adequately discharge the responsibilities
- 1437 designated by the court [without favoring the
- 1438 interests of lead counsel's clients].
- 1439 (b) COMMON BENEFIT FUND. The court may order establishment of a
- 1440 common benefit fund to compensate lead counsel for
- 1441 discharging the designated responsibilities. The order
- 1442 may be modified at any time, and should [must?]:
- 1443 (1) set the terms for contributions to the fund [from
- 1444 fees payable for representing individual
- 1445 plaintiffs]; and
- 1446 (2) provide for distributions to class counsel and other
- 1447 lawyers or refunds of contributions.

- 1448 (c) SETTLEMENT DISCUSSIONS. If an order under Rule 23.3(a)(1)(D)
1449 authorizes lead counsel to discuss settlement terms that
1450 [will? may?] be offered to plaintiffs not represented by
1451 lead counsel, any terms agreed to by lead counsel:
1452 (1) must be fair, reasonable, and adequate;⁷
1453 (2) must treat all similarly situated plaintiffs
1454 equally; and
1455 (3) may require acceptance by a stated fraction of all
1456 plaintiffs, but may not require acceptance by a
1457 stated fraction of all plaintiffs represented by a
1458 single lawyer.
- 1459 (d) ATTORNEY FEES.
1460 (1) *Common Benefit Fees*. The court may award fees and
1461 nontaxable costs to lead counsel and other lawyers
1462 from a common benefit fund for services that
1463 provide benefits to [plaintiffs? parties?] other
1464 than their own clients.⁸
1465 (2) *Individual Contract Fees*. The court may modify the
1466 attorney's fee terms in individual representation
1467 contracts when the terms would provide unreasonably
1468 high fees in relation to the risks assumed,
1469 expenses incurred, and work performed under the
1470 contract.

⁷ This is a particularly difficult proposition. In one way it seems obvious, and almost compelled by the analogy to Rule 23(e). But the justification depends on the proposition that a leadership team may face the same de facto conflicts of interests as class counsel. The incentive to settle on terms that produce substantial fees – both for representing individual plaintiffs and for common-benefit activities – may be real. But the comparison to Rule 23 is complicated by the right of each individual plaintiff to settle, or refuse to settle, on whatever terms that plaintiff finds adequate.

⁸ Another tricky question. Lead counsel services often provide benefits both to lead counsel's clients and to other parties, usually — perhaps always? — other plaintiffs. But some services may provide benefits only to others' clients. A particular member of the leadership team, for example, may have clients who used only one version of a product that, in different forms, caused distinctive injuries to others, but the work can easily cross those boundaries. And we have occasionally heard hints about leadership counsel who have no clients at all. Is it feasible to write anything about the distinction into rule text? And is there any reason to try: if my hard work would be just as hard if I were representing only my own clients, but it confers great benefit on other lawyers who are spared the need to duplicate the work, why not provide some compensation for the benefit?

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APPENDIX B
Subcommittee Conference Call Notes

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**MDL Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 10, 2020**

1477 On Sept. 10, 2020, the MDL Subcommittee of the Advisory
1478 Committee on Civil Rules held a conference call. Participants
1479 included Judge Robert Dow (Chair of the subcommittee),
1480 Judge John Bates (Chair of the Advisory Committee), Judge Joan
1481 Ericksen, Judge Robin Rosenberg, Virginia Seitz, Ariana Tadler,
1482 Helen Witt, Joseph Sellers, Rebecca Womeldorf (Chief Counsel, Rules
1483 Committee Staff), Julie Wilson (Counsel, Rules Committee Staff),
1484 Prof. Edward Cooper (Reporter to the Advisory Committee) and Prof.
1485 Richard Marcus (Reporter to the subcommittee), and Emery Lee (FJC).

1486 The focus of this call was the possibility of trying to
1487 develop rule provisions that would address the related questions of
1488 judicial appointment of leadership counsel in MDL proceedings and
1489 the frequent emergence (often as a result of negotiations by
1490 leadership counsel) of some sort of "global settlement." In keeping
1491 with their supervision of leadership counsel, it may be that
1492 transferee judges' oversight of the terms of the settlement could
1493 be addressed in a rule.

1494 At a very general level, such an approach might develop for
1495 MDL proceedings, or at least some of them, a set of rule provisions
1496 somewhat like Rules 23(e), (g), and (h). Those Rule 23 provisions
1497 have been very extensively expanded (in the case of 23(e)), and
1498 added (in the case of 23(g) and (h)) during the last two decades.
1499 No similar modernization has occurred with the MDL statute, § 1407.

1500 Before the conference call, Prof. Marcus circulated a set of
1501 introductory materials, largely drawn from the report to the
1502 Standing Committee in June 2020, along with an Appendix setting out
1503 a possible draft Rule 23.3 sketched by Prof. Cooper at the
1504 beginning of the year in an effort to provide some concreteness to
1505 the concepts the subcommittee has struggled to define.

1506 The subject was introduced as presenting a "big question" —
1507 whether these possibilities are worth pursuing. If one looks for
1508 strong support for doing something along these lines, one initially
1509 is more likely to find that in law review articles by law
1510 professors than among experienced MDL practitioners or transferee
1511 judges.

1512 For some time, it has seemed that the most important need in
1513 carefully evaluating these issues is to gather more information
1514 about the possible effects of such rulemaking. Until now, the main
1515 focus of the subcommittee has been on other matters. It has
1516 received abundant input about the question of expanded
1517 opportunities for interlocutory review, including at least two

1518 full-day conferences devoted to just that topic. Nothing of that
1519 dimension has occurred on this topic.

1520 But there are certainly quite a few challenging questions that
1521 proceeding down this path could present, some of which are
1522 identified in the materials circulated before the call.

1523 A suggestion was made: Perhaps the subcommittee could prompt
1524 the Emory Complex Litigation Center to convene a conference on this
1525 topic similar to the one held June 19, 2020, on interlocutory
1526 appeals. That event was extremely helpful. The goal would be to
1527 ensure that the participants represent diverse viewpoints and
1528 perspectives.

1529 A first reaction from a subcommittee member was that holding
1530 such a conference seemed an excellent idea. This member had not to
1531 date fully focused on these issues, and thought that thorough
1532 discussion would benefit from multiple reactions.

1533 Another member agreed that there has been considerable
1534 academic interest in these subjects, but noted also that the
1535 subcommittee has not yet received a great deal of practitioner
1536 input.

1537 A third member agreed that such a conference was worth
1538 exploring, but added that it would be important to identify groups
1539 or individuals who might be opposed to proceeding along these
1540 lines. Academic views are often helpful, but diversity of viewpoint
1541 can be even more important.

1542 That drew the response that there probably are academics of a
1543 different persuasion; they do not all sing the same tune. And there
1544 are judges who seem to have experience in providing early and clear
1545 direction and supervision of leadership counsel of the sort we
1546 might be exploring for a rule. It would be important to involve
1547 them.

1548 At the same time, it should also be kept in mind that any rule
1549 would not be designed to restrict the judge's flexibility so much
1550 as recognizing the judge's authority and focusing on what appear to
1551 be the most important factors when that authority is wielded.

1552 The need for diversity was stressed — not just plaintiff-side
1553 and defense-side representation, though that is certainly critical,
1554 but also in terms of gender, race, sexual orientation, and age,
1555 perhaps particularly age — younger lawyers are needed in this
1556 sphere, and the subcommittee should hear from them. Indeed, one of
1557 the initiatives that might be furthered by this effort would be
1558 expansion of the participants beyond "the usual suspects."

1559 A question was raised: Is there a way to locate and have
1560 representation for objectors? There are people who often appear as
1561 objectors to class action settlements. Is that a source for useful
1562 participants in such a conference?

1563 One suggestion was that one could look for what are sometimes
1564 called IRPAs — Individually Represented Plaintiffs’ Attorneys.
1565 Those people may take umbrage at court orders (a) limiting their
1566 ability to litigate their cases, (b) requiring them to pay part of
1567 their attorneys’ fees into a common benefit fund that would be used
1568 to pay leadership counsel, and perhaps (c) facing a judicially-
1569 imposed cap on their fees as well.

1570 But IRPAs may not be the right focus, it was noted. The more
1571 promising focus would be on people who seek appointment as
1572 leadership counsel. Those are the people who are seeking an
1573 opportunity to become involved in an important way in major MDL
1574 proceedings. If we wish to consider ways to increase diversity in
1575 such leadership ranks, it would make most sense to look to those
1576 who have attempted to obtain appointment to leadership positions.
1577 Those who are disgruntled about the overall functioning of MDL
1578 proceedings are probably not as useful a source of participants as
1579 those who seek to be involved at the outset.

1580 Another perspective was raised: It will probably be important
1581 to involve some current member of the Judicial Panel. Judges Vance
1582 and Proctor have been very helpful to the subcommittee, but neither
1583 of them is presently on the Panel. In addition, it would be
1584 important, if possible, to identify an academic who is not urging
1585 the adoption of provisions for MDLs like Rules 23(e), (g), and (h).

1586 All this was summed up as emphasizing both the importance and
1587 the challenge of getting viewpoint diversity. This can be the
1588 suggestion to the full Committee during the October meeting. The
1589 goal should be to have this conference before the spring meeting of
1590 the full Committee. It might be possible to set it up for November,
1591 but perhaps more realistic to point toward January.
1592

1640 nor the objection of another party or counsel to, such a
1641 commentary in the interlocutory order, may be grounds for
1642 a writ or appeal.

1643 As explained, this statute provides the trial court judge with a
1644 vehicle to convey a view on the utility of immediate review. Though
1645 California has a method for consolidating related cases from around
1646 the state (called JCCP), this statute is not limited to such cases.
1647 It also is not limited to orders of a certain type.

1648 Another question about California practice came up. Justice
1649 Streeter also mentioned that some matters are entitled to expedited
1650 review in the California system, in particular rulings on Anti-
1651 SLAPP motions and rulings involving juvenile delinquency. Although
1652 the exact aspects of that expedited treatment are uncertain, it
1653 does seem that at least some of these rulings (e.g., matters
1654 involving juveniles in possibly dangerous circumstances) are not
1655 frequently before the federal courts.

1656 Under § 166.1, there is no expedited treatment on appeal.
1657 Justice Streeter's memo mentions a litigation also mentioned on
1658 June 19 by Judge Kuhl, who is a Complex Litigation judge on Los
1659 Angeles Superior Court (and a member of the Standing Committee). In
1660 one mass toxic exposure litigation in the California state courts,
1661 review was had through final ruling by the Supreme Court of
1662 California (presumably following an intermediate decision by the
1663 Court of Appeal) in a total of two years.

1664 Moving to other topics under discussion on June 19, it was
1665 noted that among the many judges present at the miniconference,
1666 there seemed to be only one district judge who was really receptive
1667 to expanded interlocutory review in MDL proceedings.

1668 But at least one appellate judge raised the possibility that
1669 a rule modeled on 28 U.S.C. § 158(d)(2)(A)(iii), which focuses on
1670 whether "an immediate appeal from the judgment, order, or decree
1671 may materially advance the progress of the case or proceeding in
1672 which the appeal is taken" should be considered. It may be that
1673 this standard is better suited to the MDL situation than the
1674 standard in § 1292(b) — "materially advance the ultimate
1675 termination of the litigation." And at least one other district
1676 judge who was involved in the June 19 miniconference (and has MDL
1677 experience) has since voiced some receptivity to a standard more
1678 closely attuned to the MDL situation, in which the transferee court
1679 has authority only over "pretrial" matters.

1680 The reference to § 158(d)(2) prompted a question. Has anyone
1681 done research to find out how that statute is actually interpreted?
1682 Before we give serious consideration to adopting a standard from
1683 another statute, it would be important to be familiar with how it
1684 has been applied. Those on the call were not certain how that
1685 statute has been interpreted.

1686 This comment drew the reaction that a standard might also
1687 focus on what the transfer statute itself says. § 1407(a) says that
1688 the transfer is for “coordinated or consolidated pretrial
1689 proceedings,” and that cases should be returned at “the conclusion
1690 of such pretrial proceedings.” Perhaps, then, a standard could
1691 build on that — “materially advance the completion of the
1692 coordinated or consolidated pretrial proceedings.” This standard
1693 would not be tied so directly to the bankruptcy appeal provision.

1694 Another question arose: Are we talking about all MDL
1695 proceedings, or only some of them? That prompted a response that we
1696 have found it difficult to identify a dividing line among MDL
1697 proceedings that would be promising. One criterion would be the
1698 number of cases — somehow to focus only on a “mega” MDL. But
1699 counting cases or claimants seemed somewhat difficult. In addition,
1700 it could be that the formal claimant list would be an undercount.
1701 In some MDL mass tort proceedings there may be hundreds or even
1702 thousands of potential claimants whose cases are “on hold” pending
1703 developments in the formal MDL. In addition, as the work of the
1704 Supreme Court fellow on when new cases arrive in MDL mass tort
1705 proceedings has demonstrated, sometimes the number of cases rises
1706 rather gradually; even though the final case count is very large,
1707 that may not be apparent for a long time.

1708 A different perspective was offered: “If we don’t limit this
1709 to the ‘mega’ MDLs, why should my MDL with eight cases qualify
1710 potentially for interlocutory review while a single district
1711 consolidation (say in a toxics case) with 1,000 claimants does
1712 not?”

1713 This discussion pointed up the importance of focusing on what
1714 might be the criteria in a rule if one seemed worth pursuing, but
1715 the threshold question is whether the subcommittee has reached a
1716 consensus on whether it is presently not promising even to try to
1717 draft a rule.

1718 *Do Existing Procedures Provide*
1719 *Sufficient Flexibility?*

1720 The discussion turned to what might be called the “ultimate
1721 question”: Based on nearly three years of fairly intense study, has
1722 the subcommittee reached consensus on whether there is sufficient
1723 promise to justify proceeding with possible drafting of an
1724 interlocutory review rule?

1725 There already are some routes for interlocutory review, and
1726 some recent experience shows that they can work in MDL proceedings.
1727 Judge Furman certified an issue to the Second Circuit in one of his
1728 MDLs and that appeal is proceeding. The Sixth Circuit has used
1729 mandamus to review at least some rulings in the opioids MDL. So at
1730 least sometimes there is an avenue to review.

1731 The first subcommittee member to address this topic reported
1732 initially favoring this effort. Over the long and intense period of

1733 exploring these issues, however, this member became convinced that
1734 any rulemaking would face major issues that are presently not
1735 fixable. For example, the delay problem has been shown to be very
1736 serious, and there seems to be no good fix for that. And there are
1737 several other similarly intractable problems. § 1292(b) is not a
1738 panacea, but any effort to supplement it would be fraught with such
1739 difficulties that it is not sensible to proceed. Of great
1740 importance is the very broad judicial opposition to expanding the
1741 rules. These difficulties "cannot be fixed in a rational rule."

1742 Another subcommittee member reported having undergone a very
1743 similar evolution in attitude. There is a real problem with
1744 inability to obtain timely review in some MDL cases, but we have
1745 not heard of any realistic solution. With virtually all the judges
1746 opposed, there would be almost no hope of success. Among attorneys,
1747 there is also much dissent. This project is "not doable."

1748 Another subcommittee member expressed agreement. The idea of
1749 using the standard in § 158(d) regarding bankruptcy appeals was
1750 intriguing in some ways. But as one of the judges who participated
1751 in the June 19 conference stressed, there could be very serious
1752 unintended consequences to broadening the route to interlocutory
1753 appeal. One particular example was labeled the "Achilles heel of
1754 MDL" of any such effort — the effect on the federal court's
1755 ability to provide leadership for state courts entertaining related
1756 cases. Right now, it may often happen that the MDL transferee
1757 judge's collaboration with state court judges and the resulting
1758 federal judicial leadership are critical to the orderly handling of
1759 parallel litigation. Often the state courts will "wait" for the
1760 federal cases to proceed first. But if the federal proceedings were
1761 slowed by an interlocutory appeal, there would be a significant
1762 likelihood that state courts would be unwilling to wait. There
1763 would likely be no obvious leader in those circumstances, so one
1764 could find that state court litigation would proceed in numerous
1765 states. That is contrary to the basic goal of MDL to achieve
1766 coordinated pretrial development of these cases.

1767 Another subcommittee member agreed with the ones who had
1768 already spoke — "We should leave this as it is."

1769 A judge member observed that "the evidence is simply not there
1770 to support a change." The statistics provided in submissions from
1771 the plaintiff side show an affirmance rate that resembles the rate
1772 in other civil litigation and belies a need to facilitate
1773 interlocutory review. Though some defense counsel say they are
1774 unwilling to seek review under § 1292(b), there is no persuasive
1775 evidence of backlash by transferee judges when defendants do seek
1776 review under the existing statute.

1777 Another judicial member agreed: "The existing rules are good
1778 enough." Our focus should be elsewhere, and we should steer away
1779 from this possibility.

1780 A third judicial member reported going "back and forth" on
1781 this question for a long time. There is a valid concern with
1782 whether some transferee judges appreciate that § 1292(b) offers
1783 sufficient flexibility to accommodate needed review. Judge Furman's
1784 GM order was a *tour de force*, and it is now in the official
1785 reports. But it may be that some judges would not be comfortable
1786 doing what he did. As the June 19 conference confirmed, however,
1787 and we had seen even before that, the great majority of experienced
1788 judges were not receptive to broadening interlocutory review.

1789 CONSENSUS: The consensus was that the subcommittee should
1790 report to the full Committee that it does not favor proceeding
1791 further with efforts to expand interlocutory review.

1792 It was observed that the ultimate decision whether to proceed
1793 is up to the full Committee, not the subcommittee, so the
1794 suggestion was that further discussion address whether, should the
1795 full Committee direct the subcommittee to proceed with the
1796 interlocutory appeal issue, it could also advise on what seemed to
1797 be its inclinations on the additional points that have been under
1798 discussion. Surely some will not produce consensus, but others may
1799 and that may be a useful thing to report during the fall meeting.
1800 In a sense, this portion of the report would identify the difficult
1801 issues that would lie in the future if the subcommittee is directed
1802 to proceed, as well as permitting Advisory Committee members to
1803 express reservations, if any, with the consensus the subcommittee
1804 has reached on some questions.

1805 The discussion continued for this hypothetical purpose.

1806 *Appeal as of Right or Discretionary*

1807 CONSENSUS: The subcommittee reached consensus that an appeal
1808 of right should not be provided; any rule should make appeal
1809 discretionary with the court of appeals.

1810 *Expedited Treatment in Court of Appeals*

1811 CONSENSUS: The subcommittee consensus was that a rule
1812 (particularly a Civil Rule) should not attempt to command a
1813 court of appeals to grant priority to such an appeal. Whether
1814 a rule should, if adopted, invite the district court to
1815 comment on whether interlocutory review would be helpful in
1816 light of the likely duration of an appeal appears to deserve
1817 further study.

1818 *Stay of Proceedings*

1819 CONSENSUS: The subcommittee consensus was that there should
1820 not be an automatic stay provision should discretionary review
1821 be granted. If the Subcommittee is to proceed further on the
1822 interlocutory review question, it might look to Rule 23(f):
1823 "An appeal does not stay proceedings in the district court
1824 unless the district judge or the court of appeals so orders."

1825

Role of the District Court

1826 The subcommittee has been convinced that the Rule 23(f) model
1827 should not be used on this issue; the district court should not be
1828 excluded from being heard on whether an immediate appeal should be
1829 allowed.

1830 The subcommittee did not reach full consensus on other issues
1831 related to the role of the district court, however. The current
1832 discussion suggests that the goal should be to provide the district
1833 court with a timely and meaningful opportunity to express a view,
1834 and provide the court of appeal with needed insight on whether
1835 granting review would really advance the MDL process. If the
1836 subcommittee proceeds with this topic, it will need to give further
1837 attention to these matters. Various models exist:

1838 Appellate Rule 21(b) (4), dealing with a petition for a writ of
1839 mandamus, says: "The court of appeals may invite or order the
1840 trial-court judge to address the petition or may invite an
1841 amicus curiae to do so. The trial-court judge may request
1842 permission to address the petition but may not do so unless
1843 invited or ordered to do so by the court of appeals."

1844 California Code of Civil Procedure § 166.1 says: "Upon the
1845 written request of any party or his or her counsel, or at the
1846 judge's discretion, a judge may indicate [whether immediate
1847 review] will materially advance the conclusion of the
1848 litigation."

1849 Section 1292(b) says that the court of appeals has discretion
1850 to grant review only if the district certifies an order for
1851 immediate review. This is the "district court veto."

1852 A rule might provide the district court with a period of time,
1853 say 30 days, to express views on the value of immediate
1854 review, with the expectation that the court of appeals would
1855 not act on the proposed appeal until that time had expired.

1856 A rule might invite or direct the district court to express a
1857 view on the utility of immediate review, perhaps including
1858 attention to whether the likely time needed for an appellate
1859 decision would frustrate the purposes for enabling
1860 interlocutory review.

1861 The subcommittee has not reached consensus on which of these
1862 approaches, or which alternative approach, might be suitable. It
1863 was noted that it is highly unlikely that a court of appeals would
1864 grant review if the transferee judge offered reasons why it would
1865 not be helpful and might be harmful. Given that, it might be that
1866 something like the "district court veto" would make sense. For some
1867 subcommittee members, a veto power would give the district judge
1868 undue power.

1869 An example was offered, based in part on the June 19
1870 discussion — a *Daubert* ruling. As one of the judges pointed out,
1871 that is a heavily fact-bound decision. Reviewing based on a full
1872 trial record may be much better than relying on a pretrial ruling,
1873 particularly when (as seems likely) the pretrial ruling is not to
1874 exclude the opinion evidence. (If the ruling were to exclude, at
1875 least in the cases the subcommittee has heard about, that would
1876 often lead to entry of summary judgment for defendants, an
1877 appealable order.)

1878 This discussion prompted a caution. “If the subcommittee might
1879 recommend a rule without a district court veto power, it would need
1880 to explain why it has changed § 1292(b) that way but only for
1881 certain cases.” In a way, that looks to the next topic — scope of
1882 the possible new rule. Nonetheless, it is important to keep in mind
1883 at this juncture also.

1884 As has already been discussed, line drawing may look peculiar
1885 if the new rule can be used in all MDLs — including one with only
1886 eight cases — but not in any other cases, even if they are
1887 consolidations of hundreds or thousands of cases or claims from
1888 within a given district. Why do disappointed parties in MDL cases
1889 get a chance to persuade the court of appeals to grant review
1890 without first obtaining the support of the district judge, while
1891 the lawyers in the 1,000 plaintiffs case do not (unless one
1892 considers the extraordinary and rarely available writ of mandamus)?

1893 Section 1292(e) would have to be the authority for such a
1894 rule. It says:

1895 The Supreme Court may prescribe rules, in accordance with
1896 section 2072 of this title [the Rules Enabling Act], to
1897 provide for an appeal of an interlocutory decision to the
1898 courts of appeals that is not otherwise provided for
1899 under section (a), (b), (c), or (d).

1900 At some point there might be questions raised about whether
1901 changing § 1292(b) only slightly — to remove the district court
1902 veto, for example — is really within the grant of rulemaking
1903 authority. It might be said that the rulemaking authority was not
1904 added to permit the rulemakers to authorize appeals in “near miss”
1905 cases that can’t satisfy all of the requirements for certification
1906 under subsections (a), (b), (c), or (d).

1907 That ties in with the question whether any rule change would
1908 apply only to MDL cases. Unless there is something pertinent and
1909 unique about them, it may be hard to justify what could be said to
1910 bypass § 1292(b) for only those cases. But if it is not limited to
1911 MDL cases, it really sounds like rewriting what Congress enacted.

1912 For the present, the important thing is to alert the full
1913 Committee that this may be a challenging question if the
1914 subcommittee is to continue pursuing this question.

1961 CONSENSUS: There was no consensus within the subcommittee on
1962 how to handle these problems; instead, the consensus is that
1963 there would be considerable challenges resolving them.

1964 *Types of Rulings Subject to Review*

1965 For a time, some proponents of review urged that categories of
1966 rulings might be included in a rule that would limit it to appeals
1967 of those sorts of rulings. Candidates advanced had included
1968 preemption rulings, Daubert rulings, and jurisdiction rulings. But
1969 the research done so far on actual appeals in MDL proceedings does
1970 not show that these sorts of rulings are often the subject of an
1971 appeal, and does show that a great variety of other rulings are
1972 often the subject of appeals. So it is not apparent that these
1973 sorts of rulings should be singled out.

1974 Perhaps the most persuasive approach to this question was to
1975 emphasize that "cross-cutting" rulings should be the focus. But
1976 that really is just another way of saying that appeals should be
1977 allowed only when their resolution will significantly advance the
1978 overall resolution of either the MDL as a whole, or at least the
1979 pretrial proceedings transferred to the MDL transferee judge.

1980 CONSENSUS: There appears to be no value to trying to define in
1981 a rule categories of orders that are the only ones eligible
1982 for interlocutory review under the rule.

1983 *Standard for Granting Review*

1984 This topic was touched on several times during the call. The
1985 existing standard in § 1292(b) — "an immediate appeal from the
1986 order may materially advance the ultimate termination of the
1987 litigation" — may not quite fit because the transferee judge is
1988 not authorized to hold a trial, but only to complete pretrial
1989 activities.

1990 The standard in § 158(d) — "materially advance the progress
1991 of the case or proceeding" — might be closer to the mark.

1992 A standard tied to § 1407(a) — "materially advance the
1993 conclusion of the coordinated or consolidated pretrial proceedings"
1994 — might better explain treating MDLs differently from other cases.

1995 CONSENSUS: The subcommittee does not have a consensus view on
1996 what the standard should be; these issues would have to be
1997 pursued further if it is to continue considering a rule on
1998 interlocutory appellate review.

1999

2000 APPENDIX
2001 Participants Invited to the June 19 Miniconference

2002 Plaintiffs' Counsel:

2003 Lauren Barnes, Hagens Berman
2004 Virginia Buchanan, Levin Papantonio
2005 Elizabeth Cabraser, Lief Cabraser
2006 Brian Devine, Seeger Salvas
2007 Gretchen Freeman Cappio, Keller Rohrback
2008 Jenn Joost, Kessler Topaz
2009 Dena Sharp, Girard Sharp
2010 Adam Slater, Mazie Slater

2011 Defense Counsel:

2012 John Beisner, Skadden
2013 Kim Branscome, Dechert
2014 Chris Chorba, Gibson Dunn
2015 Cari Dawson, Alston
2016 Joe Petrosinelli, Williams & Connolly
2017 Will Barnette, Home Depot
2018 Becky Francis, Microsoft

2019 District Judges:

2020 Judge Charles Breyer (CA)
2021 Judge Karen Caldwell (KY)
2022 Judge Gary Feinerman (IL)
2023 Judge Jesse Furman (NY)
2024 Judge Paul Grimm (MD)
2025 Judge Matthew Kennelly (IL)
2026 Judge David Proctor (AL)
2027 Judge Lee Rosenthal (TX)
2028 Judge Leonard Stark (DE)
2029 Judge Jon Tigar (CA)

2030 Court of Appeals Judges:

2031 Judge Michael Chagares (3d Cir.)
2032 Judge William Fletcher (9th Cir.)
2033 Judge Anthony Scirica (3d Cir.)
2034 Judge Diane Wood (7th Cir.)

2035 State Court Judges:

2036 Judge Carolyn Kuhl (Los Angeles)
2037 Justice Jon Streeter (California Court of Appeal)

2038 Law Professors:

2039 Professor Andrew Bradt
2040 Professor Robert Klonoff
2041

2042 Government/Court Personnel:

2043 Tommie Duncan (JPML)
2044 Jerry Kalina (JPML)

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2045 **APPEAL FINALITY AFTER CONSOLIDATION**
2046 **JOINT CIVIL-APPELLATE SUBCOMMITTEE**

2047 The Civil and Appellate Rules Committees have established a
2048 joint subcommittee, chaired by Judge Rosenberg, to consider the
2049 effects of the decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018).
2050 The Court ruled that final disposition of all claims among all
2051 parties in what began as a separate action constitutes a final
2052 judgment for appeal purposes, even when the action has been
2053 completely consolidated with another action under Civil Rule 42(a).
2054 The Court also suggested, however, that the Rules Enabling Act
2055 committees are the place to look for an answer if this approach
2056 creates practical problems.

2057 The subcommittee concluded that one source of practical
2058 problems would be forfeiture of appeal opportunities resulting from
2059 unfamiliarity with what was a new rule for most circuits, or from
2060 failure to realize that a series of orders had resolved all claims
2061 among all parties in what began as a separate action. The Federal
2062 Judicial Center agreed to undertake a study to determine whether
2063 such problems could be identified.

2064 Dr. Emery Lee began the FJC study by a docket search of all
2065 federal civil actions filed in 2015, 2016, and 2017. Given the time
2066 required to move from filing to consolidation and then to final
2067 disposition of all parts of an originally separate action, this
2068 period included approximately equal numbers of cases terminating
2069 before and terminating after *Hall v. Hall* was decided. Cases in MDL
2070 proceedings were excluded from the data base both because they are
2071 difficult to track after consolidation, and because few are
2072 remanded by the MDL court. The remaining cases yielded 5,953
2073 consolidations that included a total of 20,730 originally
2074 independent actions. Together, they were 2.5% of all federal civil
2075 filings. A random sample of 400 of these cases was selected from a
2076 cohort of "lead" consolidated cases, yielding 385 that were
2077 suitable for study. In this sample, 28% of the consolidations were
2078 for all purposes, and the nature of the consolidation was not
2079 indicated for 48%. It seems likely that most of these were for all
2080 purposes. If so, three out of four consolidations effectively
2081 become a single action.

2082 This sample yielded nine consolidations that resulted in a
2083 judgment terminating all parts of an originally separate action
2084 without disposing of the entire consolidated proceeding. Some
2085 perspective on this number may be gained by reflecting that 48% of
2086 the consolidate proceedings were resolved by settlement, and
2087 another 19% by voluntary dismissal. Examination of those nine "*Hall*
2088 *v. Hall* moments" showed that no appeal was taken in three, and that
2089 no apparent problems arose from the *Hall v. Hall* rule in the
2090 remaining six.

2091 The subcommittee explored the FJC results in a conference
2092 call. Notes on the call are appended below. The subcommittee
2093 decided that the apparent lack of any practical problems in a

2094 sample of 385 consolidations suggests that there is little reason
2095 to expand the sample extracted from the 2015-17 data base. Nor does
2096 it seem useful to immediately launch a study of two more years,
2097 2018 and 2019, in part because time will be required for cases
2098 filed in those years to progress to the kinds of dispositions that
2099 might yield further useful information. This kind of empirical work
2100 consumes substantial resources. Further study by other means may
2101 show good reason for an expanded docket search, but not for now.

2102 The subcommittee explored other possible ways to gather
2103 additional information. It chose to begin an informal survey of a
2104 few courts of appeals. Several means may be found to identify and
2105 resolve *Hall v. Hall* questions in a court of appeals. Staff
2106 attorneys may spot questions of jurisdiction or timeliness. Motions
2107 panels may encounter them. Merits panels may reach them and decide,
2108 perhaps with an opinion not for publication or with a precedential
2109 opinion. These inquiries should be relatively easy to pursue.

2110 It also may prove useful to reach out to the bar groups that
2111 frequently provide help to the rules committees. That question will
2112 be considered further.

2113 The subcommittee also will continue to evaluate the arguments
2114 that new rules should be proposed even if empirical study fails to
2115 show practical problems. It seems likely that the 48% of
2116 consolidation orders that do not designate the purpose of
2117 consolidation generally intend consolidation for all purposes.
2118 There is no indication that this practice causes problems. Amending
2119 Rule 42(a) to encourage or require a more explicit statement of the
2120 purposes of "consolidation" does not seem an urgent matter.

2121 The values that inhere in Rule 54(b), on the other hand, may
2122 warrant further thought. If indeed most consolidations are ordered
2123 for "all purposes," with an intent to conduct all further
2124 proceedings as if the originally independent actions had been filed
2125 as one, the calculus of finality from that point on seems the same
2126 as if they had been filed as one. If it all begins as a single
2127 action, Rule 54(b) relies on the district judge as the
2128 "dispatcher," charged with evaluating the possible gains and losses
2129 of an immediate appeal. An immediate appeal may be useful, even
2130 important, for the parties caught up in the orders that can be made
2131 final judgments. It can be important as well for other parties. The
2132 trial court can benefit from appellate resolution of questions that
2133 affect the matters that remain pending before it, even when it
2134 seems prudent to stay further proceedings pending appeal. Or it may
2135 find that it can carry on with further proceedings without fear
2136 that the effort will be laid waste by the decision on appeal. The
2137 court of appeals may benefit from the opportunity to decide a
2138 common controlling question early, or may instead be burdened by
2139 the prospect of separate appeals that present closely related
2140 issues on an essentially common record.

2141 The subcommittee will continue its work, recognizing that
2142 valuable information and insights may be gained, but also believing
2143 that there is no pressing need for prompt decisions. The subject is
2144 worthy, but not urgent.

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2145

CARES ACT SUBCOMMITTEE

2146

The CARES Act

2147 Section 15002 of the CARES Act included specific provisions
2148 for the use of video and telephone conferences in criminal cases
2149 during the period of the national emergency relating to the COVID-
2150 19 pandemic. It also included § 15002(b)(6):

2151 (6) NATIONAL EMERGENCIES GENERALLY.—The Judicial Conference of
2152 the United States and the Supreme Court of the United
2153 States shall consider rule amendments under chapter 131
2154 of title 28, United States Code (commonly known as the
2155 “Rules Enabling Act”), that address emergency measures
2156 that may be taken by the Federal courts when the
2157 President declares a national emergency under the
2158 National Emergencies Act (50 U.S.C. 1601 et seq.)

2159 The Evidence Rules Committee is moving toward the conclusion
2160 that the Evidence Rules can adapt to any foreseeable emergency
2161 circumstances. The Appellate, Bankruptcy, Civil, and Criminal Rules
2162 Committees have all created subcommittees to study the ways in
2163 which their rules might be amended in response to this invitation.

2164 Reports and recommendations by the subcommittees will be
2165 considered at the fall meetings of their respective advisory
2166 committees. Professor Daniel Capra, Reporter for the Evidence Rules
2167 Committee, has undertaken the role of ambassador plenipotentiary,
2168 observing subcommittee meetings, reporting progress of each to the
2169 others, and promoting uniformity as they work toward their
2170 recommendations. His work as a neutral without a subcommittee to
2171 respond to has proved invaluable.

2172 The task for this Committee is to review the assessment and
2173 recommendations of the CARES Act Subcommittee chaired by Judge Kent
2174 Jordan. The goal is to prepare recommendations that reflect the
2175 Advisory Committee’s best judgment of what makes sense for the
2176 Civil Rules, given their inherent character and what we know about
2177 the adjustments that parties and courts have made to meet the needs
2178 of litigation during a nation (indeed world)-wide pandemic. The
2179 Standing Committee will consider the recommendations of the several
2180 advisory committees at their January 2021 meeting. The Standing
2181 Committee, however, does not expect to act at that meeting to
2182 approve proposals for public comment. The goal, instead, is to
2183 learn as much as can be from recommendations that may diverge in
2184 various respects. It is possible, and perhaps probable, that
2185 different approaches are appropriate for each set of rules. The
2186 prospect that there may be no recommendation for emergency
2187 provisions in the Evidence Rules is a good illustration. At the
2188 same time, there are good reasons to work for uniformity in some
2189 common provisions. The definition of what constitutes an
2190 “emergency” is a leading example that continues to confront
2191 different views in different subcommittees. It will be important
2192 for each advisory committee to consider what it knows of the

2193 progress in other advisory committees or subcommittees at the time
2194 it meets. Differing views can be further discussed among the
2195 subcommittees as each committee prepares its report to the Standing
2196 Committee. But it is proper to adhere to each advisory committee's
2197 best judgment, providing different perspectives for consideration
2198 by the Standing Committee.

2199

Recommendations

2200 Introduction. The process of generating these recommendations
2201 has involved several subcommittee conference calls and exchanges in
2202 between the calls. Successive rules sketches and then drafts have
2203 evolved through a process so transformative that there is little
2204 point in setting them out in detail. The evolution is summarized in
2205 the discussion of the central points that follows these
2206 recommendations, and detailed in the notes of the conference calls
2207 appended to this report.

2208 A separate task awaits. Many close observers of adaptations
2209 made in response to the current pandemic have suggested that this
2210 experience has demonstrated the advantages of remote procedures,
2211 particularly in discovery but perhaps at trial as well. The
2212 subcommittee has begun to shape a list of rules that might be
2213 considered for amendments that apply generally, without any thought
2214 of a rules emergency. The list will be shortened if the Advisory
2215 Committee adopts the alternative recommendation to forgo any
2216 general emergency rule in favor of proposing adoption of a few
2217 general rules amendments on the time track that would have been
2218 used to propose a general emergency rule. A separate list of rules
2219 that might be considered for general amendments prepared by member
2220 Joseph Sellers is appended below.

2221 Emergency Rule or No Emergency Rule? The subcommittee has
2222 reached a point of equipoise on the question whether any general
2223 emergency rule, here illustrated by a draft Rule 87, should be
2224 recommended for publication and adoption. The alternative would be
2225 to follow the same timetable to publish and adopt as part of the
2226 regular rules all or some of the Emergency Rules authorized by
2227 draft Rule 87(c).

2228 Several advantages may be gained by proceeding toward a
2229 general emergency rule. Although none of the different advisory
2230 committee subcommittees are considering proposals that fit the
2231 narrow focus of the CARES Act invitation, taking up the invitation
2232 responds to the concerns that moved Congress to extend the
2233 invitation. And on the likely assumption that general emergency
2234 rules will be proposed for at least the Bankruptcy and Criminal
2235 Rules, the absence of any similar Civil Rule would inevitably
2236 prompt speculation and perhaps arguments about negative
2237 implications. The distinctive environments in which the different
2238 sets of rules operate, and the roles of the corresponding advisory
2239 committees, should not support "expressio unius" comparisons across
2240 different sets of rules. But the temptation might prove
2241 irresistible, even if alleviated to some extent by the absence of

2242 any emergency provision in the Evidence Rules. The wise and
2243 effective application that has characterized the Civil Rules during
2244 the COVID-19 pandemic might be stunted as a result.

2245 The implications that might be drawn from the absence of a
2246 general Civil Emergency Rule could be addressed directly by some
2247 means. All of the reasons for concluding that no general rule is
2248 needed could be reported to the Standing Committee. It does not
2249 seem likely, however, that many litigants or courts routinely look
2250 to that source for guidance. A more ambitious approach would be to
2251 publish a Rule 87 proposal for comment, asking for comment on the
2252 proposition that the rules are better left as they are, apart from
2253 specific amendments. That would generate a more visible record, and
2254 could provide useful information that prompts actual adoption of a
2255 rule, with modifications to reflect the new information. That may
2256 in the end prove the most useful approach.

2257 A more functional reason can be found for adopting a general
2258 emergency rule. Although the Civil Rules have borne up remarkably
2259 well during the COVID-19 pandemic, some rules texts may impose
2260 impenetrable barriers, allowing no discretion or interpretation to
2261 meet emergency circumstances. The specific Emergency Rules set out
2262 in draft Rule 87(c) seem to raise such barriers. But if there are
2263 as few of these rules as seem to be, this need can be met by
2264 amending those rules directly.

2265 The argument for eschewing a general emergency rule is based
2266 primarily on the belief that the Civil Rules have, with very
2267 limited exceptions, proved sufficiently flexible to serve the needs
2268 of litigants and the courts, despite the extraordinary pressures
2269 generated by the COVID-19 pandemic. When a rule set serves its
2270 purpose, as ours has, the case can be made that doing nothing
2271 (except perhaps for making the few changes noted in draft
2272 Rule 87(c)) is preferable to announcing a new rule and then facing
2273 the law of unintended consequences, as creative lawyers and
2274 tenacious litigants seek out handholds for new arguments in the
2275 cracks and seams that even the most carefully drafted language will
2276 present. Better to leave well enough alone, the reasoning runs,
2277 than to create a new ground for battle. In addition, permanent
2278 revisions to the few rules identified in draft Rule 87(c) may prove
2279 more generally effective because they will be referred to with
2280 greater frequency than will a general emergency rule, and they may
2281 prove useful in circumstances that do not rise to the level of a
2282 rules emergency.

2283 General Emergency Rule. The value of recommending a general
2284 emergency rule depends in large part on the quality of the rule.
2285 This draft Rule 87 has been developed by a process that continually
2286 narrowed all provisions, beginning with the definition of an
2287 emergency, identifying the judicial actors that may declare an
2288 emergency, and restricting the number of rules that might be
2289 subjected to departures in an emergency.

2290 The draft Rule 87 text and committee note are set out here
2291 without elaborate footnotes or commentary on many of the issues
2292 that require careful thought, particularly those that arise from
2293 differences in the approaches developed by the subcommittees for
2294 different advisory committees. Paragraphs 87(c)(5) and (6) are
2295 shown with overstriking that reflects the subcommittee's
2296 conclusions that they should not be advanced for further work, but
2297 deserve review to confirm or change that conclusion. All proposals
2298 remain in progress. The targets for comparison will shift. But a
2299 few notes on the specific Emergency Rules identified in Rule 87(c)
2300 are included after the committee note.

2301 **Rule 87. Procedure in Emergency**

- 2302 (a) RULES EMERGENCY. The Judicial Conference of the United
2303 States may declare a rules emergency when extraordinary
2304 circumstances relating to public health or safety, or
2305 affecting physical or electronic access to a court,
2306 substantially impair the court's ability to perform its
2307 functions in compliance with these rules.
- 2308 (b) DECLARATION OF RULES EMERGENCY. A declaration of a rules
2309 emergency:
- 2310 (1) must designate the court or courts affected by the
2311 emergency;
 - 2312 (2) may authorize only one or more of the Emergency
2313 Rules provided by Rule 87(c) to take the place of
2314 the same rule [for the period set by Rule 87(b)(3),
2315 (4), and (5)];
 - 2316 (3) must be limited to a stated period of no more than
2317 90 days;
 - 2318 (4) may be renewed through additional declarations of
2319 the Judicial Conference for successive periods of
2320 no more than 90 days [each]; and
 - 2321 (5) may be modified or terminated before the end of the
2322 stated period.
- 2323 (c) EMERGENCY RULES.
- 2324 (1) Emergency Rule 4(e)(2)(B): leaving a copy of each
2325 at the individual's dwelling or usual place of
2326 abode with someone of suitable age and discretion
2327 who resides there, or, if ordered by the court,
2328 sending a copy of each to [that place] [the
2329 individual's dwelling or usual place of abode] by
2330 registered or certified mail or other reliable
2331 means that require a signed receipt.
 - 2332 (2) Emergency Rule 4(h)(1)(B): by delivering a copy of
2333 the summons and of the complaint to an officer, a
2334 managing or general agent, or any other agent
2335 authorized by appointment or by law to receive
2336 service of process or, if ordered by the court, by
2337 mailing them by registered or certified mail or
2338 other reliable means that require a signed receipt,
2339 and – if the agent is one authorized by statute and
2340 the statute so requires – by also mailing a copy of
2341 each to the defendant;

- 2342 (3) Emergency Rule 4(j)(2)(a): delivering a copy of the
2343 summons and of the complaint to its chief executive
2344 officer or, if ordered by the court, sending them
2345 to the chief executive officer by registered or
2346 certified mail or other reliable means that require
2347 a signed receipt;
- 2348 (4) Emergency Rule 6(b)(2): A court may apply Rule
2349 6(b)(1) to extend for a period of not more than 30
2350 days the time to act under Rules 50(b) and (d),
2351 52(b), 59(b), (d), and (e), and 60(b). The order
2352 extending time has the same effect under Appellate
2353 Rule 4(a)(4)(A) as a timely motion under those
2354 rules.
- 2355 ~~(5) Emergency Rule 43(a): At trial, the witnesses'~~
2356 ~~testimony must be taken in open court or, with~~
2357 ~~appropriate safeguards, by remote means that permit~~
2358 ~~reasonable public access unless a federal statute,~~
2359 ~~the Federal Rules of Evidence, these rules, or~~
2360 ~~other rules adopted by the Supreme Court provide~~
2361 ~~otherwise.~~
- 2362 ~~(6) Emergency Rule 77(b): Every trial on the merits~~
2363 ~~must be conducted in open court in person or by~~
2364 ~~remote means that permit reasonable public access~~
2365 ~~and, so far as convenient, in a regular courtroom.~~
2366 ~~Any other act or proceeding may be done or~~
2367 ~~conducted by a judge in chambers, without the~~
2368 ~~attendance of the clerk or other court official,~~
2369 ~~and anywhere inside or outside the district. But no~~
2370 ~~hearing other than one ex parte may be~~
2371 ~~conducted outside the district unless all the~~
2372 ~~affected parties consent.~~
- 2373 (d) EFFECT OF TERMINATION. A proceeding not authorized by a rule
2374 but authorized and commenced under an emergency rule may
2375 be completed under the emergency rule when compliance
2376 with the rule would be infeasible or work an injustice.⁹

2377

Committee Note

2378 Subdivision (a). This rule addresses the prospect that
2379 extraordinary circumstances may so substantially interfere with the
2380 ability of the court and parties to act in compliance with a few of
2381 these rules as to substantially impair the court's ability to
2382 effectively perform its functions under these rules. The responses
2383 of the courts and parties to the COVID-19 pandemic provided the
2384 immediate occasion for considering a formal rule authorizing
2385 departure from the ordinary constraints of a rule text that
2386 substantially impairs a court's ability to perform its functions.

⁹ This provision seems unnecessary if only Emergency Rules 4, and even 6, are authorized. If we venture into "open court" territory, it may be useful to ensure that it is proper to carry on with a remote trial after it has begun. But this is an added argument for avoiding all of the "open court" issues.

2387 At the same time, these responses showed that almost all challenges
2388 can be effectively addressed through the general rules provisions.
2389 The emergency rules authorized by this rule allow departures only
2390 from a narrow range of rules that, in rare and extraordinary
2391 circumstances, may raise unsurpassable obstacles to effective
2392 performance of judicial functions.

2393 The range of the extraordinary circumstances that might give
2394 rise to a rules emergency is wide, in both time and space. An
2395 emergency may be local – familiar examples include hurricanes,
2396 flooding, explosions, or civil unrest. The circumstance may be more
2397 widely regional, or national. The emergency may be tangible or
2398 intangible, including such events as a pandemic or disruption of
2399 electronic communications. The concept is pragmatic and functional.
2400 The determination of what relates to public health or safety, or
2401 what affects physical or electronic access to a court, need not be
2402 literal. The ability of the court to perform its functions in
2403 compliance with these rules may be affected by the ability of the
2404 parties to comply with a rule in a particular emergency. A shutdown
2405 of interstate travel in response to an external threat, for
2406 example, might constitute a rules emergency even though there is no
2407 physical barrier that impedes access to the court.

2408 Responsibility for declaring a rules emergency is vested
2409 exclusively in the Judicial Conference. But a court may, absent a
2410 declaration by the Judicial Conference, utilize all measures of
2411 discretion and all the flexibility that is embedded in the
2412 character and structure of the Civil Rules.

2413 A pragmatic and functional determination whether there is a
2414 rules emergency should be carefully limited to problems that cannot
2415 be resolved by construing, administering, and employing the
2416 extensive flexibility deliberately incorporated in the structure of
2417 the Civil Rules. The rules rely extensively on sensible
2418 accommodations among the litigants and on wise management by judges
2419 when the litigants are unable to resolve particular problems. The
2420 effects of an emergency on the ability of the court and the parties
2421 to comply with a rule should be determined in light of the flexible
2422 responses to particular situations generally available under that
2423 rule. And even if a rules emergency is declared, the court and
2424 parties should exhaust the opportunities for flexible use of a rule
2425 before turning to rely on an emergency departure. Adoption of this
2426 Rule 87, or a declaration of a rules emergency, do not imply any
2427 limitation of the courts' ability to respond to emergency
2428 circumstances by wise use of the discretion and opportunities for
2429 effective adaptation that inhere in the Civil Rules themselves.

2430 Subdivision (b). A declaration of a rules emergency must
2431 designate the court or courts affected by the emergency. An
2432 emergency may be so local that only a single court is designated.
2433 The declaration can extend to one or more of the emergency rules
2434 listed in subdivision(c) and must designate the emergency rule or
2435 rules included in the declaration. An emergency rule takes the
2436 place of the Civil Rule for the period covered by the declaration.

2437 A declaration must be limited to a stated period of no more
2438 than 90 days, and may be renewed through additional declarations of
2439 the Judicial Conference for successive stated periods of no more
2440 than 90 days each, but the Judicial Conference may terminate or
2441 modify a declaration before the end of the stated period.

2442 Subdivision (c). Subdivision (c) lists the only Emergency
2443 Rules that may be authorized by a declaration of a rules emergency.

2444 Emergency Rules 4(e)(2)(B), 4(h)(1)(B), and 4(j)(2)(a) begin
2445 with the text of the present rule and authorize additional means of
2446 service "if ordered by the court." The nature of some emergencies
2447 may make it appropriate to rely on case-specific orders tailored to
2448 the particular emergency and the identity of the parties, taking
2449 account of the fundamental role of serving the summons and
2450 complaint in providing notice of the action and the opportunity to
2451 respond. Other emergencies may make it appropriate for a court to
2452 adopt a general practice for the district by entering a standing
2453 order, or even by local rule if it is practicable to adopt a local
2454 rule within the expected duration of the emergency and the prospect
2455 that the declaration of emergency may be renewed.

2456 [Emergency Rule 6(b)(2) supersedes the flat prohibition in
2457 Rule 6(b)(2) of any extension of the time to act under Rules 50(b)
2458 and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may
2459 extend those times under Rule 6(b)(1). Rule 6(b)(1) requires the
2460 court to find good cause. Some emergencies may justify a standing
2461 order that finds good cause in general terms, but the period
2462 allowed by the extension will ordinarily depend on case-specific
2463 factors as well. Special care must be taken to ensure that the
2464 parties understand the effect of an extension on the time for
2465 filing a notice of appeal. The interface with Appellate Rule
2466 4(a)(4) is complicated by the provision in Emergency Rule 6(b)(2)
2467 that an order extending time has the same effect as a timely motion
2468 under the enumerated rules. If the order extending time is not
2469 followed by an actual motion within the extended time, the time to
2470 file a notice of appeal begins when the extended time period ends.]

2471 ~~The emergency provisions for Rules 43 and 77 must not be taken~~
2472 ~~to imply that remote proceedings do not satisfy an "open court"~~
2473 ~~requirement without authorization of an emergency rule.~~

2474 Subdivision (d). Proceedings may be commenced under an
2475 emergency rule but not be completed before the declaration of a
2476 judicial emergency terminates. Completing a particular proceeding
2477 by reverting to the general provisions of the applicable rule may
2478 be possible without any real difficulty or may generate unnecessary
2479 waste. A proceeding may be completed as if the declaration had not
2480 terminated when compliance with the applicable rule would be
2481 infeasible or work an injustice.

2482 ~~{Dissipation of the circumstances that supported the~~
2483 ~~declaration of a rules emergency does not always mean that the~~
2484 ~~effects of the emergency have dissipated as well. Delays in all~~

2485 ~~proceedings in the district courts, civil, criminal, and~~
2486 ~~bankruptcy, may produce backlogs that can be reduced only over~~
2487 ~~relatively protracted periods. Perhaps all of the needed~~
2488 ~~adjustments can be addressed under the general provisions of the~~
2489 ~~rules, but it remains possible to declare a rules emergency to~~
2490 ~~address the after-effects of the original emergency.]¹⁰~~

2491 *Comments on Specific Emergency Rules*

2492 Emergency Rules 4(e)(2)(B), 4(h)(1)(B), and 4(j)(2)(a): These
2493 emergency rules are drafted in the same way. Each begins with the
2494 full text of the present rule. Each adds the same provision for
2495 making service of the summons and complaint by alternative means:
2496 "registered or certified mail or other reliable means that require
2497 a signed receipt." Each depends on a court order to authorize
2498 resort to the alternative means. As explored in the committee note,
2499 the court may act by order in a particular case or may adopt a
2500 standing order, or perhaps a local rule, establishing more general
2501 standards for relying on the alternative means. The description of
2502 the alternative means is deliberately open-ended. United States
2503 Mail is a familiar mode of service, available now in many federal
2504 courts by adopting state practice. But, particularly in emergency
2505 circumstances, it may be that familiar commercial carriers are more
2506 reliable. It is too early to speculate whether electronic means of
2507 communication will, at the time of some future emergency, prove an
2508 attractive alternative for at least some parties, and provide a
2509 reliable electronic equivalent of a signed receipt.

2510 If these are the only emergency rules that come to remain in
2511 Rule 87(c), however, the arguments for abandoning Rule 87 become
2512 more powerful. Direct amendments of Rule 4 could become more
2513 attractive.

2514 Emergency Rule 6(b)(2): Rule 6(b)(2) presents an impenetrable
2515 barrier: "A court must not extend the time to act under Rules 50(b)
2516 and (d), 52(b), 59(b), (d), and (e), and 60(b)." These post-
2517 judgment motions require prompt action, both to enable the court to
2518 act while the action remains fresh in mind and to avoid
2519 unacceptable delay in moving toward appeal finality. There is
2520 little reason to reexamine the present rule in its own terms.

2521 It is not difficult, however, to imagine emergency
2522 circumstances that make it difficult or impossible to comply with
2523 the 28-day time period set for these motions apart from Rule 60(b).
2524 The time runs from entry of judgment. Notice of the judgment may
2525 not arrive immediately if a party is not in the CM/ECF system. Some
2526 time may be required to decide whether to make a motion, and then
2527 to prepare it. Emergency circumstances might shut down all means of

¹⁰ This paragraph was suggested during the July 30 subcommittee meeting. It had some relevance to a rule that permitted open-ended emergency responses, but is difficult to maintain with the current approach.

2528 filing before the 28th day; even if the court is inaccessible
2529 within the meaning of Rule 6(a)(3), extending the time to the first
2530 accessible day is not much relief. Allowing a more effective
2531 opportunity is attractive.

2532 Rule 60(b) motions stand somewhat different. Rule 60(c) sets
2533 the time as "a reasonable time—and for reasons (1), (2), and (3)
2534 no more than a year after the entry of the judgment * * *." A
2535 "reasonable time" can readily accommodate emergency circumstances.
2536 The flat one-year barrier seems more absolute, and the prospect of
2537 reinstating the reasonable time limit by working through the catch-
2538 all provision of Rule 60(b)(6) seems remote. The Rule 6(b)(2)
2539 provision for Rule 60(b) is further complicated by its role with
2540 respect to appeal time. Appellate Rule 4(a)(4) treats a Rule 60(b)
2541 motion in the same way as timely motions under the other rules
2542 listed in Rule 60(b)(2) if the Rule 60(b) motion is filed no later
2543 than 28 days after judgment is entered.

2544 The central difficulty with Emergency Rule 6(b)(2) arises from
2545 the nexus to Appellate Rule 4 just noted. Extending the time to
2546 make any of these motions would be useful for a party who intends
2547 to stand or fall on the motion, without appealing no matter how the
2548 motion is resolved. But for a party that wishes to appeal,
2549 extending the time to make the motion is not much help unless the
2550 appeal time is also extended. That is why Emergency Rule 6(b)(2)
2551 provides that an order extending the time to act "has the same
2552 effect under Appellate Rule 4(a)(4) as a timely motion under those
2553 rules." And that is why a 30-day limit is imposed on the extension,
2554 even recognizing that might not provide real relief in a severe
2555 emergency. An open-ended license to defer entry of a judgment that
2556 triggers appeal time would be questionable.

2557 At the least, the relationship to appeal time means that a
2558 proposal to move forward with Emergency Rule 6(b)(2) will have to
2559 be coordinated with the Appellate Rules Committee. It is not
2560 unlikely that consideration must be given to once again amending
2561 Appellate Rule 4(a)(4), given the mandatory and jurisdictional
2562 character of appeal time. Draft Emergency Rule 6(b)(2), moreover,
2563 attempts to skirt the tie to Rule 4(a)(4) by providing that an
2564 extension has the same effect as a timely motion. That is intended
2565 to mean that if an extension is granted but no motion is made
2566 within the allotted time, appeal time starts to run on expiration
2567 of the allotted time. This indirect operation on the Appellate
2568 Rules raises serious challenges. There are traps enough in
2569 Appellate Rule 4 for all but the most experienced appellate
2570 lawyers. Adding yet another is not attractive, even recognizing
2571 that some measure of protection is available under Appellate Rule
2572 4(a)(6).

2573 If an Emergency Rule 6(b)(2) is pursued further, it will be
2574 necessary to examine further the way in which the present draft
2575 incorporates Rule 6(b)(1). Rule 6(b)(1)(A) governs extensions
2576 granted "before the original time or its extension expires." That
2577 is compatible with multiple extensions for the "no more than 30

2578 days" allowed by Emergency Rule 6(b)(2). Rule 6(a)(1)(B) allows an
2579 extension on a motion after the original time has expired on a
2580 showing of excusable neglect. It may be that the emergency rule
2581 should be drafted in more complex terms.

2582 These competing concerns left the subcommittee uncertain
2583 whether it would be better to omit Emergency Rule 6(b)(2). Crafting
2584 a satisfactory emergency rule will be difficult. But foreclosing
2585 any direct opportunity for emergency relief is truly unattractive.

2586 This question deserves careful discussion.

2587 Emergency Rules 43(a) and 77(b): These two rules are presented
2588 with overstriking because the subcommittee recommends that they be
2589 considered but then rejected.

2590 Both proposals respond to "open court" rules that might be
2591 read too narrowly to permit adequate responses to some emergency
2592 conditions. One reason to abandon them is the belief that the
2593 corresponding rules should be interpreted and applied to achieve
2594 the same results as the emergency rules drafts. The risk of
2595 adopting them is that the contrast between the emergency rule text
2596 and the general rules will discourage flexible application of the
2597 general rules. The subcommittee believes that the prospect of
2598 unduly narrow application of the general rules is outweighed by the
2599 hope for appropriately broad application and the risk of unintended
2600 negative inferences following adoption of the emergency rules.
2601 There is every hope that rules emergencies will be rare, and often
2602 limited in time and space. Maintaining the elastic potential of the
2603 general rules is more important.

2604 Rule 43(a) directs that the witnesses' testimony be taken in
2605 open court, but adds this: "For good cause in compelling
2606 circumstances and with appropriate safeguards, the court may permit
2607 testimony in open court by contemporaneous transmission from a
2608 different location." Conditions that warrant declaration of a rules
2609 emergency are almost certain to establish good cause and compelling
2610 circumstances. Appropriate safeguards can be ordered for each
2611 witness, no matter whether most or all witnesses testify by
2612 contemporaneous transmission. Emergency Rule 43(a) adds an express
2613 direction that the means of transmission permit reasonable public
2614 access, but that too can be provided as something that inheres in
2615 "open court." The only apparent concern is that some courts may
2616 fear that the general provisions of Rule 43(a) may be read to focus
2617 on a single witness, or no more than a few. The rule text, however,
2618 begins with "witnesses' testimony," and the contemporaneous
2619 transmission sentence follows up by referring to "testimony" in
2620 general terms. The prospect that Rule 43(a) will be applied as
2621 appropriate to meet emergency circumstances is strong enough to
2622 discard draft Rule 87(c)(5).

2623 Rule 77(b) directs that "every trial on the merits must be
2624 conducted in open court and, so far as convenient, in a regular
2625 courtroom." This provision has not prevented courts from responding

2626 to the COVID-19 pandemic by planning for, and even starting to
2627 hold, trials on remote communication platforms. The challenges of
2628 such proceedings are recognized, with special emphasis on the
2629 difficulties that inhere in jury trials. Draft Emergency Rule 77(b)
2630 does nothing to address these challenges, nor could it. Much more
2631 experience is needed to support extensive and as yet uncertain
2632 provisions for jury trials, beginning with attempts to ensure a
2633 fairly representative selection of potential jurors and proceeding
2634 on through voir dire, trial itself, and jury deliberations.
2635 Opportunities abound for innocent or even willful jury behavior
2636 while participating by remote means. At most, an emergency rule can
2637 provide reassurance that remote means that provide reasonable
2638 public access satisfy the "open court" direction. And that
2639 reassurance would be bought at the price of stimulating arguments
2640 by negative inference to stifle effective implementation of Rule
2641 77(b) as it is. Here too, the prospect that Rule 77(b) is being
2642 applied to meet the needs of emergency circumstances, and will be
2643 applied with growing assurance as experience develops, is strong
2644 enough to discard draft Rule 87(c) (6).

2645 General Concerns and the Paths of Development

2646 The discussion that follows describes in summary fashion the
2647 paths followed by the subcommittee, as guided by the work of the
2648 other subcommittees, in developing the proposals described above.
2649 Understanding this history will help in evaluating the proposals.

2650 *Uniformity*

2651 The value of uniformity is noted in the CARES Act
2652 introduction. Different substantive approaches to common or related
2653 issues are discussed in the sections that follow. Differences in
2654 what seem to be issues of style, however, are deferred for
2655 resolution in joint work among the advisory committees and the
2656 Style Consultants. The committees should consider issues only at
2657 the uncertain line where an issue that seems a matter of style to
2658 some may seem a matter of substance to others.

2659 *What Constitutes an Emergency?: Rule 87(a)*

2660 The very first efforts to define the scope of emergency rules
2661 took a cue from § 15002(b) (6) of the CARES Act. They looked for an
2662 emergency declared by the President under the National Emergencies
2663 Act.

2664 This approach foundered on two basic concerns. The first was
2665 the discovery that Presidents have declared several national
2666 emergencies. Some of them have remained in force for many years,
2667 and remain in force now. Few of them have any relation to
2668 circumstances that affect court operations and procedures for any
2669 substantial period of time. There would be no effective limit on
2670 whatever emergency rules might be established if all that were
2671 required is an extant declaration of emergency.

2672 The second concern was that many emergencies that intensely
2673 affect court operations may be local or regional, not national in
2674 scope. Familiar examples include a courthouse bombing; a hurricane,
2675 tidal surge, or flood; widespread fires; civil unrest; or a local
2676 and sustained disruption of travel or electronic communication.

2677 The prospect of local emergencies initially led to emergencies
2678 declared by local authorities, such as a governor, mayor, or other
2679 official.

2680 The prospect that emergencies declared by local authorities
2681 should be considered led to a still deeper concern. Why should the
2682 courts depend on executive or legislative officials, state or
2683 national, to enable judicial responses to emergency circumstances
2684 that impede effective judicial functions?

2685 These concerns led to adoption of a functional definition of
2686 an emergency that does not depend on external definitions. What
2687 counts is impact on court functions. An early suggestion in this
2688 direction was provided by Judge Lewis A. Kaplan, as reported by the
2689 draft Minutes for the May 5, 2020 Criminal Rules Committee meeting:
2690 "Emergency ought to be defined in relation to the impairment of the
2691 ability of the courts to perform their constitutional functions.
2692 Nothing else."

2693 The functional approach developed over time. Initial drafts of
2694 Civil Rule 87 looked only to extraordinary circumstances creating
2695 a "judicial emergency" by impeding a court's ability to perform its
2696 functions. Exchanges among the subcommittees concluded that it is
2697 better, and more functional, to refer to a "rules emergency." And
2698 a more detailed criterion was added to Civil Rule 87 by acceding to
2699 draft Criminal Rule 62(a), as reflected above:

2700 extraordinary circumstances relating to public health or
2701 safety, or affecting physical or electronic access to a
2702 court, substantially impair the court's ability to
2703 perform its functions in compliance with these rules.

2704 Draft Criminal Rule 62(a) adds an additional element:

2705 no viable [feasible? practical? workable?] alternative
2706 measures would eliminate the impairment within a
2707 reasonable time.

2708 It seems possible, perhaps probable, that the differences
2709 between the Civil Rules and Criminal Rules contexts justify
2710 different definitions. For many years, the Civil Rules have been
2711 drafted with a deliberate choice to confer very broad discretion to
2712 shape the general provisions to the needs of each specific action.
2713 Reports on the adaptations made by litigants and the courts in
2714 response to the current pandemic suggest that this flexibility has
2715 proved adequate to meet nearly all emergency problems. The Criminal
2716 Rules, on the other hand, include several less flexible provisions.
2717 The need for proceedings in the presence of the court reappears

2718 regularly. The specific Criminal Rules identified in the CARES Act
2719 are of this sort. The Criminal Rules subcommittee continues to work
2720 to identify other Criminal Rules that might be included in an
2721 emergency rule that enumerates those rules — and only those rules
2722 — that might be subject to departure when a rules emergency is
2723 declared. Comparisons may prove more illuminating when the list is
2724 developed further.

2725 For the Civil Rules, the “no viable alternative” provision
2726 seems an unnecessary complication. It seems intended, by its very
2727 nature as an added criterion, to stiffen the initial reference to
2728 circumstances that “substantially impair” the ability to function
2729 in compliance with the rules. For the Civil Rules, “substantially
2730 impair,” coupled with the sound judgment of the Judicial
2731 Conference, seems protection enough. A transient impairment, or one
2732 that can be addressed under the rules, is not substantial. Beyond
2733 that, it seems likely that “alternative measures” are intended to
2734 contemplate measures that, after all, are available within the
2735 general rules as they stand. If so, this is another but ambiguous
2736 attempt to ensure care in making the determination whether the
2737 court can perform its functions in compliance with these rules. A
2738 different possible interpretation would be that alternatives not
2739 within these rules must be studied, perhaps in a search for means
2740 that are both necessary and narrowly tailored to meet the
2741 necessity. An illustration may be provided by 28 U.S.C. § 141,
2742 which authorize “special sessions” of a district court at places
2743 outside the district on a finding of emergency conditions that
2744 prevent holding the session at a reasonably available location
2745 within the district. That specific illustration, however, seems
2746 better understood as an example of an alternative available “in
2747 compliance with these rules.” A broader interpretation seems
2748 inconsistent with the structure of Civil Rule 87, which permits
2749 only a specific set of emergency rules. Rejecting that
2750 interpretation, however, simply underscores the role of the “no
2751 viable alternative” provision as an apparently redundant emphasis
2752 on the central requirement that the court not be able to perform
2753 its functions in compliance with these rules.

2754 Omitting this added criterion also avoids the question raised
2755 by the Criminal Rule 62(b)(1) provision that the Judicial
2756 Conference may declare a rules emergency “upon finding that the
2757 conditions” for a rules emergency are met. It is not clear whether
2758 it suffices simply to declare that an emergency exists, or whether
2759 more specific factors must be found and articulated. Requiring the
2760 Judicial Conference to identify and evaluate possible alternative
2761 measures and their inadequacies would be an onerous task.

2762 The subcommittee has resisted adding this element to
2763 Rule 87(a) for these reasons. It may not be useful to attempt to
2764 reconcile the Civil and Criminal Rules drafts. The subcommittee has
2765 frequently considered, and found persuasive, the proposition that
2766 the structure, traditions, and sources of the Criminal Rules are
2767 markedly different from the structure, traditions, and sources of
2768 the Civil Rules. To be sure, different directions to the Judicial

2769 Conference may seem disconcerting if Civil Rule 87 is proposed for
2770 adoption. That question remains for further deliberation.

2771 *Who Declares an Emergency?: Rule 87(a)*

2772 Several alternatives were explored before reaching the
2773 proposal that a rules emergency can be declared only by the
2774 Judicial Conference. The list included circuit judicial councils,
2775 chief circuit judges, chief district judges, or the full bench of
2776 circuit or district courts. The Supreme Court was mentioned once by
2777 one subcommittee, but was promptly discarded for fear of adding yet
2778 another responsibility to its already heavy burdens.

2779 The more localized authorities seemed attractive because they
2780 know local circumstances better than more remote bodies. They also
2781 know their own capacities better, and can tailor emergency
2782 responses that better fit their operations.

2783 The subcommittee narrowed the list rather early to include
2784 only circuit judicial councils. The balance of circuit and district
2785 judges would provide good access to local information, and at the
2786 same time promote uniformity in responding to local, regional, or
2787 circuit-wide emergencies. Individual districts could readily ask
2788 the circuit council to act, and it was expected that the council
2789 could act quickly.

2790 The recommendation to rely on the Judicial Conference alone
2791 was based in part on the preference of the Criminal Rules
2792 subcommittee. Circuit councils might well adopt disparate responses
2793 to national emergencies or regional emergencies that cross circuit
2794 lines. One council or another might not be as reluctant as the
2795 Judicial Conference to declare a rules emergency, and might be
2796 willing to depart from more rules provisions. The Judicial
2797 Conference, composed of the chief judge of each circuit and a
2798 district judge from each circuit, is able to respond quickly in an
2799 emergency. Its members provide an immediate source of local
2800 information, and can quickly gather more. The Judicial Conference
2801 also plays a pivotal role in the Rules Enabling Act process. In
2802 all, it seemed best to rely on the Judicial Conference alone. If it
2803 declares a national rules emergency, it can provide for nationally
2804 uniform responses when appropriate. At the same time, it can
2805 declare a rules emergency for a single district or, at least in
2806 theory, part of a district.

2807 The Judicial Conference need not rely on its own resources to
2808 know when it should consider declaring a rules emergency.
2809 Suggestions that it act can come not only from its own members but
2810 from other judges, often by informal means, particularly when the
2811 scope of a potential emergency is local or regional.

2812 Relying only on the Judicial Conference may have some impact
2813 on the understanding of the appropriate scope of a rules emergency
2814 declaration. Although it is well structured to respond quickly in
2815 determining whether to declare an emergency, it may not be well

2816 structured to define the precise scope of the rules-departing
2817 procedures best suited for immediate adoption, and perhaps ongoing
2818 adaptation. That range of concerns is addressed in the draft
2819 provisions of Rule 87(b) and (c) that prescribe the contents of a
2820 declaration of emergency and the rules that can be adopted under a
2821 declaration.

2822

2823

The Declaration: Rule 87(b)

2824 Draft Rule 87(b) prescribes in narrow ways the authority
2825 established by declaring a rules emergency. Some of the limits are
2826 formal: The declaration must designate the court or courts affected
2827 by the emergency; must be limited to a stated period of no more
2828 than 90 days; and may be modified or terminated before the end of
2829 the stated period.

2830 The remaining limit on the authority to declare a rules
2831 emergency is found in Rule 87(b)(2). This draft is quite narrow,
2832 authorizing only a few specific revisions of a few identified
2833 rules. The subcommittee came to this recommendation by a process
2834 that continually narrowed the scope of this authority. The process
2835 is described with draft Rule 87(c).

2836

Extending a Declaration

2837 Draft Rules 87(b)(4) and (5) address the questions created by
2838 the variable and often uncertain duration of rules emergencies.
2839 Paragraph (4) allows renewal by additional declarations of the
2840 Judicial Conference for periods of no more than 90 days each,
2841 ensuring continued attention to the need for emergency measures.
2842 Paragraph (5) allows a declaration to be modified or terminated
2843 before the end of the initial stated period.

2844 Draft Criminal Rule 62(b)(3) takes a more formal approach,
2845 providing for "additional declarations if emergency conditions
2846 change or persist." This is a real difference, but this is a point
2847 on which Civil Rule 87, if it is pursued further, and Criminal Rule
2848 62, should be made uniform.

2849

Emergency Rules: Rule 87(c)

2850 Rule 87(c) authorizes only a small number of departures from
2851 the Civil Rules in response to a declaration of a rules emergency.
2852 This recommendation rests on the belief that ongoing responses to
2853 the procedural challenges arising from the COVID-19 pandemic have
2854 demonstrated the capacity of courts and litigants to seize the
2855 opportunities created by the wide measures of discretion and
2856 flexibility deliberately built into the rules. It will be important
2857 to continually monitor potential roadblocks to ensure that this
2858 belief continues to be justified. The process that led to the
2859 present recommendation is instructive.

2860 Early drafts authorized essentially wide-open responses once
2861 an emergency is declared. The most enthusiastic draft offered

2862 alternative versions. One, somewhat narrower, authorized a district
2863 court to authorize departure from a rule identified by a
2864 declaration of emergency "when (1) necessary to perform the court's
2865 functions [in a particular case] and (2) consistent with all
2866 obligations [imposed by][under] the Constitution of the United
2867 States and applicable statutes." The broader version provided that
2868 "the parties should [agree on]{propose to the court} modified
2869 procedures that depart from the rule to the extent necessary to
2870 respond to the emergency. If the parties cannot agree the court may
2871 act under Rule 16 to specify the procedure to be followed."

2872 More restrained versions soon followed. Two basic forms were
2873 considered. One would allow the Judicial Conference to declare an
2874 emergency with respect to any rule or rules except for those
2875 identified in a list of untouchable rules. The illustrative list of
2876 excluded rules never came on for extended discussion. Sufficient
2877 illustration is provided by rules affecting the right to jury trial
2878 – an emergency could not justify relaxing the standard for judgment
2879 as a matter of law or for summary judgment, seating a jury of fewer
2880 than 6 members, dispensing with jury instructions, or like
2881 measures. The other basic form was the obvious counter: it would
2882 list the only rules that could be affected by a declaration of
2883 emergency.

2884 The difficulty of the task quickly emerged from attempts to
2885 develop suitable lists of rules to be excluded from, or included
2886 in, a declaration of emergency. Rule 4 provides an example that is
2887 duplicated by many other rules. Parts of Rule 4 may well deserve
2888 modification to meet emergency circumstances if they are not
2889 modified for all purposes. Other parts, including the basic
2890 requirement that summons and complaint be served, should not be
2891 modified. Any list of exclusions or inclusions would be quite long,
2892 and fraught with the prospect of error.

2893 *Regular Rules Amendments Alternative*

2894 The alternative to recommending a narrow set of emergency
2895 rules to be available through a Judicial Conference declaration of
2896 a rules emergency is to proceed directly, on the same time table,
2897 to propose amendments of the same rules that do not depend on a
2898 determination of an emergency by the Judicial Conference or any
2899 court. The amendments might simply adopt the proposed emergency
2900 rule text for all circumstances. Or somewhat different provisions
2901 might be proposed, seeking terms flexible enough to accommodate an
2902 emergency without relaxing important safeguards.

2903 The subcommittee has not extensively studied the differences
2904 that might be made in proposing to amend the regular rules in ways
2905 that parallel the draft emergency rules. There should be time
2906 enough, however, to study the possible differences and advance
2907 proposals for publication at the same time that a potential general
2908 emergency rule might be — or is — proposed for publication.

2909 Emergency Rules 4: The three Emergency Rules 4 proposed in
2910 draft Rule 87(c) (1), (2), and (3) all begin with present rule text.
2911 Each authorizes service by additional means if ordered by the
2912 court. The additional means, "registered or certified mail or other
2913 reliable means that require a signed receipt," are modest, and
2914 familiar in present practice when authorized by state law. Adding
2915 these provisions to the regular rules is likely to prove desirable
2916 for nonemergency circumstances as well as for emergencies.

2917 It would be possible to propose still more detailed
2918 provisions. One illustration overlaps problems that exist now, but
2919 may be multiplied by an emergency. A calamitous fire, flood,
2920 earthquake, or hurricane may render large numbers of people
2921 homeless. How should service be made on an individual who has no
2922 "dwelling or usual place of abode"? Or what of intended defendants
2923 who deliberately disappear to evade service, perhaps with added
2924 cover generated by an emergency?

2925 These and like questions occur regularly. They have not
2926 generated calls for rules amendments. It seems better to defer them
2927 rather than attempt to find answers in the time frame for
2928 publishing emergency rule proposals.

2929 Emergency Rule 6(b) (2): The discussion of Emergency Rule
2930 6(b) (2) shows the difficulties that will be encountered in
2931 attempting a general revision to permit extensions of the times for
2932 the enumerated post-judgment motions. The same difficulties face
2933 any attempt at a general rule revision, without the comfort of
2934 relying on a Judicial Conference declaration that adopts the
2935 emergency rule for a stated and limited period.

2936 If a proposal is to be made to amend Rule 6(b) (2) itself, it
2937 likely should borrow from the standard set by draft Rule 87(a) for
2938 declaring a rules emergency. The authority to extend the time for
2939 a post-judgment rule would require "extraordinary circumstances"
2940 that make it impossible (or nearly impossible?) to move within the
2941 "original time." The same standard should be set for even making a
2942 motion to extend after expiration of the original time, if such
2943 motions are to be recognized at all.

2944 One possibility would be to work on a general amendment of
2945 Rule 6(b) (2), recognizing that it may not be feasible to draft a
2946 suitable proposal on the same time track as the emergency rules.

2947 Emergency Rules 43(a), 77(b): In one way, general rules
2948 amendments may reduce the reservations about proposing these
2949 emergency rules to ensure that "open court" proceedings can include
2950 remote testimony, argument, and deliberation. The concern has been
2951 that adopting these provisions only for emergencies could all too
2952 easily stifle desirable evolution of nonemergency practice. General
2953 rules amendments on the same terms vanquish that concern, and may
2954 have the added benefit of encouraging remote proceedings more
2955 generally.

2956 Still, pursuing these issues for general rules amendments
2957 would require further thought. Experience with remote trials is
2958 only beginning to develop, and cogent concerns remain even for
2959 emergency circumstances. Additional safeguards might well be wise
2960 for any general rules amendments.

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APPENDIX
Subcommittee Conference Call Notes

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**CARES Act Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
September 11, 2020**

2967 On September 11, 2020, the CARES Act Subcommittee of the
2968 Advisory Committee on Civil Rules held a conference call.
2969 Participants included Judge Kent Jordan (Chair of the
2970 subcommittee); Judge John Bates (Chair of the Advisory Committee);
2971 Judge Robert Dow; Judge Sara Lioi, Judge Jennifer Boal, Joseph
2972 Sellers, Susan Soong, Prof. Edward Cooper (Reporter to the Civil
2973 Rules Committee); Prof. Daniel Capra (Reporter to the Evidence
2974 Rules Committee); Prof. Richard Marcus (Associate Reporter to the
2975 Civil Rules Committee); and Rebecca Womeldorf representing the
2976 Rules Committee Staff.

2977
2978 The call began with a recap: Since the August 20 conference
2979 call, the Rule 87 draft has been revised and circulated. It will be
2980 the main focus of discussion during this call. In addition, the
2981 Advisory Committee's Reporters have conferred with the Reporters of
2982 the other advisory committees under the guidance of Prof. Capra.
2983 The goal is to determine what should be put before the full
2984 Advisory Committee at its October meeting.

2985 One starting point is that the other advisory committees
2986 (except Evidence) have also been working on drafts of possible
2987 emergency rules. The various drafts vary on certain things. All
2988 (save Appellate) are describing the trigger event as a "rules
2989 emergency." The general criterion of what constitutes a rules
2990 emergency is as follows: "extraordinary circumstances relating to
2991 public health or safety or affecting physical or electronic access
2992 to a court [that] substantially impair the ability of a court to
2993 perform its functions in compliance with these rules."

2994 Criminal and Civil both say authority for declaring a judicial
2995 emergency rests with the Judicial Conference, and specify that such
2996 a declaration must not last longer than 90 days (subject to renewal
2997 or a new declaration). Criminal adds an additional criterion —
2998 that no "viable alternative measures would eliminate the impairment
2999 within a reasonable time." The Civil draft does not include that
3000 "viable alternatives" limitation. The Criminal draft also calls for
3001 the Judicial Conference to make "findings." The Civil draft calls
3002 only for a "declaration" by the Conference.

3003 An initial note of caution was expressed about both the
3004 "viable alternatives" and "findings" aspects of the Criminal draft
3005 rule. Those provisions would seem to constrain the Judicial
3006 Conference too much by requiring that it imagine and account for
3007 all possible alternatives. It might even be that there could be
3008 disagreements about which alternatives are "viable." And the
3009 findings requirement seems an unnecessary formality.

3010 Another difference is that the Criminal draft separates the
3011 definition of a rules emergency in its section (a) from its section
3012 (b), which recognizes the Judicial Conference as having authority
3013 to declare such an emergency. That might arguably suggest that
3014 courts might regard themselves as authorized to declare a rules
3015 emergency without prior Judicial Conference action. There may be
3016 some other divergences, but those appear the major differences.

3017 The question whether the various sets of rules must be the
3018 same remains somewhat open. Consistency seems inherently desirable,
3019 but the various rules need not move in lock step. The overall
3020 standard, after all, is that a rules emergency exists when the
3021 described events prevent the court from performing its functions
3022 "in compliance with these rules." That might be different for
3023 different sets of rules, which call for different measures of
3024 compliance.

3025 A subcommittee member expressed worries about the "viable
3026 alternatives" idea. That seems to limit the flexibility of courts
3027 to respond to emergency conditions and also may invite disputes
3028 about what are "alternatives" and whether they are "viable." The
3029 Criminal draft also says that inquiry must address whether the
3030 alternatives could be employed "within a reasonable time." That
3031 could add to the uncertainty and constrain needed flexibility. How
3032 soon is soon enough?

3033 Another subcommittee member agreed. The "viable alternatives"
3034 provision is a real difference. Perhaps the Standing Committee will
3035 have to decide whether it is useful, if the two sets of rules can't
3036 diverge on that point. But perhaps it will be satisfactory for the
3037 Criminal Rules to include the "viable alternatives" proviso while
3038 the Civil Rules do not.

3039 One reason for the "viable alternatives" language was noted —
3040 it may be that the Criminal Rules drafters regard it as important
3041 to consider the alternative offered by 28 U.S.C. § 141 — holding
3042 proceedings outside the district — rather than other alternatives.

3043 Another subcommittee member expressed a preference for the
3044 overall arrangement in Rule 87 (compared to the Criminal Rules
3045 draft), and did not favor adding the "viable alternatives" proviso.

3046 The emerging consensus of the subcommittee was not to include
3047 the "viable alternatives" language. It was emphasized, however,
3048 that the agenda report should make the full Advisory Committee
3049 aware of this choice so that it could decide whether to alter or
3050 endorse it. It is likely that the Criminal Rules Committee (at
3051 least going by current discussions) will advocate including that
3052 provision in its rule.

3053 Another introductory matter was the basic question whether any
3054 rule would be needed at all. The Criminal Rules achieved needed
3055 flexibility for the COVID-19 pandemic only with action by Congress.
3056 Without that congressional action there might have been

3057 considerable difficulties in criminal cases. The Civil Rules, on
3058 the other hand, afforded great flexibility during the pandemic
3059 lockdowns.

3060 The Rule 87 draft was introduced in broad strokes. Subsection
3061 (a) says that the Judicial Conference may declare a rules emergency
3062 when the specified conditions exist. Those have already been
3063 discussed. Subsection (b) specifies the contents and limits of such
3064 a Judicial Conference declaration. The declaration may focus on
3065 only one or a few courts. It may implement fewer than all the
3066 Emergency Rules in subsection (c). It may not remain in effect for
3067 more than 90 days. It could be "modified" or "renewed" for further
3068 periods of no more than 90 days. It could also be modified or
3069 terminated early. The question whether, when emergency conditions
3070 persist after 90 days, there must be an entirely new declaration
3071 appears to be another difference between the Rule 87 draft and the
3072 Criminal Rules draft, which seems to require a new declaration
3073 rather than only a "renewal."

3074 The "extension" v. "new declaration" issue was discussed. One
3075 example is the current pandemic. When this began six months ago,
3076 few of us expected things would still be as bad as they are now,
3077 six months later. "It's still happening." Does it make sense to say
3078 that the Judicial Conference must make a complete new declaration
3079 through a formal process? Why shouldn't we trust the Conference on
3080 this one. But one reaction was that this divergence between the
3081 Civil and Criminal drafts does not seem really to be very
3082 significant. Maybe this is not worth debating.

3083 This drew the comment that the definition is different
3084 ("viable alternatives"), and our draft does not say the Judicial
3085 Conference must make "findings," either on an initial declaration
3086 or on a renewal. Perhaps these details will not actually matter too
3087 much. "The Judicial Conference won't see its task as
3088 differentiating between rules statements of standards." But that
3089 point could equally bear on the Criminal rules draft.

3090 On the other hand, it was suggested, the draft Criminal Rule
3091 may actually be more flexible. So the choice is not so stark. And
3092 a question was asked: If the Conference may "modify" an initial
3093 declaration, would that include "modifying" a declaration that
3094 found California to be in emergency conditions to add Nevada?

3095 Discussion turned to subsection (c) of the Rule 87 draft,
3096 which enumerates the specific rule changes that can be made. There
3097 are not many, but they come into play only "if ordered by the
3098 court." Should that court order be retained even though none of
3099 this can happen without Judicial Conference action?

3100 An issue that emerged was that this phrase ("if ordered by the
3101 court") is often used in the rules, and always or almost always
3102 means an order in the individual action. Is that what this is
3103 getting at? Perhaps a different phrase would be a better choice.

3104 One reaction, particularly with regard to the service methods
3105 permitted under Rule 4, is that individual judge orders should not
3106 suffice. The rule should say that only a General Order or other
3107 district-wide provision would suffice.

3108 A response was that if we can trust the Judicial Conference
3109 not to declare a rules emergency inappropriately, we can also trust
3110 the district courts not to suspend service requirements
3111 inappropriately. Moreover, given districts may have very different
3112 circumstances. The number of judges varies quite a lot. Some
3113 districts include multiple courthouses; access may be impaired in
3114 some but not others. In fact, in several district courts, there has
3115 been a collaborative attitude toward methods of coping with the
3116 current pandemic.

3117 A different perspective was that the Civil, Criminal, and
3118 Bankruptcy Rules Committees have developed basically the same
3119 structure. In each, subsection (c) provides specifics on what
3120 variations are permitted under that set of rules. There are
3121 differences in details, but overall there is notable consistency.
3122 On this subject, the contrast with the draft under study by the
3123 Appellate Rules is striking. It may say that a circuit Chief Judge
3124 may declare any rule inapplicable due to an emergency. This
3125 authority seems extremely broad.

3126 A suggestion emerged: Maybe the way to handle this question is
3127 for the committee note to say that the rule is not intended to
3128 promote individual variations within a district, and express the
3129 expectation that ordinarily a district-wide solution would be
3130 expected. Another suggestion was that the committee note could say
3131 the usually a General Order for the entire district would be
3132 expected.

3133 Another idea is a an "emergency local rule." 28 U.S.C.
3134 § 2071(e) permits districts to adopt local rules without the
3135 customary public notice and opportunity for comment on determining
3136 that "there is an immediate need for a rule." Perhaps the best
3137 solution for the Civil Rules would be for the committee note to say
3138 that such measures "often" would be taken district-wide rather than
3139 on a judge-by-judge basis. Probably what will happen if an
3140 emergency rule is added to the national rules is that there will
3141 also be emergency provisions added to local rules to permit
3142 adoption of local measures without the formalities that attend
3143 adoption of a local rule for non-emergency use.

3144 Discussion turned to draft Rule 87(c)(4), which addresses the
3145 current rule that forbids extending the time with regard to certain
3146 motions, an authority that dovetails with limitations in Appellate
3147 Rule 4 on appeals. The big problem is that this affects the time
3148 limit for appeal, and that is not something principally governed by
3149 the civil rules. For Civil to act without a parallel measure from
3150 Appellate would not be sensible. And beyond that there is the
3151 mandatory and jurisdictional aspect of time to appeal. Can this be
3152 done? Should it even be attempted?

3153 A first reaction was that one of the most frustrating problems
3154 confronted by appellate courts is anything that might be a trap for
3155 the unwary on time to appeal. But that is not a problem this
3156 subcommittee, or this Advisory Committee, can solve. Adding
3157 something that suggests the problem has been solved might create
3158 new problems without solving others. Consider somebody who relied
3159 on this new rule provision but could have complied with the usual
3160 one had the emergency rule not offered respite. That could be a
3161 trap.

3162 On the other hand, it was urged, consider the people who
3163 cannot use ECF and have to depend on the U.S. mail or going to the
3164 courthouse. What are those people to do?

3165 After further discussion about the impossibility of solving
3166 such problems in the Civil Rules, the conclusion was to leave the
3167 idea in the materials for the discussion of the concept with the
3168 full Advisory Committee.

3169 Discussion shifted to the "bottom line" question: Should there
3170 be an emergency rule at all? Experience this year has shown that
3171 the civil rules are very flexible. Maybe there is no need for a
3172 Rule 87.

3173 One reaction was that there is a value to focus attention in
3174 this way on the very few places where there still appear to be
3175 pressure points despite the overall flexibility of the civil rules.
3176 That's what draft Rule 87(c) does — focusing on service, allowing
3177 the court to extend time for motions under Rules 50(b) and (d),
3178 Rule 52(b), Rule 59(b), (d), and (e), and 60(b) (though that might
3179 raise difficult issues of appellate jurisdiction), and addressing
3180 "open court" provisions.

3181 Another point was raised: If the Criminal, Bankruptcy, and
3182 Appellate Rules all have emergency provisions, perhaps that will be
3183 taken to mean that emergency measures are not allowed under the
3184 Civil Rules because they do not have a parallel provision.
3185 Moreover, having a very limited Rule 87 would nevertheless support
3186 a committee note that could affirm that experience this year has
3187 shown that most of the civil rules have sufficient flexibility
3188 built in. This rule, then, would be designed to address the few
3189 that do not, and at the same time the note could emphasize that it
3190 does not narrow the latitude the other rules have afforded the
3191 courts to respond to the pandemic emergency.

3192 A subcommittee member noted that it is important to highlight
3193 that flexibility. Otherwise there may be a risk people will say
3194 that we can't change anything from the way it is done in normal
3195 times under the civil rules except with regard to the specific
3196 things mentioned in the emergency rule.

3197 Perhaps, it was suggested, there might be a way to say that we
3198 considered a general emergency rule and determined it would not be
3199 needed. But unless there is some rule change, that cannot be done

3200 because one cannot issue a committee note without a rule amendment.

3201 A possible downside to adopting a narrow rule was reiterated:
3202 It might suggest that nothing else can be done differently in
3203 emergency conditions. Having a rule seems to imply that only the
3204 changes authorized in the rule may be made.

3205 A subcommittee member observed "I have vacillated on this."
3206 The draft committee note says the rules are already flexible. The
3207 risk is that a narrow rule might tempt some to argue that the new
3208 emergency rule actually constricts the needed flexibility we have
3209 now. "We did o.k. this time, but limiting our flexibility to
3210 respond to unforeseen circumstances would be dangerous."

3211 One reaction was that maybe for the present we can "punt" on
3212 this question. It's not clear that we need an emergency rule.
3213 Certainly we do not want one that limits existing flexibility in
3214 the rules system. It may be that a committee note that affirms the
3215 existing flexibility would be a good antidote, but that could be
3216 risky as well.

3217 Another reaction was that, if the only things subject to
3218 change are in Rule 4 on service, it would also be clear that the
3219 rule is so limited because of that overall flexibility.

3220 A further reaction was that the proposals dealing with the
3221 "open court" provisions now in the rules (e.g., 43(a) and 77(b))
3222 seem more likely to cause problems than to solve problems. A
3223 consensus emerged that these provisions could be dropped from the
3224 proposal to the full Advisory Committee.

3225 A different reaction was that there might be a vice in having
3226 a narrow emergency rule if it impeded needed flexibility in regard
3227 to rules not mentioned.

3228 A suggestion was made — perhaps a rule that only dealt with
3229 Rule 4 service issues in emergency conditions could suffice for
3230 rule-adjustment purposes. And that might come with a committee note
3231 affirming the general flexibility of the rules, as evidenced by the
3232 pandemic experience. But that drew the response that unless there
3233 is a general emergency rule it is unlikely that people seeking to
3234 affirm the overall flexibility will look for affirmation in a note
3235 to Rule 4.

3236 Another reaction was that service via email may become a
3237 generally acceptable method, but that's for the future. We need not
3238 raise that with the full Advisory Committee at this time.

3239 The conference call concluded with the need to have agenda
3240 materials ready for the Advisory Committee's October meeting.

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**CARES Act Subcommittee
Advisory Committee on Civil Rules
Notes of Conference Call
August 20, 2020**

3245 On August 20, 2020, the CARES Act Subcommittee of the Advisory
3246 Committee on Civil Rules held a conference call. Participants
3247 included Judge Kent Jordan (Chair of the subcommittee); Judge John
3248 Bates (Chair of the Advisory Committee); Judge Robert Dow; Judge
3249 Sara Lioi, Judge Jennifer Boal, Joseph Sellers, Susan Soong, Prof.
3250 Edward Cooper (Reporter to the Civil Rules Committee); Prof. Daniel
3251 Capra (Reporter to the Evidence Rules Committee); Prof. Richard
3252 Marcus (Associate Reporter to the Civil Rules Committee); and
3253 Rebecca Womeldorf and Julie Wilson representing the Rules Committee
3254 Staff.

3255
3256 Before the conference call, subcommittee member Joe Sellers
3257 circulated a list of possible rules for inclusion in a "positive"
3258 list in an emergency rule. That listing is included as an Appendix
3259 to these notes.

3260 This call began with the recognition that the previous call
3261 had left off comparing a "negative" with a "positive" list of
3262 rules. One way of looking at that question, with the Sellers list
3263 in mind, would be to consider how many rules really would need to
3264 be included on such a list. Approaching the same question from the
3265 "other end," one might instead ask how many rules should be
3266 insulated against relaxation, with an emergency rule that only
3267 limited relaxation of those rules. The very comprehensive list
3268 compiled by Mr. Sellers suggested that a positive list might be
3269 very long.

3270 As a starting point, however, a question arose about how the
3271 other advisory committees were approaching their tasks. Prof.
3272 Capra, who has participated in the online meetings and conference
3273 calls of all the participating advisory committees (criminal,
3274 bankruptcy, and appellate in addition to civil) provided a report.
3275 The Criminal and Bankruptcy Rules Advisory Committees were
3276 gravitating toward a relatively aligned set of rule provisions. One
3277 divergence was about who should have authority to declare a rules
3278 emergency. None favored making that depend on a declaration by the
3279 President or some other entity outside the Judiciary. But there
3280 were divergences about where within the Judiciary this authority
3281 should lie. The Criminal Rules group favored having the Judicial
3282 Conference be the sole authority. The Bankruptcy Rules group was
3283 receptive to multiple sources for declaring the rules emergency —
3284 the Judicial Conference, the Circuit Council or Circuit Chief
3285 Judge, or the Chief Bankruptcy Judge. In addition, the drafts are
3286 also focusing on what one might call a "soft landing" — to address
3287 measures taken under an emergency rule provision when it was in
3288 effect, but not completed until after the emergency period ended.

3289 This introduction led to a question: If an emergency is
3290 declared, who decides what rules may be modified, and in what way?

3291 An initial response was that the answer to that question remains
3292 unclear. The Criminal Rules draft includes a section (c) to
3293 identify rules that could be relaxed, but that provision has not
3294 been drafted yet. It may be that the thinking is that the Judicial
3295 Conference is to make that choice, perhaps at the same time it
3296 declares a rules emergency. It is not absolutely clear whether this
3297 decision might be made court by court.

3298 For the present, the parallelism among various rule drafts has
3299 been at the forefront of discussion. Almost by definition, what
3300 specific rules can be relaxed, and in what way, is not a comparably
3301 common issue. The question whether there is a rule emergency, and
3302 the decision who can so declare, seem to be things on which there
3303 should be parallelism. The Reporters are soon to confer among each
3304 other to compare notes on parallelism and divergence.

3305 This discussion led to a further question: How can the
3306 Judicial Conference really be asked to specify the rules, or
3307 portions of rules, that might be relaxed? Consider, for example,
3308 Rule 4 of the Civil Rules regarding service. It is quite long and
3309 intricate. It is one thing to say that service by mail might be
3310 authorized during an emergency like this one even if not so
3311 authorized in the courts of the state in which the federal court
3312 sits. (In California, for example, service by mail is authorized,
3313 so under Rule 4(e)(1) it is similarly available for cases in
3314 federal court in California.) But surely nobody is suggesting that
3315 service of process can be entirely suspended. So a considerable
3316 amount of precision is required, and the selection of rules to
3317 relax really depends on details it seems too much to ask that the
3318 Judicial Conference master, particularly during a time of
3319 emergency.

3320 On the other hand, leaving the question entirely uncertain is
3321 very likely to provoke resistance to an emergency rule. So there is
3322 a gulf between complete discretion for somebody to decide what is
3323 subject to relaxation and saying that the Judicial Conference must
3324 answer that question in great detail.

3325 It was noted that the Judicial Conference has 26 committees,
3326 and the Standing Committee is just one of them. That underscores
3327 how difficult it would be for the Conference itself to do this
3328 detail work. But the Standing Committee is not set up to provide
3329 that sort of guidance either. The Standing Committee meets twice a
3330 year, and the advisory committees also meet twice a year. The
3331 Conference has an Executive Committee to take actions when urgently
3332 needed, but asking that committee to take this responsibility for
3333 the detail of emergency measures seems unwarranted.

3334 This discussion prompted a reaction from judicial members of
3335 the subcommittee: The Civil Rules have much more flexibility than
3336 the Criminal Rules. There is a reason for that; the Criminal Rules
3337 are intended to be more precise and constraining due to the
3338 characteristics of criminal cases, including constitutional rights
3339 and statutory provisions that come into play there. Remember that

3340 the CARES Act explicitly authorized modification of practice during
3341 the pandemic under quite a few criminal rules, and spelled out the
3342 findings required and the substitute procedures permitted.

3343 The Civil Rules, by way of contrast, have flexibility built
3344 into them. For example, the references to things that must be done
3345 "in open court" might be raised as obstacles to some current
3346 practices but, without any change in the national rules, courts
3347 have effectively conducted business via online methods. Similarly,
3348 the need for a court order to go forward (absent stipulation) with
3349 a remote deposition might give way. The pandemic experience has
3350 shown that, without change, the Civil Rules are flexible enough to
3351 accommodate a lot of accommodation measures.

3352 Nevertheless, if there is to be an emergency provision in the
3353 Civil Rules, it might be a great deal easier to justify if it were
3354 not an omnibus authorization to deviate from any or all the rules
3355 in the rule book. Instead, it might say "these three rules" may be
3356 modified, and perhaps prescribe exactly how they could be modified.
3357 That drew the comment that "we are still going toward a positive
3358 approach — listing which rules can be changed rather than saying
3359 all can be changed unless on the 'do not touch' list."

3360 It was agreed that some rules are "sacrosanct." Service is
3361 fundamental to due process, though there are many different ways to
3362 deliver service. The summary judgment standard is similarly not
3363 subject to relaxation during an emergency; the Seventh Amendment
3364 makes that clear. Perhaps an emergency rule could identify the
3365 rules subject to relaxation without specifying the exact
3366 modification that could be made to respond to an emergency.

3367 Summing up, it was suggested that the discussion was tending
3368 toward two questions: (1) What modifications or allowed, or what
3369 rules may be modified? and (2) Who makes the decision on which
3370 rules are to be modified, and in what way? On the second question,
3371 several alternatives seem to be in play. One is the Judicial
3372 Conference. Another is the Circuit Chief Judge or Circuit Council,
3373 and a third is the district chief judge. The Appellate Rules
3374 approach, for example, looks to the circuit chief judge. The CARES
3375 Act, on the other hand (with the imprimatur of Congress on which
3376 criminal rules may be relaxed, and in what way) looks to district
3377 chief judge.

3378 That prompted the question "Do we have to emulate the CARES
3379 Act?" The CARES Act requires findings from the district chief
3380 judges and/or individual district judges. If one looks to the chief
3381 judges of the various circuits, one problem could be that in a
3382 national emergency there could be considerable differences in
3383 district courts in adjacent states. If one looks to district chief
3384 judges or individual district judges, there might be concern that
3385 judges would indulge their attitudes toward various Civil Rules,
3386 and that some judges may be impatient with some rules. To all of
3387 this, one response was: "That takes us back to the Judicial
3388 Conference."

3389 Summing up, one reaction was that maybe we should try to find
3390 the "least bad answer." That may well be relying on the Judicial
3391 Conference. But for specifics, it seems unwise to expect the
3392 Conference to be conversant with four sets of rules and aware of
3393 where the "pressure points" are in each of them. So maybe the
3394 responsibility to provide specifics should fall on the respective
3395 advisory committees. But having an advisory committee assemble,
3396 even online, sounds very difficult to arrange, particularly in an
3397 emergency. They just are not set up to do that job.

3398 There was discussion of alternatives to the Judicial
3399 Conference. Regarding the Appellate Rules, it would surely not be
3400 district court judges, much less bankruptcy chief judges. For the
3401 Bankruptcy Rules, it seems odd that the chief bankruptcy judge
3402 might wield such authority rather than the chief district judge,
3403 since the bankruptcy court is really a part of the district court.

3404 This discussion drew the reaction "I'm comfortable with the
3405 Judicial Conference having the sole authority to declare a rules
3406 emergency." What about a really local emergency, it was asked. The
3407 response was that the Judicial Conference should then be nimble
3408 enough to respond, and should be trusted to obtain reliable
3409 information from the affected locale.

3410 A different question emerged: One feature of a declaration of
3411 an emergency under the draft was that it must specify the duration
3412 of the emergency, or at least the duration of the emergency
3413 authority to deviate from the ordinary rules. The draft recognizes
3414 that a declaration may be "renewed" for successive stated periods
3415 of no more than 90 days. The experience since March shows that a
3416 forecast about the duration of an emergency may under estimate.
3417 Some method of responding to that reality is important.

3418 That prompted the question whether "renewal" should require
3419 just as much formality as the initial declaration of a rules
3420 emergency. Put differently, it was noted that the Criminal Rules
3421 draft calls for "findings" to declare an emergency and also to
3422 extend permission to relax the rules for additional time beyond 90
3423 days. Should the limits on an extension be stricter? Does this
3424 possibility of "unending" renewals reinforce the wisdom of having
3425 only the Judicial Conference authorized to declare a rules
3426 emergency, rather than having that authority at the district court
3427 level?

3428 The reaction was that these issues warranted another look at
3429 the draft.

3430 The discussion turned to what should be listed on a "positive"
3431 list of rules, and perhaps what specific alternative or additional
3432 provisions could be implemented regarding those rules.

3433 A first reaction was that the Sellers list (see Appendix) and
3434 a review of modifications adopted in many districts in this
3435 pandemic under the current rules suggest that there are really few

3436 rules that present major obstacles to flexibility needed in an
3437 emergency. For example, one might point to Rule 43(a) on remote
3438 testimony, Rule 30(b)(4) on remote depositions, and Rule 77(b) on
3439 holding trial in "open court." If one wanted to prepare a
3440 "negative" list of "do not touch" rules, it might include Rule 56,
3441 Rule 23, Rule 38, and important parts of Rule 4.

3442 A reaction to these points was that perhaps there might be a
3443 hybrid approach — authorize the Judicial Conference to declare a
3444 rules emergency, but also specify which rules might be relaxed, and
3445 perhaps in what ways, thereby providing the Conference with what
3446 might be called a checklist, and a substitute or additional rule
3447 that might be implemented during the emergency.

3448 That suggestion raised a question: Should there be a catch-all
3449 further authority for other rules not listed? A reaction to that
3450 idea was "How does the Judicial Conference know what additional
3451 rules to include?" That could return us to the starting problem of
3452 how the Conference could pick and choose.

3453 A response was that if you look at the 90-plus numbered rules
3454 in our rule book there would probably be uniform agreement that 60
3455 to 70 need not be changed, either because the emergency had no
3456 significant impact on them, or because they already have built-in
3457 flexibility that can accommodate needed emergency adaptations. So
3458 maybe one could have a rule that includes three features: (1)
3459 specific rules that could be modified in specified ways; (2) a list
3460 of rules that can't be touched; and (3) a flexible "catch-all"
3461 provision that permits modification of other rules. Indeed, maybe
3462 there is no reason to try to identify the rules that are
3463 sacrosanct. Maybe all that is needed is a list of five or six that
3464 can be modified (perhaps in specified ways) and provide the
3465 Judicial Conference with authority to modify others if essential to
3466 dealing with a rules emergency.

3467 The question whether to try to provide an "off limits" list
3468 was discussed. This could be tough to devise. But failure to do so
3469 could invite blow back about the latitude conferred to disregard
3470 what's in the rules. The Rules Enabling Act requires that rule
3471 changes be subject to public comment and put before Congress before
3472 they go into effect. The emergency rule might be characterized as
3473 an "escape hatch" from those statutory constraints. Another
3474 reaction was that most rules don't substantially impair the courts'
3475 ability to perform their functions.

3476 The evolving discussion was summed up: "Maybe we can leave off
3477 a safety valve, and also the idea of a negative list of rules that
3478 can't be touched." Instead, the question is what we really need to
3479 put on our positive list.

3480 Further discussion suggested that actually (particularly in
3481 light of experience during the pandemic) very few rules need be on
3482 our list. One example might be the "open court" provisions that
3483 appear in some rules. But actual experience with proceedings via

3484 Zoom or other methods shows that the "open court" provisions have
3485 not prevented needed accommodations in current circumstances. So
3486 one view could be "it's working now, and we don't need to add
3487 emergency authority."

3488 Another point was that some rules have been identified as
3489 possibly deserving consideration for long-term amendment after the
3490 pandemic eases, if there is a "new normal." Would there be an
3491 inconsistency in saying that these rules might be amended for non-
3492 emergency times, but need not be relaxed during emergencies?
3493 Examples of this sort include Rule 30(b)(4) on remote depositions,
3494 Rule 43(a) on remote testimony in "open court," Rule 32(a)(4) on
3495 use of deposition testimony of "unavailable" witnesses, and Rule
3496 77(b) on place of trial.

3497 Another rule that might need relaxation was suggested: Rule
3498 6(b)(2), which forbids a court to extend the time for motions under
3499 Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). Because
3500 time limits can cause serious problems in situations like the one
3501 in which we presently find ourselves, it is probably important to
3502 permit judges to extend time pursuant to Rule 6(b)(1) even with
3503 regard to those motions in emergency conditions. But it would be
3504 important to integrate any change here with the Appellate Rules.

3505 On the other hand, other rules that have sometimes been
3506 identified as warranting greater flexibility may not. For example,
3507 Rule 77(c)(1) on the hours of the clerk's office seems to afford
3508 enough flexibility. It was noted that the C.D. Cal. has a deputy
3509 clerk "virtually on duty" even though physical access to the
3510 clerk's office is not provided.

3511 Another rule that has been mentioned is Rule 77(a), which says
3512 when court is "open." But it says court is "considered always
3513 open." The word "considered" is important in that rule. That surely
3514 does not mean that the public can go inside 24/7; and electronic
3515 filing goes a long time toward actually making the court "open"
3516 even when nobody is there.

3517 A related question that has been raised by several recent rule
3518 change submissions is whether the rule on pro se electronic filings
3519 should be changed, or at least subject to relaxation during
3520 emergency conditions. It may be that actual experience has proven
3521 flexible enough.

3522 The call ended with the expectation that the subcommittee
3523 should re-convene by conference call or Zoom before agenda
3524 materials are due for the Advisory Committee's October meeting. In
3525 the interim, the Reporters will try to identify a list of rules
3526 that should be subject to suspension or relaxation by the Judicial
3527 Conference when it declares an emergency, and consider whether
3528 draft Rule 87(c) could not only list those rules but also specify
3529 what rules would be applied during the emergency period. That would
3530 relieve the Judicial Conference of any need to provide such
3531 specifics in the event of a rules emergency.

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APPENDIX
*List of Rules Compiled by Joe Sellers
and Circulated Before August 20 Conference Call*

3535 Rule 4(d)(1)(G): This rule provides that notice of
3536 commencement of suit and the waiver of service option may be sent
3537 by 1st class mail "or other reliable means." While the rule
3538 language should be sufficient to allow for modifications to
3539 accommodate obstacles created by a rules emergency, it may be wise
3540 to include the rule among those implicated by a rules emergency to
3541 ensure what qualifies as "other reliable means" is applied in a
3542 consistent manner.

3543 Rule 4(d)(1)(F): Rule provides for time to return a request to
3544 waive service. As Rule 6(b) permits courts to extend time before
3545 the original time expires or for good cause after the time expired,
3546 the rule already empowers the court to extend the time. Query
3547 whether to include the rule among those implicated by a rules
3548 emergency to ensure a consistent approach to the provision of extra
3549 time.

3550 Rule 4(e)(2): Rule provides that service of individual w/in a
3551 judicial district may be achieved by delivering a copy to the
3552 individual personally, leaving a copy at their usual abode or
3553 delivering a copy to an authorized agent. Do we need to include
3554 among rules implicated by a rules emergency to provide for delivery
3555 by electronic or "other reliable means."

3556 Rule 4(f)(2)(c)(I): Rule provides for service of individual in
3557 a foreign country, which may be achieved where no international
3558 agreement exists by (I) delivering a copy of the summons and
3559 complaint to the individual personally or (ii) using any form of
3560 mail that the clerk addresses and requires a signed receipt. Does
3561 subsection (c)(ii) permit the clerk to design forms that will
3562 accommodate emergency conditions without a rule change? If so, then
3563 may not need to include within the rules implicated by a rules
3564 emergency.

3565 --Separate Q about relying on use of mail. Aside from the current
3566 controversy over the adequacy of mail, are there any concerns about
3567 relying on mail. Should the rule be included among those addressed
3568 in a rules emergency to allow for service by electronic mail with
3569 a means of ensuring receipt by the addressee.

3570 Rule 4(h)(1)(B): The rule provides that service on a
3571 corporation can be achieved by delivering a copy to an officer,
3572 managing or general agent. Should the rule be included among those
3573 implicated in a rules emergency to permit service by electronic
3574 mail or by other means that are "reliable."

3575 Rule 4(i)(1)(A)(i): The rule provides for service on the US by
3576 delivering a copy to the U.S. Attorney. Should the rule be included
3577 among those implicated in a rules emergency to permit service by
3578 electronic mail or by other means that are "reliable."

3579 Rule 4(j)(2)(A): The rule provides that service on a state or
3580 local government may be achieved by delivering a copy to the chief
3581 executive officer. Should the rule be included among those covered
3582 by a rules emergency to permit service by electronic mail or by
3583 other means that are "reliable."

3584 Rule 4.1(a): The rule provides that service of other process
3585 may be achieved by the US Marshal or other specially designated
3586 person anywhere within the state where the forum district is
3587 located or beyond where a statute permits. As this service is
3588 expressly contemplated to be achieved in person, it seems we will
3589 need to include this rule among those implicated by a rules
3590 emergency.

3591 Rule 5(b)(2)(B): this rule provides that service in general
3592 may be achieved by handing the papers to the person to be served or
3593 leaving it at the person's office or dwelling or mailing to the
3594 last known address. As this rule does not permit service by remote
3595 means, other than by first class mail, this rule should be included
3596 among those implicated by a rules emergency.

3597 Rule 5(b)(2)(D): This rule provides that, by default, service
3598 on someone with no known address is to be achieved by leaving the
3599 papers with the court clerk. Assuming the rule permits the papers
3600 to be left with the clerk electronically, it may be unnecessary to
3601 include this rule among those implicated by a rules emergency.

3602 Rule 5(b)(2)(E): This rule permits service by through the ECF
3603 or transmission to another person authorized to receive service
3604 electronically. As this rule ordinarily accommodates service
3605 remotely, there shouldn't be a need for its inclusion among those
3606 implicated by a rules emergency.

3607 Rule 5(d)(3)(c): This rule provides for signatures to be made
3608 electronically on filed documents. As the rule already permits
3609 signatures to be transmitted remotely, there shouldn't be a need
3610 for inclusion among those implicated by a rules emergency.

3611 Rule 6(a)(1)(c): This rule provides for particular occasions
3612 when filings may be made beyond the prescribed time period. As
3613 emergencies that could qualify as a rules emergency are not
3614 included in the enumerated list of occasions permitting out-of-time
3615 filings, this rule should be included among those implicated by a
3616 rules emergency.

3617 Rule 6(a)(3): This rule provides for extra time to file when
3618 the clerk's office is inaccessible. As the rule already provides
3619 for filings out-of-time when the clerk's office is unavailable, it
3620 be unnecessary to include among the rules implicated by a rules
3621 emergency.

3622 Rule 11(b) & (c)(2): The rule provides for 21 days in which
3623 writings alleged by a party to violate Rule 11(b) can be withdrawn
3624 or corrected in order to avoid possible sanctions. As the rule

3625 already permits courts to set a longer period than 21 days to
3626 withdraw or correct alleged deficiencies, it may be unnecessary to
3627 include among the rules implicated by a rules emergency.

3628 Rule 16(a): The rule provides that courts may require
3629 attorneys and/or parties to "appear" for pretrial conferences. As
3630 the rule does not indicate whether an appearance can be achieved
3631 remotely, it should be included among the rules implicated by a
3632 rules emergency.

3633 Rule 26(c)(1): The rule requires that parties seeking
3634 protective orders certify that they "conferred or attempted to
3635 confer" before submitting a motion. As the rule permits parties to
3636 attempt to confer before seeking a protective order, difficulties
3637 created by an emergency should not impede the ability to seek a
3638 protective order. Accordingly, it shouldn't be necessary to include
3639 this rule among those covered by emergencies.

3640 The rule also already authorizes courts, for good cause, to
3641 specify terms, including time and place for the discovery
3642 (26(c)(1)(B)) and to prescribe a different method of discovery than
3643 the one sought by a party (26(c)(1)(c)). Those provisions should
3644 afford the court sufficient flexibility to adjust the means or
3645 other features of discovery to accommodate emergency conditions.

3646 Rule 26(f): The rule requires parties to meet and confer no
3647 later than 21 days before a scheduling conference except "when the
3648 court orders otherwise." That language should suffice to afford the
3649 court the needed flexibility to adjust the meet and confer time to
3650 accommodate emergency conditions.

3651 Rules 28 & 29: Pertinent parts of these rules prescribe
3652 persons before whom depositions may be taken and permit parties to
3653 stipulate that depositions may be taken before any other person. As
3654 Rule 28 (a)(1)(B) permits courts to appoint anyone to administer
3655 the oaths and take testimony, it appears that the Rule may already
3656 afford the court sufficient authority to accommodate emergency
3657 conditions.

3658 Rule 30(b)(4): The rule permits depositions to be taken by
3659 telephone or other remote means either by party stipulation or as
3660 "the court may on motion order." As provision for depositions to be
3661 conducted remotely either requires a party stipulation or an order
3662 of the court but apparently only by motion, it may not be necessary
3663 to include the rule among those implicated by a rules emergency.

3664 Rule 30(c)(3): The rule permits use of written questions as an
3665 alternative to oral examination, in which an officer asks the
3666 written questions and records the responses. As long as the officer
3667 is not required to be physically present with the witness, this
3668 rule should not require it to be included among the emergency
3669 rules.

3670 Rule 30(d)(1): The rule provides for the duration of
3671 depositions "unless otherwise stipulated or order by the court" or
3672 if "any other circumstance impedes or delays the examination." The
3673 rule seems sufficient to accommodate emergency conditions.

3674 Rule 31(b): The rule prescribes the duties of officers who
3675 conduct deposition by written questions. As nothing in the rule
3676 seems to require the officer to be physically present with the
3677 witness or otherwise to perform duties that cannot be performed
3678 remotely or on a flexible schedule, it seems sufficient to
3679 accommodate emergency conditions.

3680 Rule 32(a)(4): The rule provides circumstances when a
3681 deposition may be used because the witness is unavailable. While
3682 there is no provision for emergency circumstances, subsection (E)
3683 permits the court to allow a deposition to be used "on motion and
3684 notice" when "the interest of justice and with due regard to the
3685 importance of live testimony in open court" permit. The rule seems
3686 sufficiently flexible to allow for emergency conditions and
3687 therefore it may be unnecessary to include among those implicated
3688 by a rules emergency.

3689 Rule 32(a)(4)(c): The rule limits circumstances when a witness
3690 cannot attend or testify to those of age, illness, infirmity or
3691 imprisonment. Courts should be allowed to add emergency. Therefore
3692 the rule should be included among the rules that can be amended
3693 upon a rules emergency.

3694 Rule 34(b)(2)(E): The rule governs the production of documents
3695 and ESI. In its present form, the rule provides a rigid protocol
3696 for production. But the preamble to the subsection permits
3697 modification of the rule where the parties stipulate or is "ordered
3698 by the court..." The preamble should provide sufficient flexibility
3699 to accommodate emergency conditions.

3700 Rule 35: The rule governs physical and mental examinations.
3701 Clearly this rule should be included among those subject to
3702 modification in an emergency. While some forms of examination might
3703 be conducted remotely, such as some mental examinations, virtually
3704 all physical examinations, or parts of them, could not ordinarily
3705 be conducted remotely.

3706 Rule 37(b)(2)(B): This rule governs when sanctions may be
3707 imposed for failing to produce persons for a Rule 35 examination.
3708 The rule does provide an exemption from sanctions when a party
3709 shows "it cannot produce the other person." But a party should not
3710 have to risk exposure to sanctions before it can avoid the
3711 imposition of sanctions. Accordingly, this rule should be included
3712 among those subject to modification in an emergency.

3713 Rule 38: This rule, which provides for the demand of a trial
3714 by jury, does not address in any way modifications to the jury
3715 trial process that may be warranted in an emergency. As the rule is
3716 entitled: "Right to a Jury Trial; Demand," either the rule may need

3717 to be re-titled and a new subsection added or a new rule should be
3718 inserted to authorize the court to adopt procedures to serve the
3719 safety and convenience of the jurors while permitting jury trials
3720 to proceed upon a finding that statutory and constitutional rights
3721 to a jury trial will be protected.

3722 Rule 43(a): The rule requires that trial testimony be taken in
3723 open court except that, among other things, upon "good cause in
3724 compelling circumstances and with appropriate safeguards, the court
3725 may permit testimony in open court by contemporaneous transmission
3726 from a different location." While the rule may be sufficiently
3727 flexible to permit a court to take testimony from a witness in a
3728 remote location, it still seems to require that the testimony be
3729 taken in open court. As such, in its current form, the rule may not
3730 accommodate circumstances in which the court may be presiding from
3731 a remote location as well. If trials can proceed in circumstances
3732 in which the court and its staff are located remotely, then this
3733 rule should be included among those subject to modification in an
3734 emergency.

3735 Rule 43(c): The rule governs the evidence on which a motion
3736 may be heard, including "on oral testimony." Whether this rule
3737 subsection warrants modification in an emergency should be governed
3738 by the way Rule 43(a) is treated.

3739 Rule 45(c) (1): This rule, which governs the power of subpoenas
3740 to command a person's attendance at a trial, hearing or deposition
3741 permits the person to be commanded to attend proceedings away from
3742 his/her home. As such, it should be subject to modification in an
3743 emergency.

3744 Rule 45(c) (2) (A): This rule, which governs the power of
3745 subpoenas to command production of things, also commands production
3746 up to 100 miles from the place of employment or regular transaction
3747 of business. As such, compliance may not be achieved remotely and,
3748 therefore the rule should be subject to modification in an
3749 emergency.

3750 Rule 45(d): While R 45(d) (1) cautions parties to refrain from
3751 imposing an undue burden or expense on a subpoena recipient, R
3752 45(d) (2) places the burden on the recipient of the subpoena to
3753 lodge a timely objection and R

3754 Rule 45(d) (3) prescribes grounds on which a subpoena may be
3755 quashed. As no provision for emergency conditions is provided as a
3756 basis for relief from a subpoena, this rule should be subject to
3757 modification in an emergency.

3758 Rule 53(a) (1) (B) (i): The rule provides for appointment of
3759 masters "to hold trial proceedings . . . if appointment is
3760 warranted by: (i) some exceptional circumstances" There doesn't
3761 seem to be any reason this could not include a rules emergency and,
3762 therefore, the may not need to be subject to modification in an
3763 emergency.

3764 Rule 63: The rule provides for continuation of a trial or
3765 hearing when a judge is unable to proceed. While the committee
3766 notes make clear that the rule was intended to apply in
3767 circumstances personal to the judge, there is nothing in the text
3768 of the rule that so limits its scope. Therefore, it may unnecessary
3769 to include this rule among those implicated by a rules emergency.

3770 Rule 65(a)(2): The rule governs consolidation of a preliminary
3771 injunction hearing with a trial on the merits. Nothing in the rule
3772 requires that evidence be taken in open court. As long as Rule 43
3773 is subject to modification in emergency conditions, to allow for
3774 the taking of testimony by remote means, it may not be necessary to
3775 include this rule in the list subject to modification in rules
3776 emergencies.

3777 Rule 67(a): The rule governs deposits in the court of funds or
3778 other things in satisfaction of a judgment. As long as electronic
3779 funds transfers are available in the courts, the deposits
3780 themselves should not require any modification for rules
3781 emergencies. The rule also requires the depositing party to
3782 "deliver to the clerk a copy of the order permitting deposit." As
3783 the committee note characterizes the delivery as service of the
3784 order on the clerk, it would seem service could be achieved by ECF.
3785 Therefore, it may not be necessary to include this rule among those
3786 subject to modification upon a rules emergency.

3787 Rule 71.1(d)(1): This rule governs procedures for condemnation
3788 of real and personal property by eminent domain. This subsection
3789 provides that the plaintiff must "promptly deliver to the clerk
3790 joint or several notices directed to the named defendants." Nothing
3791 in the rule or in the committee note seems to preclude the
3792 provision of notice by ECF. Therefore, it may not be necessary to
3793 include this rule among those subject to modification upon a rules
3794 emergency.

3795 Rule 71.1(d)(3)(B): This rule governs notice by publication,
3796 which is only warranted when the plaintiff certifies that the
3797 defendant cannot be served personally pursuant to Rule 4. The rule
3798 also does not prescribe the type of publication required. While
3799 nothing in the rule seems to impose requirements that could not be
3800 satisfied in a rules emergency, it may be safer to include the rule
3801 among those subject to modification in a rules emergency to ensure
3802 adequate notice is achieved when unforeseen impediments to notice
3803 may arise.

3804 Rule 77(a): The rule provides that the court is considered
3805 "always open for filing" While electronic filing may be
3806 available in emergency conditions, filings by persons without
3807 access to the ECF may be impaired by an emergency. Therefore, the
3808 rule should be included among those covered in a rules emergency.

3809 Rule 77(b): This rule provides that "every trial on the merits
3810 must be conducted in open court and, so far as convenient, in a
3811 regular courtroom." Therefore, the rule seems to require that all

3812 trials be conducted "in open court" and the "so far as convenient"
3813 language appears only to apply to the provision that trials be
3814 conducted in "a regular courtroom." These provisions seem to
3815 distinguish between trials that are open to the public and those
3816 open to the public that are held in a regular courtroom. As such,
3817 the current rule language seems to permit trials on the merits by
3818 remote means as long as the public has electronic access to the
3819 proceedings. And the provision that, where convenient, the trial
3820 should be conducted in a regular courtroom seems to allow for
3821 circumstances in an emergency where trials in a courtroom would not
3822 be convenient. As long as Rule 43 allows for testimony to be taken
3823 by remote means, this rule should permit trials in emergency
3824 circumstances.

3825 Rule 77(c)(1): The rule provides that the clerk's office must
3826 be open, and a clerk or deputy on duty, during business hours every
3827 day, except weekends and holidays. As the clerk's staff may be
3828 unable to be present in the office, provision may be needed to
3829 allow for alternative ways to access clerk's office staff.
3830 Therefore, the rule should be included among those covered in a
3831 rules emergency.

3832 Rule 77(d)(2): The rule provides that lack of notice of
3833 judgment does not affect the time for appeal. Although Appellate
3834 Rule 4(a)(5)(c) permits some additional time to note an appeal when
3835 a party shows it failed to receive notice of the judgment or order
3836 appealed, this is an area that might be appropriate for
3837 modification in a rules emergency, after consultation with the
3838 Appellate Rules Committee, in order to avoid the prejudice from a
3839 lost right of appeal when an rules emergency may cause chaos or
3840 poor communications.

3841 Rule 80: The rule provides that testimony in a hearing or
3842 trial may be used in a later trial when "the transcript is
3843 certified by the person who reported it." Assuming certification of
3844 the transcript is no different from certification provided by any
3845 stenographer or other person authorized to record testimony,
3846 emergency circumstances shouldn't interfere with providing this
3847 certification. Ordinarily, therefore, it may be unnecessary to
3848 include this rule among those subject to modification in a rules
3849 emergency.

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RULE 4(c)(3): SERVICE BY THE U.S. MARSHALS SERVICE

Suggestion 19-CV-A

3852 A possible ambiguity in the text of the Rule 4(c)(3) provision
3853 for service by the marshal in actions brought in forma pauperis or
3854 by a seaman has been on the agenda since Judge Furman raised it at
3855 the Standing Committee meeting in January, 2019. It has been
3856 discussed three times, and carried forward each time in the hope
3857 that better practical information can be obtained.

3858 It is appropriate to continue to carry these questions forward
3859 without attempting present action. The COVID-19 pandemic has made
3860 it impracticable to distract the Marshals Service with requests for
3861 deeper consultation. Practices adopted in response to the pandemic
3862 may, when there is time to reflect on them, provide a new source of
3863 useful information. And, perhaps most importantly, the CARES Act
3864 Subcommittee recommendations with respect to Rule 4 may point the
3865 way toward general revisions that reduce the burdens imposed by
3866 Rule 4(c)(3). If service by mail, commercial carrier, or even e-
3867 mail becomes available, service can be accomplished at much lower
3868 cost. 28 U.S.C. § 1915(d) directs that "the officers of the court
3869 shall issue and serve all process, and perform all duties in such
3870 cases." Rather than the marshal, a court clerk may find it feasible
3871 to make service. And i.f.p. plaintiffs may more often make service
3872 themselves, as seems to happen frequently now when the plaintiff is
3873 represented by a lawyer.

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3922 The potential complications that may follow the
3923 proposed amendment are identified indirectly by asserting
3924 answers in the draft committee note that follows. It
3925 remains unclear whether the potential efficiencies that
3926 would flow from avoiding formal substitution as officers
3927 enter and leave public office justify whatever risks of
3928 complication may be encountered. As most recently
3929 advised, the Department of Justice position seems
3930 essentially neutral. This topic deserves careful study.

3931 **Rule 17. Plaintiff and Defendant; Capacity; Public**
3932 **Officers**

3933 * * *
3934 *Alternative (1)*

3935 (d) PUBLIC OFFICER'S TITLE AND NAME. A public officer
3936 who sues or is sued in an official capacity
3937 ~~may~~ must be designated by official title
3938 rather than name, but the court may order that
3939 the officer's name be added.

3940 *Alternative (2)*

3941 (d) PUBLIC OFFICER'S TITLE AND NAME. A public officer
3942 who sues or is sued in an official capacity
3943 ~~may~~ must be designated by official title
3944 rather than name, when suit can be brought by
3945 or against the office. The officer must be
3946 designated by name when:
3947 (1) suit cannot be brought against the
3948 office,
3949 (2) the officer is sued in an individual
3950 capacity, or
3951 (3) but the court may so orders that the
3952 officer's name be added.

3953 This second version may be more elaborate than
3954 necessary. Courts have managed for years without rule
3955 text suggesting that care should be taken to make sure
3956 that the office can be made a party, and without a
3957 reminder that an officer may sue or be sued in both
3958 official and individual capacities or in an individual
3959 capacity alone. And the 1961 committee note to the
3960 substitution of parties provision in Rule 25(d) (1) (now
3961 (d)) addressed the Eleventh Amendment by stating that the
3962 rule applies to "actions to prevent officers * * * from
3963 enforcing unconstitutional enactments, *cf. Ex parte*
3964 *Young*, 209 U.S. 123 (1908)." The pretense that a state
3965 official sued to restrain unconstitutional official
3966 action is sued in an individual capacity was addressed by
3967 indirection: the rule applies "to any action brought in
3968 form against a named officer, but intrinsically against
3969 the government or the office or the incumbent thereof
3970 whoever he may be from time to time during the action."
3971 This view of substitution of parties when a public

3972 official leaves office apparently carried over to what
3973 then was Rule 25(d)(2), now Rule 17(d). The committee
3974 note described the provision for designating a public
3975 official by official title as "applicable in 'official
3976 capacity' cases as described above * * *."

3977 The more elaborate rule text likely would lead to a
3978 more elaborate committee note. This draft Note addresses
3979 many issues that might be omitted even if the more
3980 elaborate rule text were adopted. Almost all of it would
3981 be omitted if the simplest rule amendment is adopted.

3982 **Committee Note**

3983 Rule 17(d) is amended to require, not simply permit,
3984 designation by official title of a public officer who
3985 sues or is sued in an official capacity. The requirement
3986 applies only if the officer holds an office that can sue
3987 or be sued as an office. The court's power to require
3988 that the officer's name be added is retained. Designating
3989 the office as party means that there is no need to
3990 substitute parties under Rule 25(d) when a particular
3991 public official leaves the office, with or without
3992 immediate appointment of a successor. But if the office
3993 is transformed or abolished, substitution of a different
3994 office may be required, at least so long as there is an
3995 appropriate office to sue or be sued.

3996 The rule does not attempt to address the question
3997 whether the office held by any particular public official
3998 can sue or be sued. Rule 17(d) applies to all public
3999 officials, federal, state, and local. If it is unclear
4000 whether the office can be joined as a party, both the
4001 office and the officer's names may be used. Federal law
4002 determines whether a federal office exists and has the
4003 capacity to sue or be sued.¹¹ State and local law applies
4004 to state and local offices. The rule, moreover, addresses
4005 only the naming of the party. It does not affect the
4006 rules that determine when suit against a public official
4007 is permitted by sovereign immunity or the Eleventh
4008 Amendment. See the 1961 committee note to Rule 25(d).
4009 Neither does the rule address whether a government can be
4010 sued directly, or whether a public agency can be made a
4011 party as an agency rather than by joining agency members.

4012 When a public officer is sued in both an official
4013 capacity and an individual capacity, the office title
4014 must be used for the official-capacity claim when that is

¹¹ This is inevitably correct, even though Rule 17(b)(3) might be read to say that state law governs capacity in this situation. See 6A Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 1566 (2010).

4015 possible, and the officer's name must be used for the
4016 individual claim. The officer's name must be used for
4017 both claims when the office cannot be sued.

4018 The Rule 4(i)(2) and (3) provisions for making
4019 service when a United States officer or employee is sued
4020 in an official capacity continue to apply when the office
4021 is designated as a party.

4022 A wrong designation should be cured by amending the
4023 pleadings.

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4024 **RULE 5(d)(3)(B): E-FILING BY AN UNREPRESENTED PERSON**

4025 *Suggestions 20-CV-J, K, L, M, N, O, P, Q, S, U, V, W, and X*

4026 Rule 5(d) was amended in 2018 to provide for nonelectronic
4027 filing (Rule 5(d)(2)), and for electronic filing and signing
4028 (Rule 5(d)(3)). Ordinarily, a person represented by an attorney
4029 must file electronically, with some exceptions. A person not
4030 represented by an attorney ordinarily may file electronically only
4031 if allowed by court order or by local rule, but may be required to
4032 file electronically by court order or by a local rule that includes
4033 reasonable exceptions.

4034 The provision limiting e-filing by unrepresented persons was
4035 considered at length. E-filing has significant advantages for the
4036 filer, the court, and all parties when an unrepresented person
4037 successfully navigates the court's system. It may be anticipated
4038 that the skills required for e-filing will continue to expand among
4039 would-be filers. The 2018 committee note recognized this prospect,
4040 suggesting that willingness to allow e-filing by unrepresented
4041 persons "may expand with growing experience in the courts, along
4042 with the greater availability of the systems required for
4043 electronic filing and the increasing familiarity of most people
4044 with electronic communication."

4045 The COVID-19 pandemic has prompted a flurry of proposals that
4046 e-filing be made generally available to unrepresented persons. The
4047 health hazards involved in mailing or physically delivering a paper
4048 to the court are emphasized, along with pleas that unrepresented
4049 persons should be protected equally with attorneys and those they
4050 represent. These suggestions include 20-CV-J, K, L, M, N, O, P, Q,
4051 S, U, V, W, and X.

4052 These suggestions tie closely to the whole set of questions
4053 raised by experience with the responses of courts and litigants to
4054 the current pandemic. As discussed in the report of the CARES Act
4055 Subcommittee, it may be that information about these responses,
4056 carefully gathered and evaluated, will provide solid foundations
4057 for proposing amendments to general rules provisions.

4058 One path would be to put e-filing by unrepresented parties on
4059 the long-term agenda. Experiences, both in courts that expanded
4060 access to e-filing and in those that did not, could be gathered and
4061 evaluated. That path would be particularly helpful if experience
4062 showed either that many or most unrepresented persons successfully
4063 managed e-filing, or that many did not.

4064 Another path would be to attempt to advance this subject for
4065 immediate attention. It might even be published in August 2021, at
4066 the same time as any emergency rule might be published. But it
4067 would make sense to move ahead now only if there is enough solid
4068 experience to show that e-filing by unrepresented persons works
4069 well enough, often enough, to provide significant benefits. Initial
4070 informal inquiries suggest that experience is mixed. Holding this
4071 subject for the long-term agenda seems advisable.

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IN FORMA PAUPERIS DISCLOSURES
Suggestion 19-CV-Q

4074 At the October 29, 2019 meeting the Advisory Committee
4075 considered a proposal by Sai that addressed four topics relating to
4076 in forma pauperis practices. One argued that the relevant
4077 Administrative Office forms call for too much information, and
4078 indeed that some of the information cannot constitutionally be
4079 required. The proposal was removed from the agenda, with the
4080 thought that it might raise questions better considered by the
4081 Court Administration and Case Management Committee. The only
4082 vestige that has survived is the ongoing consideration of Appellate
4083 Rules Form 4 by the Appellate Rules Committee.

4084 Sai continues to press arguments that requiring disclosure of
4085 information about a litigant's spouse is prohibited by the
4086 Constitution. Appellate Form 4 provides illustrations in
4087 requirements to disclose such matters as a spouse's income from
4088 diverse sources, gifts, alimony, child support, public assistance,
4089 and still others; spouse's employment history; spouse's cash and
4090 money in bank accounts or in "any other financial institution"; a
4091 spouse's other assets; and persons who owe money to the spouse and
4092 how much.

4093 No action is called for now. If the Administrative Office
4094 should come to reconsider its forms, whether in reaction to
4095 proposals to revise Appellate Form 4 or otherwise, these questions
4096 may be brought back for further consideration.

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E-FILING DEADLINE JOINT SUBCOMMITTEE

Suggestion 19-CV-U

4099 The several committees are studying a suggestion to reconsider
4100 the provisions in the rules that set the end of the last day for
4101 electronic filing "at midnight in the court's time zone." For the
4102 Civil Rules, this provision appears in Rule 6(a)(4)(A).

4103 The FJC has undertaken a broad quest for information about
4104 actual filing practices. Its work remains ongoing. This topic will
4105 be taken up again after the FJC reports its findings.

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4106 **RULE 9(b) : GENERAL PLEADING OF MALICE, INTENT, ETC.**

4107 *Suggestion 20-CV-Z*

4108 Advisory Committee member Dean and Professor A. Benjamin
4109 Spencer has submitted a proposal to amend the second sentence of
4110 Rule 9(b) to restore the meaning it enjoyed up to the Supreme
4111 Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687
4112 (2009). The proposal is supported by an article, A. Benjamin
4113 Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing*
4114 *the Damage Wrought by Iqbal*, 41 *Cardozo L. Rev.* 1015 (2020). The
4115 article is appended below.

4116 Because the Court interpreted the second sentence of Rule 9(b)
4117 against the first sentence, the entire subdivision is important:

4118 (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or
4119 mistake, a party must state with particularity the
4120 circumstances constituting fraud or mistake.
4121 Malice, intent, knowledge, and other conditions of
4122 a person's mind may be alleged generally.

4123 The proposed amendment would revise the second sentence:

4124 Malice, intent, knowledge, and other conditions of a
4125 person's mind may be alleged generally without setting
4126 forth the facts or circumstances from which the condition
4127 may be inferred.

4128 This proposal is presented as an information item rather than
4129 an item for action at this meeting. The aim is to provide an
4130 introduction to a challenging topic and to invite engaged study
4131 over a period longer than the time between delivery of agenda
4132 materials and this Advisory Committee meeting. Careful preparation
4133 during the interval before the spring meeting will be important.

4134 The *Iqbal* opinion elaborated now-familiar general Rule 8(a)(2)
4135 standards for pleading "a short and plain statement of the claim
4136 showing that the pleader is entitled to relief." The details of the
4137 *Iqbal* complaint deserve a brief summary to pave the way for the
4138 Rule 9(b) ruling. The plaintiff, "a citizen of Pakistan and a
4139 Muslim," was arrested on fraud charges, pleaded guilty, served a
4140 term of imprisonment, and was removed to Pakistan. He did not
4141 challenge the arrest or the confinement as such. But he did claim
4142 that he was designated a "person of high interest" in connection
4143 with the terrorist attacks of September 11, 2001, and placed in
4144 administrative maximum confinement, "on account of his race,
4145 religion, or national origin." The Court accepted the prospect that
4146 he had pleaded claims against some of the many defendants. The case
4147 came to it on qualified immunity appeals by two of the defendants
4148 — John Ashcroft, the former Attorney General, and Robert Mueller,
4149 the Director of the FBI. He alleged that Ashcroft was the principal
4150 architect of the unconstitutional policy, and that Mueller was
4151 instrumental in its adoption. He further alleged that they "knew
4152 of, condoned, and willfully and maliciously agreed to subject" him

4153 to harsh conditions of confinement "as a matter of policy, solely
4154 on account of [his] religion, race, and/or national origin and for
4155 no legitimate penological interest."

4156 The Court found these allegations failed to push the claim
4157 beyond mere possibility into plausibility. It applied a legal
4158 standard that "purposeful discrimination requires more than 'intent
4159 as volition or intent as awareness of consequences.' * * * It
4160 instead involves a decisionmaker's undertaking a course of action
4161 'because of,' not merely 'in spite of,' [the action's] adverse
4162 effects upon an identifiable group.'" Knowledge of, and
4163 acquiescence in, discriminatory acts by their subordinates would
4164 not suffice to hold the Attorney General and Director of the FBI
4165 liable. The allegations of these defendants' purpose "are
4166 conclusory, and not entitled to be assumed true." "It is the
4167 conclusory nature of respondent's allegations, rather than their
4168 extravagantly fanciful nature, that disentitles them to the
4169 presumption of truth." The allegations were "consistent with" an
4170 unlawful discriminatory purpose, but did not plausibly establish
4171 this purpose "given more likely explanations." Lower-ranking
4172 government officials may have designated the plaintiff a person of
4173 high interest and subjected him to unlawful conditions of
4174 confinement for unlawful reasons, but nothing more could be
4175 inferred against these two defendants than seeking "to keep
4176 suspected terrorists in the most secure conditions available until
4177 the suspects could be cleared of terrorist activity."

4178 The Court addressed Rule 9(b) after setting the general
4179 pleading requirements. It characterized the plaintiff's argument to
4180 be that by allowing discriminatory intent to be pleaded
4181 "generally," Rule 9(b) permits a conclusory allegation without
4182 more. This argument was rejected on the face of the rule text.
4183 "Generally" is used to distinguish allegations of malice, intent,
4184 knowledge, or other conditions of a person's mind from the
4185 particularity standard established for fraud or mistake.
4186 "Generally" "does not give [a party] license to evade the less
4187 rigid – although still operative – strictures of Rule 8. * * * And
4188 Rule 8 does not empower respondent to plead the bare elements of
4189 his cause of action, affix the label 'general allegation,' and
4190 expect his complaint to survive a motion to dismiss."

4191 Member Spencer's article is too rich to be summarized with any
4192 justice. It is set in a background of evident dissatisfaction with
4193 the general pleading standards announced in *Bell Atlantic Corp. v.*
4194 *Twombly*, 550 U.S. 544 (2007), and restated in the *Iqbal* opinion.
4195 But it seems to be accepted that after the Advisory Committee has
4196 studied multiple suggestions for restoring Rule 8(a)(2) to its pre-
4197 *Twombly* meaning, "it appears that ship has sailed." p. 1054, n.
4198 145. The focus instead is confined to Rule 9(b). The proposed
4199 amendment, set out above, "would alter the outcome in *Iqbal*." The
4200 entire argument is aimed at that goal. But as an alternative, if
4201 that argument is not accepted, "making the *Iqbal* interpretation of
4202 Rule 9(b) explicit or abrogating the second sentence of Rule 9(b)
4203 altogether would be the appropriate course to pursue."

4204 The article unfolds in several steps that should be read
4205 carefully. First, it annotates the proposition that lower courts
4206 are following the new interpretation of Rule 9(b), applying it to
4207 such claims as actual malice in defamation of a public figure, or
4208 discriminatory intent in employment cases. Then it argues that the
4209 Court "got the interpretation of Rule 9(b) terribly wrong" as
4210 compared to the original understanding. The 1937 committee note
4211 says simply to see English Rules. The English rule cited provided
4212 that when alleging "malice, fraudulent intention, knowledge, or
4213 other condition of the mind of any person, it shall be sufficient
4214 to allege the same as a fact without setting out the circumstances
4215 from which the same is to be inferred." This text provides the
4216 basis for the Rule 9(b) amendment proposed to set matters right.

4217 Perhaps worse than departing from intended meaning, severe
4218 difficulties are found in the Court's reading of Rule 9(b). Often
4219 a pleader cannot "provide the particulars of a person's state of
4220 mind" without benefit of discovery. Employment discrimination cases
4221 are a leading example. Requiring a complaint to articulate facts to
4222 substantiate an alleged state of mind, indeed, may run afoul of the
4223 First Amendment's prohibition of any law prohibiting the right of
4224 the people to petition the Government for the redress of
4225 grievances. The general pleading standard that looks to "judicial
4226 experience and common sense," moreover, invites "decisions based on
4227 various biases and categorical or stereotypical reasoning,"
4228 particularly when lacking complete information about an individual
4229 or a situation. "A civil claim is all about deviation from the
4230 norm"; pleaders should not be obliged "to offer sufficient facts to
4231 convince normatively biased judges that an allegation of deviant
4232 intent is plausible."

4233 There is much more in the article than this bald introduction.
4234 It provides a comprehensive framework to hold the simpler reaction
4235 of those who were surprised by the Court's reading of Rule 9(b). At
4236 least some procedure mavens had continued to believe that
4237 "generally" allowed pleading of a state of mind as if a fact, just
4238 as the English rule said more explicitly. On this view, sufficient
4239 notice was given by pleading the facts whose legal consequences are
4240 measured by the defendant's state of mind.

4241 Pursuing this invitation toward actual proposal of an
4242 amendment for publication will require careful development.

4243 One task might be to examine the development of Rule 9(b)
4244 practices in the lower courts before the *Iqbal* decision. The story
4245 of general "notice" pleading practices before the *Twombly* and *Iqbal*
4246 decisions was decidedly mixed, not only in the lower courts but in
4247 the Supreme Court itself. Broad and frequent repetitions of the "no
4248 set of facts" phrase retired by the *Twombly* opinion were
4249 interspersed by decisions that not only departed from any (and
4250 improbable) literal meaning, but went well into the realm of fact
4251 pleading. The story of Rule 9(b) may prove to have been similar,
4252 offering an example of hard-earned judicial experience that,
4253 whether or not aware of the intentions communicated only by citing

4254 a mid-late nineteenth century British practice, found a need for
4255 more detailed pleading. A standard suited to pleading common-law
4256 claims and such statutory claims as existed then in England might
4257 well prove inadequate in the civil-action environment of the
4258 Twentieth and Twenty-First Centuries.

4259 Apart from the evolution of substantive law, the procedural
4260 framework also has evolved. In the general pleading part of the
4261 *Iqbal* opinion, the Court observed that while Rule 8 departs from
4262 "the hypertechnical, code-pleading regime of a prior era, * * * it
4263 does not unlock the doors of discovery for a plaintiff armed with
4264 nothing more than conclusions." The Committee has frequently
4265 wrestled with the prospect that at least some guided discovery
4266 should be permitted to support an amended complaint based on
4267 information not available to the plaintiff but often available to
4268 the defendant, or perhaps to nonparties. Writing a provision for
4269 discovery in aid of pleading into the rules has not proved an easy
4270 task.

4271 A more pointed set of questions about the role of substantive
4272 law is illustrated by the Advisory Committee's deliberations about
4273 enhanced pleading during the period from the *Leatherman* decision in
4274 1993, when the Supreme Court ruled that heightened pleading can be
4275 required only as specifically provided in rule text, and 2007, when
4276 the *Twombly* opinion was announced. The issue began with qualified
4277 official immunity cases. That example expanded into questions about
4278 the difficulty of identifying which substantive theories might be
4279 required to satisfy heightened pleading requirements. Those
4280 questions in turn led both to abstract concerns about
4281 transsubstantivity and to practical concerns about the need to have
4282 a solid grasp of litigation realities in any substantive area that
4283 might be captured in a specific pleading rule. The present proposal
4284 recognizes this possibility by suggesting that a desire to protect
4285 defendants who may be entitled to official immunity could be
4286 vindicated by a pleading rule specific to those cases, "not through
4287 a wholesale judicial reinterpretation of the generally applicable
4288 rule found in Rule 9(b)." p. 1052 n. 137.

4289 The official immunity example finds parallels in the examples
4290 recounted by the proposal. What elements of underlying substantive
4291 law, and what realities of litigation practice, might distinguish
4292 the pleading standards appropriate for actual malice in an action
4293 for defamation of a public figure? For discrimination in
4294 employment? For malicious prosecution? For "fraudulent"
4295 conveyances? Rule 9(b), as some had understood it from 1938 to
4296 2009, and as it might be revised, covers a wide universe of
4297 substantive law. One approach might be to examine multiple areas of
4298 the law where a claim depends on proving malice, intent, knowledge,
4299 or other conditions of a person's mind, seeking to develop an
4300 appropriate pleading standard for each. But if that task seems as
4301 unmanageable as a parallel task seemed from 1993 to 2007, which
4302 general rule would be better? Whatever practices emerge from
4303 adapting the general and highly variable standards of Rule 8(a)(2)
4304 as mandated by the Supreme Court? Or a return to a practice that

4305 treats as a sufficient allegation of fact a direct averment of
4306 "malice," "intent," "knowledge," or some other condition of a
4307 person's mind as required by the substantive claim asserted in the
4308 pleading?

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WILLIAM & MARY
LAW SCHOOL

OFFICE OF THE DEAN

August 28, 2020

Honorable John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Proposed Amendment to Rule 9(b)

Dear Judge Bates:

Please find attached a copy of an article in which I propose an amendment to Rule 9(b) of the Federal Rules of Civil Procedure. In brief, the proposal is to amend the rule as follows:

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

Although a full explanation of the motivations and justifications for this proposed amendment are reflected in the attached article, the following draft proposed committee note aptly summarizes the design of the change:

Subdivision (b). Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See, e.g., *Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); see also *Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term “generally” in Rule 9(b)’s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)’s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to “state any supporting facts” as is found in Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person’s mind at the pleading stage.

To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted “maliciously” or “with fraudulent intent” or “with the purpose of discriminating against

the plaintiff on the basis of sex,” or that the defendant “had knowledge of X.” For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, “On March 1, [year], defendant [name of defendant 1] conveyed all of defendant’s real and personal property to defendant [name of defendant 2] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.”

Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). However, a pleader’s failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

As I point out in the attached article, Rule 9(b) was based on an English rule that manifestly did not require the pleading of facts in support of allegations pertaining to conditions of the mind. Justice Kennedy’s interpretation of Rule 9(b) in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has unfortunately been taken to mean the exact opposite of that, which is unfortunate given the inordinate difficulty of factually substantiating condition-of-the-mind allegations at the pleading stage.

I urge you to review the article in its entirety to fully appreciate the complete set of arguments in favor of revising Rule 9(b) as I propose. I look forward to being able to discuss this item at one of our next meetings and am hopeful that the committee will determine that the proposal warrants further consideration, perhaps by a newly formed subcommittee.

Best regards,



A. Benjamin Spencer
Dean & Chancellor Professor

Cc: Hon. Robert M. Dow, Jr.
Prof. Ed Cooper
Prof. Rick Marcus
Ms. Rebecca A. Womeldorf, Esq.

PLEADING CONDITIONS OF THE MIND UNDER
RULE 9(b): REPAIRING THE DAMAGE WROUGHT BY
IQBAL

A. Benjamin Spencer†

“There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail.”

—Charles E. Clark, 1937¹

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† Bennett Boskey Visiting Professor of Law, Harvard Law School; Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. I would like to thank those who were able to give helpful comments on the piece.

¹ Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

INTRODUCTION

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*,² in which it pronounced—among other things³—that the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure—which permits allegations of malice, intent, knowledge, and other conditions of the mind to be alleged “generally”—requires adherence to the plausibility pleading standard it had devised for Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.⁴ That is, to plead such allegations sufficiently, one must offer sufficient facts to render the condition-of-the-mind allegation plausible. This rewriting of the standard imposed by Rule 9(b)’s second sentence—which came only veritable moments after the Court had avowed that changes to the pleading standards could only be made through the formal rule amendment process⁵—is patently unsupportable for two reasons.

First, the *Iqbal* Court’s interpretation of Rule 9(b) is at odds with a proper text-based understanding of the Federal Rules: (1) The plausibility pleading obligation purports to be derived from the Rule 8(a)(2)

² 556 U.S. 662 (2009).

³ To view a fuller discussion of the *Iqbal* decision, see A. Benjamin Spencer, *Iqbal and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) [hereinafter Spencer, *Iqbal and the Slide Towards Restrictive Procedure*].

⁴ 550 U.S. 544, 555 (2007).

⁵ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (stating that different pleading standards “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation” (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993))); *Hill v. McDonough*, 547 U.S. 573, 582 (2006) (“Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.”). The Supreme Court has never indicated that rules promulgated pursuant to the Rules Enabling Act may be interpreted more loosely by the Court because of the Court’s unique role in promulgating such rules; to the contrary, the Court has steadfastly adhered to the notion that it is not free to revise such rules through judicial interpretation. *See, e.g.*, *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“The text of a rule thus proposed and reviewed [through the Rules Enabling Act process] limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure ‘shall not abridge . . . any substantive right.’” (quoting 28 U.S.C. § 2072(b) (2000))); *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (“We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.”).

obligation to “show[.]” entitlement to relief,⁶ an obligation that reflects the standard for sufficiently stating claims, not the standard for sufficiently stating the individual component allegations thereof—which is found in Rule 8(d)(1), not Rule 8(a)(2); (2) text from elsewhere in the Federal Rules and from the Private Securities Litigation Reform Act (PSLRA) reveals that the *Iqbal* interpretation of Rule 9(b) is unsound; and (3) evidence from the now-abrogated Appendix of Forms—in effect at the time of *Iqbal*—contradicts any attempt to place a plausibility pleading gloss on Rule 9(b).

Second, the Court’s alignment of Rule 9(b)’s second sentence with the 8(a)(2) plausibility pleading standard runs counter to the original understanding of Rule 9(b), which was borrowed from English practice extant in 1937. A review of the English rule that formed the basis of Rule 9(b), as well as the English jurisprudence surrounding that rule at the time, make clear that Rule 9(b) cannot be faithfully interpreted as requiring pleaders to set forth the circumstances from which allegations pertaining to conditions of the mind may be inferred.

Beyond reflecting an errant interpretation of Rule 9(b), the *Iqbal* understanding has resulted in tremendous harm to litigants seeking to prosecute their claims. Lower courts have embraced the *Iqbal* revision of Rule 9(b) with zeal, dismissing claims for failure to articulate facts underlying condition-of-mind allegations left, right, and center. This is undesirable not only because it turns on its head a rule that was designed to facilitate rather than frustrate such claims, but also because it contributes to the overall degradation of the rules as functional partners in the larger civil justice enterprise of faithfully enforcing the law and vindicating wrongs. In light of these ills arising from *Iqbal*’s adulteration of Rule 9(b), it should be amended to make the original and more appropriate understanding of the condition-of-mind pleading requirement clear, or at least revised to conform its language to the *Iqbal* Court’s reimagining of it. What follows is an exploration of these points.

⁶ *Twombly*, 550 U.S. at 555 n.3 (“Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”); see also *Iqbal*, 556 U.S. at 679 (“But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” (quoting FED. R. CIV. P. 8(a)(2))).

I. THE ADULTERATION OF RULE 9(b)

A. *Iqbal and Pleading Conditions of the Mind*

Although there are multiple aspects of the *Iqbal* decision worthy of critique,⁷ our focus here will be on its perversion of the standard applicable to alleging conditions of the mind found in Rule 9(b). Rule 9(b) reads, in its entirety, as follows:

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.⁸

The question is what pleading standard does the second sentence of Rule 9(b)—which I will refer to as the conditions-of-the-mind clause—impose?

According to Justice Kennedy—the author of the *Iqbal* opinion—the conditions-of-the-mind clause should be read to mean that allegations of malice, intent, knowledge, and other conditions of mind must be pleaded consistently with the plausibility pleading standard of Rule 8(a)(2). Justice Kennedy made this pronouncement in the following way:

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

⁷ See, e.g., Spencer, *Iqbal and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–201 (criticizing *Iqbal* for its endorsement of a subjective approach to scrutinizing pleading that will permit courts to restrict claims by members of social outgroups). I have criticized the *Twombly* decision as well. See, e.g., A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013) [hereinafter Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*]; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) [hereinafter Spencer, *Plausibility Pleading*].

⁸ FED. R. CIV. P. 9(b).

though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label “general allegation,” and expect his complaint to survive a motion to dismiss.⁹

In this passage, Justice Kennedy declared that in pleading conditions of the mind, one must apply the “still operative strictures of Rule 8.” Those strictures require “well-pleaded factual allegations”—not mere legal conclusions—that “show[]” plausible entitlement to relief:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.” FED. RULE CIV. PROC. 8(a)(2).¹⁰

In *Iqbal*, the condition of the mind being pleaded was discriminatory intent: that the defendants undertook the challenged course of action—the detention of certain individuals and subjugation of them to harsh conditions of confinement—“solely on account of” the plaintiff’s race, religion, or national origin.¹¹ Justice Kennedy declared that this was a “bare” assertion, amounting to nothing more than a “formulaic recitation of the elements’ of a constitutional discrimination claim.”¹² He acknowledged, however, that “[w]ere we required to accept this allegation as true, respondent’s complaint would survive petitioners’ motion to dismiss.”¹³ But, alas, they (the *Iqbal* majority) could not accept it as true because the allegations’ “conclusory nature . . . disentitle[d] them to the presumption of truth”¹⁴ and “the Federal Rules do not require courts to

⁹ *Iqbal*, 556 U.S. at 686–87.

¹⁰ *Id.* at 678–79.

¹¹ *Id.* at 680.

¹² *Id.* at 681 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

¹³ *Id.* at 686.

¹⁴ *Id.* at 681.

credit a complaint's conclusory statements without reference to its factual context."¹⁵ Thus, the plaintiff's claims against Ashcroft and Mueller were dismissed.¹⁶ Although this was an adverse outcome for Mr. Iqbal's individual case, the consequences of this view of Rule 9(b) have reverberated throughout the lower courts, facilitating the dismissal of a countless number of claims involving condition-of-mind allegations.¹⁷

B. *Lower Courts and Rule 9(b) after Iqbal*

By interpreting Rule 9(b) in a way that subsumed it within the pleading standard applicable to stating claims, the *Iqbal* Court empowered lower courts to apply the "still operative strictures of Rule 8"—the plausibility requirement—to the determination of whether an allegation pertaining to a condition of the mind is sufficient, thereby infusing fact skepticism into an analysis in which the Court purports that alleged facts are assumed to be true.¹⁸ What this has meant operationally

¹⁵ *Id.* at 686.

¹⁶ *Id.* at 687.

¹⁷ See *infra* Section I.B. A perhaps unexpected distinct consequence of the *Iqbal* Court's interpretation of the term "generally" in Rule 9(b) has been that lower courts have adopted and applied that interpretation to the use of the term "generally" in Rule 9(c), which permits the satisfaction of conditions precedent to be pleaded generally. See, e.g., *Dervan v. Gordian Grp. LLC*, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017) ("This Court agrees, and holds that the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)."); *Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc.*, 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements should likewise be indistinguishable."); *Napster, LLC v. Rounder Records Corp.*, 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (deeming the allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement" an insufficient "legal conclusion," and recognizing that the cited cases suggesting that such "general statement[s]" are sufficient under Rule 9(c) "all predate *Twombly* and *Iqbal*"). This interpretation of Rule 9(c) is as inappropriate as, I will endeavor to show, the *Iqbal* Court's interpretation of Rule 9(b). However, this Article will maintain a focus on the erroneousness and implications of the *Iqbal* Court's misinterpretation of Rule 9(b). For a discussion of the history and purpose of Rule 9(c), as well as coverage of post-*Iqbal* cases interpreting it, see 5A CHARLES A. WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE §§ 1302–1303 (4th ed. 2018).

¹⁸ See Spencer, *Iqbal and the Slide Towards Restrictive Procedure*, *supra* note 3, at 192 ("[T]he *Iqbal* Court's rejection of Iqbal's core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.").

is that lower courts require what Justice Kennedy called “well-pleaded facts”¹⁹ in support of their allegations: Pleadings must offer specific facts plausibly showing an alleged condition of the mind.²⁰ Many examples of

¹⁹ *Iqbal*, 556 U.S. at 679.

²⁰ Lower courts have also expanded the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) into Rule 8(a)(1), requiring the pleading of facts sufficient to support the plausible inference that there are grounds for the court to exercise subject matter jurisdiction, notwithstanding the fact that Rule 8(a)(1) does not impose a requirement to “show” that there is jurisdiction and that abrogated Form 7 did not reflect any such requirement. *See, e.g.,* *Wood v. Maguire Auto., LLC*, 508 F. App’x 65, 65 (2d Cir. 2013) (complaint failed to properly allege subject matter jurisdiction because allegation of amount in controversy was “conclusory and not entitled to a presumption of truth” (citing *Iqbal*, 556 U.S. 662)); *Norris v. Glasdoor, Inc.*, No. 2:17-cv-00791, 2018 WL 3417111, at *7 n.2 (S.D. Ohio July 13, 2018) (“To establish diversity jurisdiction, a complaint must allege facts that could support a reasonable inference that the amount in controversy exceeds the statutory threshold. . . . Here, the Amended Complaint leaves the amount in controversy to pure speculation. Therefore, 28 U.S.C. § 1332 does not provide a basis for the Court’s jurisdiction over Mrs. Norris’s breach of contract and fraud claims.”); *Weir v. Cenlar FSB*, No. 16-CV-8650 (CS), 2018 WL 3443173, at *12 (S.D.N.Y. July 17, 2018) (“[J]urisdictional [dollar] amount, like any other factual allegation, ought not to receive the presumption of truth unless it is supported by facts rendering it plausible.”); *Lapaglia v. Transamerica Cas. Ins. Co.*, 155 F. Supp. 3d 153, 156 (D. Conn. 2016) (plaintiff required to “allege facts sufficient to allow for a plausible inference that the amount in controversy meets the jurisdictional threshold”).

this practice abound both at the circuit²¹ and district court levels²² and are too numerous to list in full.²³ A few examples will illustrate the point.

²¹ See, e.g., *Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016) (“The complaint must thus set forth specific facts supporting an inference of fraudulent intent.” (citing *Melder v. Morris*, 27 F.3d 1097, 1102 (5th Cir. 1994))); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015) (“*Iqbal* makes clear that, Rule 9(b)’s language notwithstanding, Rule 8’s plausibility standard applies to pleading intent.”); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013) (“States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible.”); *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) (“[M]alice must still be alleged in accordance with Rule 8—a ‘plausible’ claim for relief must be articulated.”); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012) (“[T]o make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred.”). Although particularity is required for allegations of *fraud*, alleging fraudulent *intent* may be done generally. See, e.g., *In re Cyr*, 602 B.R. 315, 328 (Bankr. W.D. Tex. 2019) (“As previously explained, [Bankruptcy] Rule 7009(b) [the counterpart to Rule 9(b) in the bankruptcy context] distinguishes between pleading the circumstances of the alleged fraud and the conditions of the defendant’s mind at the time of the alleged fraud. Thus, the heightened standard requiring the specifics of the ‘who, what, when, where, and how’ of the alleged fraud applies to the circumstances surrounding the fraud, not the conditions of the defendant’s mind at the time of the alleged fraud.”).

²² See, e.g., *DeWolf v. Samaritan Hosp.*, No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) (“[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O’Brien were ‘aware of the great number of mistakes regarding patients’ indebtedness made by Samaritan Hospital. . . . Indeed, the Amended Complaint provides no facts . . . from which the Court could draw a reasonable inference that ORDD and O’Brien knew or should have known that Plaintiff did not owe the debt.”); *Rovai v. Select Portfolio Servicing, Inc.*, No. 14-cv-1738-BAS-WVG, 2018 WL 3140543, at *13 (S.D. Cal. June 27, 2018) (“Although th[e] general averment of intent and knowledge may be sufficient for Rule 9(b), ‘*Twombly* and *Iqbal*’s pleading standards must still be applied to test complaints that contain claims of fraud.’ This means that ‘[p]laintiffs must still plead facts establishing *scienter* with the plausibility standard required under Rule 8(a).’” (citations omitted)); *Mourad v. Marathon Petroleum Co.*, 129 F. Supp. 3d 517, 526 (E.D. Mich. 2015) (“Plaintiffs have also failed to sufficiently allege facts in support of their claim that Defendant’s acts, though lawful, were malicious. This is because Plaintiffs have not alleged facts from which this Court can reasonably infer that Defendant acted with the requisite state of mind. Although Plaintiffs correctly point out that Federal Rule of Civil Procedure 9(b) permits ‘[m]alice, intent, knowledge, and other conditions of a person’s mind [to] be alleged generally[,]’ this Rule does not, as Plaintiffs insist, permit a party to simply parrot the state of mind required by a particular cause of action. Rather, to withstand dismissal, factual allegations corroborating Defendant’s malicious intent are necessary.” (citation omitted)); *United States ex rel. Modglin v. DJO Glob. Inc.*, 114 F. Supp. 3d 993, 1024 (C.D. Cal. 2015) (dismissing allegations “that defendants ‘knew that they were falsely and/or fraudulently claiming reimbursements’ and ‘knew [their devices] were being unlawfully sold for unapproved off-label cervical use’” because “[n]one of the facts relators plead[ed] . . . support[ed] their conclusory allegation that defendants knowingly submitted false claims,” and therefore, notwithstanding “that Rule 9(b) does not require particularized

The Second Circuit fully embraced the *Iqbal* interpretation of Rule 9(b) in *Biro v. Condé Nast*, a defamation case involving a public figure.²⁴ After noting the requirement of showing “actual malice” to prevail on a defamation claim in the public figure context, the court rebuffed the plaintiff’s claim that Rule 9(b) absolved him of the duty “to allege facts sufficient to render his allegations of actual malice plausible” with the following retort: “*Iqbal* makes clear that, Rule 9(b)’s language notwithstanding, Rule 8’s plausibility standard applies to pleading intent. . . . It follows that malice must be alleged plausibly in accordance with Rule 8.”²⁵ The Seventh Circuit similarly cited *Iqbal* in imposing a requirement that allegations of bad faith be backed up with allegations of substantiating facts:

Bare assertions of the state of mind required for the claim—here “bad faith”—must be supported with subsidiary facts. *See Iqbal*, 556 U.S. at 680–83, 129 S. Ct. 1937. The plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels—that the unnamed union officials acted “invidiously” when they failed to process the grievances, or simply that the union’s actions were “intentional, willful, wanton, and malicious.” They supply no factual detail to support these conclusory allegations, such as (for example) offering facts that suggest a motive for the union’s alleged failure to deal with the grievances.²⁶

allegations of knowledge,” the complaint “[e]ll short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*”), *aff’d*, 678 F. App’x 594 (9th Cir. 2017).

²³ A more comprehensive citation to the relevant cases illustrating this trend may be found in *WRIGHT, MILLER & SPENCER*, *supra* note 17, § 1301. An example of a case in which this trend was bucked is *United States ex rel. Dildine v. Pandya*, in which the court accepted the government’s bald allegations of state of mind as sufficient to plead scienter. 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) (“Since Federal Rule of Civil Procedure 9(b) provides ‘[m]alice, intent knowledge, and other conditions of a person’s mind may be alleged generally’ and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.”).

²⁴ *Condé Nast*, 807 F.3d 541.

²⁵ *Id.* at 544–45; *see also* *Krys v. Pigott*, 749 F.3d 117, 129 (2d Cir. 2014) (indicating that based on *Iqbal*, one must plead nonconclusory facts that give rise to an inference of knowledge).

²⁶ *Yeftich v. Navistar, Inc.*, 722 F.3d 911, 916 (7th Cir. 2013) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 680–83 (2009)).

The Eleventh Circuit too, confronting this issue in 2016, concluded that the *Iqbal* approach to Rule 9(b) with respect to allegations of malice had to carry the day:

Indeed, after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings.²⁷

District courts are imposing *Iqbal*'s condition-of-mind particularity requirement with respect to allegations of malice as well.²⁸ For example, in *Moses-El v. City and County of Denver*²⁹ the court wrote:

[W]here Mr. Moses-El must plead a defendant's malicious intent, coming forward with a set of facts that permit the inference that the defendant instead acted merely negligently will not suffice; rather, Mr. Moses-El must plead facts that, taken in the light most favorable to him, dispel the possibility that the defendant acted with mere negligence. As noted in *Iqbal*, Fed. R. Civ. P. 9(b)'s allowance that facts concerning a defendant's *mens rea* may be "alleged generally" does not alter this analysis.³⁰

As a result of embracing this stringent view of the second sentence of Rule 9(b) in light of *Iqbal*'s interpretation of it, the court in *Moses-El* dismissed

²⁷ *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (citations omitted).

²⁸ *See, e.g., Diehl v. URS Energy & Constr., Inc.*, No. 11-cv-0600-MJR, 2012 WL 681461, at *4 (S.D. Ill. Feb. 29, 2012) ("Although paragraph 18 of Count V establishes that Plaintiff Diehl is proceeding against Defendant Walls under the theory that Walls was acting in his own self-interest when he terminated Diehl's employment, like paragraph 17, paragraph 18 is merely a conclusory statement. Count V (and the Complaint as a whole), does not set forth any factual content from which the Court can reasonably draw the inference that Diehl was acting maliciously and in his own self-interest."); *Ducre v. Veolia Transp.*, No. CV 10-02358 MMM (AJWx), 2010 WL 11549862, at *5-6 (C.D. Cal. June 14, 2010) ("Ducre alleges that her supervisors at Veolia knew she had a disability that required her to wear a leg brace, and that they unjustly discriminated against her because of this disability by reassigning her to 'light duty' work and eventually terminating her. She asserts that she lost income and suffered hardship as a result of these actions. These factual allegations adequately allege malice and oppression under Rule 8(a) and *Iqbal*.").

²⁹ 376 F. Supp. 3d 1160 (D. Colo. 2019).

³⁰ *Id.* at 1172.

the plaintiff's malicious prosecution claim—in the face of an express allegation of malice—on the ground that the substantiating facts did not *rule out* the possibility of negligence as an alternate explanation of the defendant's actions:

The sole allegation in the Amended Complaint that purports to demonstrate that malice is Paragraph 118, which reads “[g]iven [Dr. Brown’s] qualifications and experience, as well as her previous testimony where she recognized the significant inferences that could be deduced by results such as those described above, her gross mischaracterization of the serological evidence in this case as inconclusive . . . was malicious.” But the conclusion—maliciousness—does not necessarily flow from the facts: that Dr. Brown was experienced and qualified and that she recognized that inferences about the perpetrator could be drawn from the blood test results. Although malice is one inference that might be drawn from these facts, other equally (if not more likely) permissible inferences are that Dr. Brown was mistaken in her testing or analysis or that she conservatively chose not to ignore the (admittedly) small possibility that the test did *not* exclude Mr. Moses-El. Once again, *Iqbal* requires Mr. Moses-El to plead facts that establish a *probability*, not a *possibility*, that Dr. Brown acted with malice against him, and describing a set of facts that could readily be consistent with mere negligence does not suffice. Accordingly, the malicious prosecution claim against Dr. Brown is dismissed.³¹

This is a truly remarkable decision: although Rule 9(b) states that “Malice . . . may be alleged generally,” and the plaintiff in this instance alleged that the actions were “malicious”—and the court acknowledged that “malice is one inference that might be drawn from these facts”—the claim was still dismissed for insufficiency under the *Iqbal* Court’s perverse interpretation of Rule 9(b).³²

Moving beyond allegations of malice for defamation claims, the Sixth Circuit has shown that it is on board with the *Iqbal* interpretation of Rule 9(b) as well. In the context of a claim under the Family and Medical Leave Act (FMLA), a Sixth Circuit panel wrote as follows:

³¹ *Id.* at 1173–74.

³² *Id.* at 1174.

[A]fter the Supreme Court's decisions in *Iqbal* and *Twombly*, a plaintiff must do more than make the conclusory assertion that a defendant acted willfully. The Supreme Court specifically addressed state-of-mind pleading in *Iqbal*, and explained that Rule 9(b) . . . does not give a plaintiff license to "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). As we have explained in a non-FMLA context, although conditions of a person's mind may be alleged generally, "the plaintiff still must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).³³

Imposing a requirement to "plead facts" that "make the state-of-mind allegation 'plausible on its face,'" the court concluded that the "complaint contains no facts that allow a court to infer that [the defendant] knew or acted with reckless disregard of the fact that it was interfering with [the plaintiff's] rights."³⁴

The Third Circuit offers yet another instance of this trend, here in the context of an allegation of knowledge. In *Kennedy v. Envoy Airlines, Inc.*, a New Jersey district court reflected *Iqbal*'s heightened intent pleading requirement when it wrote, "Plaintiff has not alleged any particularized facts which, if true, would demonstrate that Ms. Fritz or any other Envoy employee actually *knew* that the positive test results were false."³⁵ The court went on to indicate that it could not accept the plaintiff's allegation of the defendant's knowledge of falsity because "such generalized and conclusory statements are insufficient to establish knowledge of falsity."³⁶ On appeal to the Third Circuit, the court questioned the district court's conclusion, but not because it disagreed with the standard the district court applied.³⁷ Instead, the Third Circuit

³³ *Katoula v. Detroit Entm't, LLC*, 557 F. App'x 496, 498 (6th Cir. 2014).

³⁴ *Id.* (quoting *Republic Bank & Tr. Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012)).

³⁵ *Kennedy v. Envoy Airlines, Inc.*, No. 15-8058 (JBS/KMW), 2018 WL 895871, at *5 (D.N.J. Feb. 14, 2018).

³⁶ *Id.*

³⁷ *Kennedy v. Am. Airlines, Inc.*, 760 F. App'x 136 (3d Cir. 2019).

embraced the standard but concluded that the plaintiff arguably satisfied it by offering additional facts showing the basis for the allegation of the defendant's knowledge:

However, we conclude that this is a closer question than the District Court's opinion postulates. Here, while Kennedy does generally assert Appellee "should have known" of the falsity, he also offers several reasons *why* Appellee should have known. In addition to his assertion that Appellee has "administered thousands of tests and is aware of the uniform and constant rate at which alcohol is metabolized," he also references Judge Ferrara's findings on the matter in an exhibit to his complaint These facts, perhaps, lend themselves to a reasonable inference that Appellee knew, or should have known, the results from the breathalyzer were inaccurate—at least for purposes of surviving a Rule 12(b)(6) motion.³⁸

Thus, we have here the endorsement of a requirement to offer "particularized facts" that "would demonstrate"³⁹ the defendant's knowledge or "lend themselves to a reasonable inference"⁴⁰ that the defendant had the requisite knowledge.

Again, district courts are requiring the allegation of substantiating facts in support of allegations of knowledge as well, citing *Iqbal's* interpretation of Rule 9(b).⁴¹ For instance, in *United States ex rel. Morgan v. Champion Fitness, Inc.*,⁴² although the court recognized the tension between the language of Rule 9(b) and the *Iqbal* Court's interpretation of it, the district court felt it was bound to adhere to that interpretation, finding that the plaintiff in the case before it could survive a motion to dismiss only because "the Complaint's representative examples have sufficient detail to support a reasonable inference providing the necessary factual support for the assertion of Defendants' knowledge."⁴³

³⁸ *Id.* at 140–41.

³⁹ *Kennedy*, 2018 WL 895871, at *5.

⁴⁰ *Kennedy*, 760 F. App'x at 141.

⁴¹ *See, e.g.*, *DeWolf v. Samaritan Hosp.*, No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients indebtedness made by Samaritan Hospital.'").

⁴² No. 1:13-cv-1593, 2018 WL 5114124 (C.D. Ill. Oct. 19, 2018).

⁴³ *Id.* at *7.

II. ASSESSING THE *IQBAL* VIEW OF RULE 9(b)

Certainly, as a matter of common sense, one would be hard pressed to suggest that the pleading requirements that have been outlined above are faithful reflections of what it means to permit conditions of the mind to be “alleged generally.” As we have seen, courts are imposing a requirement for “well-pleaded facts,” “specific facts,” or “particularized facts” that “demonstrate,” “show,” or “establish” an alleged condition of the mind, which is the epitome of what plausibility pleading requires.⁴⁴ But does Justice Kennedy’s analysis of Rule 9(b)—which has wrought all of this—stand up to scrutiny?

A. *Textual Evidence*

Justice Kennedy’s determination that the conditions-of-the-mind clause must be read to incorporate the pleading standard of Rule 8(a)(2) was a facile—if not thoughtless—conclusion based on apparent logic: If “with particularity” in the first sentence of Rule 9(b) means a heightened pleading standard, “generally” in the second sentence of Rule 9(b) must mean the ordinary pleading standard of Rule 8(a)(2), which now—post *Twombly*—requires plausibility pleading. This “reasoning” represents an abject failure of statutory interpretation for multiple reasons,⁴⁵ three of which are text-based and the fourth of which is historical.⁴⁶

⁴⁴ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (“Factual allegations must be enough to raise a right to relief above the speculative level . . .”).

⁴⁵ See, e.g., *McCauley v. City of Chicago*, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting in part) (“*Iqbal* is in serious tension with these other decisions [*Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); *Erickson v. Pardus*, 551 U.S. 89 (2007); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002)], rules, and forms, and the Court’s opinion fails to grapple with or resolve that tension.”).

⁴⁶ See *infra* Section II.B for a discussion of historical evidence demonstrating the erroneous nature of Justice Kennedy’s interpretation of Rule 9(b).

First. The object of the admonitions of Rule 9(b)—and its close cousin, Rule 9(c)⁴⁷—are distinct from that of Rule 8(a)(2). Rule 8(a)(2)—the provision the Court was interpreting and applying in *Twombly* and *Iqbal*—supplies a standard for sufficiently stating a *claim for relief*, which requires making a “showing” of entitlement to relief,⁴⁸ and which, according to the Court, requires the satisfaction of the plausibility pleading standard.⁴⁹ Rule 9(b), on the other hand, supplies a standard for sufficiently stating *allegations*,⁵⁰ which are the building blocks of claims. In other words, when the *allegations* of a complaint are joined with one another and viewed as a whole, one asks whether they amount to a *claim*, i.e., do they show entitlement to relief under the applicable law.⁵¹ The plausibility pleading standard of Rule 8(a)(2) applies to an assessment of the latter question—whether the allegations add up to a *claim*—not to the assessment of whether *an allegation* has been properly stated. This distinction tracks the intended distinction between a motion to dismiss for failure to state a claim under Rule 12(b)(6)—which challenges *claims* based on the plausibility standard of *Twombly*—and a motion for a more

⁴⁷ FED. R. CIV. P. 9(c) (“In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.”).

⁴⁸ FED. R. CIV. P. 8(a)(2) (“CLAIM FOR RELIEF. A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief”); see also *Claim*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.—Also termed *claim for relief*.”).

⁴⁹ *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (“[*Twombly* and *Iqbal*] concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, [*Twombly* and *Iqbal*] instruct, must plead facts sufficient to show that her claim has substantive plausibility.”).

⁵⁰ Prior to the restyling of the Rules in 2007, references to “allegation” and “allege” in the rules were to variations of the term “averment” instead. Compare FED. R. CIV. P. 9(b) (2006) (“In all *averments* of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be *averred* generally.” (emphasis added)), with FED. R. CIV. P. 9(b) (2007) (“In *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be *alleged* generally.” (emphasis added)); see also *Allegation*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“1. A declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or illegal. 2. Something declared or asserted as a matter of fact, esp. in a legal pleading; a party’s formal statement of a factual matter as being true or provable, without its having yet been proved; AVERMENT.”).

⁵¹ FED. R. CIV. P. 8(a)(2).

definite statement under Rule 12(e)⁵²—which challenges *allegations* as being “so vague or ambiguous that the party cannot reasonably prepare a response.”⁵³ Thus, in *Iqbal*, Justice Kennedy carelessly conflated the standard for articulating allegations—the province of Rule 9(b)—with the standard for judging the sufficiency of entire claims.

In fact, the Federal Rules of Civil Procedure do set forth the general standard for stating *an allegation* in a pleading, but not in Rule 8(a)(2). Rather, one finds the standard applicable to stating allegations in Rule 8(d)(1), which reads as follows: “(1) *In General*. Each allegation must be simple, concise, and direct. No technical form is required.”⁵⁴ This provision was meant to solidify the notion that the Federal Rules of Civil Procedure—which took effect in 1938—were intended to be a departure from the highly technical pleading requirements of the past.⁵⁵ Indeed, the

⁵² *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *Hearing*] (statement of Professor Stephen B. Burbank) (“The architecture of *Iqbal*'s mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e).”).

⁵³ FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(e). I have previously argued that a complaint containing insufficient factual details to render a claim plausible under *Twombly* should be the target of a motion for a more definite statement under Rule 12(e), not dismissal under Rule 12(c). See Spencer, *Plausibility Pleading*, *supra* note 7, at 491 (“[When faced with] a complaint with insufficient detail . . . [t]he appropriate remedy for such defects is the grant of a motion for a more definite statement, not dismissal of the claim. The defendant . . . is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.”).

⁵⁴ FED. R. CIV. P. 8(d)(1). Prior to the restyling of the Rules in 2007, this provision was found in Rule 8(e)(1) and read, “Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.” FED. R. CIV. P. 8(e)(1) (2006) (amended 2007).

⁵⁵ Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942) (indicating that subsection (e) (now subsection (d)) of Rule 8 was designed “to show that ancient restrictions followed under certain more technical rules have no place”); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) (“Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady.”); see also 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1281 (3d ed. 2004 & Supp. 2019) (“By including a provision such as Rule 8(d)(1) the draftsmen of the original federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued English and American courts under common law

Supreme Court—prior to *Iqbal*—cited this provision as evidence of the simplified notice pleading regime ushered in by the Federal Rules.⁵⁶ Why Justice Kennedy did not cite Rule 8(d)(1) when attempting to understand what Rule 9(b)'s second sentence required is unclear. What is clear, however, is that Rule 8(d)(1) does not require pleaders to state supporting facts to make a proper factual allegation.⁵⁷ Neither does the conditions-of-the-mind clause of Rule 9(b) impose such a requirement.

Second. Evidence from elsewhere in the Federal Rules and from the PSLRA reveals that the *Iqbal* interpretation of Rule 9(b) is not sound from a textualist perspective. Requiring facts that make state-of-mind allegations plausible amounts to a requirement for particularity, which the first sentence of Rule 9(b) only requires for allegations of fraud and mistake.⁵⁸ Further, it is only in an adjacent provision—Rule 9(a)(2)—that one finds an express obligation to state supporting facts; a party who wants to raise the issues of capacity or authority to sue or be sued, or the legal existence of an entity, must do so “by a specific denial, which must *state any supporting facts* that are peculiarly within the party’s knowledge.”⁵⁹ If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot

and code practice.”). This provision has also been applied to curtail overly lengthy or convoluted allegations. *See, e.g.,* *Gordon v. Green*, 602 F.2d 743 (5th Cir. 1979) (verbose pleadings of over four thousand pages violated the rule).

⁵⁶ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard. Rule 8(e)(1) states that “[n]o technical forms of pleading or motions are required.”).

⁵⁷ Abrogated Form 15 provided an illustration of pleading in conformity with Rule 8(d)(1): “On *date*, at *place*, the defendant converted to the defendant’s own use property owned by the plaintiff. The property converted consists of *describe*.” FED. R. CIV. P. Form 15 (2014) (abrogated 2015). No facts supporting the allegation of conversion are supplied in the form, which was authoritative at the time *Iqbal* was decided. *See also* *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (“Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.” (citing FED. R. CIV. P. 8(d)(1))).

⁵⁸ *See* FED. R. CIV. P. 9(b); *see also* Brief for Respondent at 33, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at *33 (“If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with ‘particularity,’ that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity.”).

⁵⁹ FED. R. CIV. P. 9(a)(2) (emphasis added); *see also* WRIGHT, MILLER & SPENCER, *supra* note 17, § 1294 (discussing Rule 9(a)(2)).

be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts sub silentio. *Expressio unius est exclusio alterius*.⁶⁰ Interpreting the general standard for stating allegations to require the statement of supporting facts would render Rule 9(a)(2)'s express imposition of a requirement redundant surplusage.⁶¹ Finally, in the PSLRA Congress imposed a requirement for plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁶² If Rule 9(b)'s second sentence imposes a requirement to plead facts that support an inference of intent and other conditions of the mind, Congress's move to impose a particularity requirement with respect to state of mind in the PSLRA would have been largely unnecessary.⁶³

⁶⁰ ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Swierkiewicz*, 534 U.S. at 513 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993))); *cf. Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1064 (2019) (Thomas, J., dissenting) ("The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. . . . Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court."); *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). . . . That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released.").

⁶¹ *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) ("We must read the body of regulations . . . so as to give effect, if possible, to all of its provisions."); *see also Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

⁶² 15 U.S.C. § 78u-4(b)(2)(A) (2018).

⁶³ *Retirement Bd. of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc.*, 767 F. App'x 139, 141 (2d Cir. 2019) ("While Federal Rule of Civil Procedure 9(b) provides that 'conditions of a person's mind may be alleged generally,' under the Private Securities Litigation Reform Act ('PSLRA'), a securities plaintiff must nevertheless allege facts that suggest a 'strong inference' of scienter.").

Third. What used to be Official Form 21—now conveniently abrogated,⁶⁴ but in force at the time *Iqbal* was decided—provided the definitive and authoritative⁶⁵ illustration of what both sentences of Rule 9(b) permit and require. It read, in pertinent part, as follows:

4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.⁶⁶

In this example we have both an allegation of fraud and two allegations of intent, each of which must look to Rule 9(b) for the applicable standard of sufficiency. Regarding the allegation of fraud—the “circumstances” of which must be stated “with particularity”—Form 21 taught that offering the “who, what, when, where and how” of the fraud is sufficient, an understanding innumerable courts have recognized.⁶⁷ When we turn to the two allegations relating to intent—(1) that the aforementioned actions by the defendant were undertaken “for the purpose of defrauding the plaintiff” and (2) that those same actions were done “for the purpose of . . . delaying the collection of the debt”—Form 21 taught that bald,

⁶⁴ FED. R. CIV. P. 84 (2014) (abrogated 2015); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (2013) (“[T]he pleading forms live in tension with recently developing approaches to general pleading standards.”); *see generally* A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015) [hereinafter Spencer, *The Forms Had a Function*] (discussing the significance of the abrogated Official Forms and the motivation behind their abandonment).

⁶⁵ Prior to its abrogation in 2015, Rule 84 provided: “The forms in the Appendix of Forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” FED. R. CIV. P. 84 (2014) (abrogated 2015). That the forms were sufficient under the rules was an important component of the rule that was added in a 1946 amendment for the very reason that courts were treating the forms as merely illustrative rather than authoritative. *See* Spencer, *The Forms Had a Function*, *supra* note 64, at 1122–24.

⁶⁶ FED. R. CIV. P. Form 21 (2014) (abrogated 2015).

⁶⁷ WRIGHT, MILLER & SPENCER, *supra* note 17, § 1297 (“A formulation popular among courts analogizes the standard to ‘the who, what, when, where, and how: the first paragraph of any newspaper story.’”); *see, e.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 490 (3d Cir. 2016) (applying the formulation to a securities fraud class action); Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015) (applying the formulation to a claim of aiding and abetting fraud); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 36 (1st Cir. 2013) (applying the formulation to a *qui tam* action under False Claims Act).

conclusory, and factless statements suffice to allege intent properly.⁶⁸ What we undeniably do not have in Form 21 is the slightest support for Justice Kennedy's homespun, improvised diktat that allegations of intent and other conditions of the mind must be supported by facts that render the allegations plausible. That such lawless imperialism—which would be derided as judicial activism if it came from another quarter—was endorsed by the sometimes textualists Antonin Scalia⁶⁹ and Clarence Thomas⁷⁰ is a dismaying but unsurprising instance of the inconsistency that has too often characterized their purported interpretive commitments.⁷¹

⁶⁸ FED. R. CIV. P. Form 21 (2014) (abrogated 2015); see *Sparks v. England*, 113 F.2d 579, 581 (8th Cir. 1940) (“The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments.”); Spencer, *Plausibility Pleading*, *supra* note 7, at 474 (“The allegation [in Form 21], however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate.”).

⁶⁹ See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 16, 22 (1997) (“[W]hen the text of a statute is clear, that is the end of the matter. . . . The text is the law, and it is the text that must be observed.”).

⁷⁰ See, e.g., *Carter v. United States*, 530 U.S. 255 (2000) (Thomas, J.) (“[O]ur inquiry focuses on an analysis of the textual product of Congress’ efforts, not on speculation as to the internal thought processes of its Members.”).

⁷¹ Justice Thomas’s inconstancy is manifestly self-evident on this score, having admonished in *Swierkiewicz v. Sorema N.A.* that the pleading requirements imposed by Rule 8(a)(2) cannot be amended by the Court outside the rule amendment process but then signing on to two opinions doing just that in *Twombly* and *Iqbal*. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (stating that different pleading standards “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation” (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993))). For an example of Justice Scalia’s fair-weather textualism, one can consult *Walmart Stores, Inc. v. Dukes*, in which Justice Scalia abandoned a faithful application of the plain text of Rule 23(a)—which requires questions “common to the class”—to impose his own wished-for requirements that there be a common injury among class members and that the common issues must be central to the dispute. 564 U.S. 338 (2011); see also A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) (“Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*. The language of Rule 23(a)—that ‘there are questions of law or fact common to the class’—expresses no need for class members to have suffered the ‘same injury.’”); *id.* at 474 (“Rather than follow his own textualist diktats, Justice Scalia pronounces efficiency as the objective policed by the commonality rule, then uses that to banish those common questions that do little to further

B. *The Original Understanding of Rule 9(b)*

Although the textual arguments against the *Iqbal* Court's interpretation of Rule 9(b) provide compelling evidence of its waywardness, and the review of the caselaw on this point above demonstrates that this erroneous interpretation of Rule 9(b) has real world negative implications for claimants, there is historical support for the view that *Iqbal* got the interpretation of Rule 9(b) terribly wrong. When Rule 9(b) was originally promulgated in 1938, the drafters of the rule provided helpful guidance as to its meaning in the committee notes. The note pertaining to Rule 9(b) read as follows: "See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22."⁷² What this citation refers to is Order 19, Rule 22 of the English Rules of the Supreme Court (the English Rules) that were promulgated under the Judicature Acts of 1873 and 1875.⁷³ That rule—which the Advisory Committee indicated was the source of Rule 9(b)—read as follows:

22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.⁷⁴

Here we see that the lineage of the second sentence of our Rule 9(b)—the conditions-of-mind clause—is an English rule that provides that conditions of the mind may be alleged "as a fact without setting out the circumstances from which the same is to be inferred."⁷⁵ Given that the 1938 rulemakers cited to Order 19, Rule 22 as their source—or at least as their inspiration—for Rule 9(b),⁷⁶ it is reasonable to suspect that "averred generally" (now "alleged generally") must have been intended to mean something akin to "without setting out the circumstances from which the

efficiency from its ambit, without regard to the fact that commonality, not efficiency, is the unambiguous requirement of Rule 23(a)(2).").

⁷² FED. R. CIV. P. 9 advisory committee's note to 1937 adoption.

⁷³ Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, as amended by Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77.

⁷⁴ English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

⁷⁵ *Id.*

⁷⁶ See, e.g., *Love v. Commercial Cas. Ins. Co.*, 26 F. Supp. 481, 482 (S.D. Miss. 1939) ("This rule [Rule 9(b)] very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22.").

same is to be inferred.”⁷⁷ What did this language mean and how was it interpreted at the time the 1938 rules of procedure were first crafted?

Commentator’s Notes and Official Forms Accompanying the English Rules. As the notes that appear following Order 19, Rule 22, in the 1937 edition of the Rules of the Supreme Court explain, to plead knowledge under the rule, “[i]t is sufficient to plead, ‘as the defendant well knew,’ or ‘whereof the defendant had notice,’ without stating when or how he had notice, or setting out the circumstances from which knowledge is to be inferred.”⁷⁸ Respecting allegations of malice, the notes remark, “But he [the plaintiff] need not in either pleading [the statement of the claim or the reply] set out the evidence by which he hopes to establish malice at the trial.”⁷⁹ The same was said of allegations of fraudulent intent; although under the English Rules allegations of fraud had to be specified by stating the acts alleged to be fraudulent,⁸⁰ the notes to Rule 22 indicated that “from these acts fraudulent intent may be inferred; and it is sufficient to aver generally that they were done fraudulently.”⁸¹

⁷⁷ English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22. The Supreme Court has employed similar reasoning when interpreting other Federal Rules of Civil Procedure. For example, in seeking to understand the meaning of Rule 42(a), the Court wrote the following:

[This case is] about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of “consolidate” in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (internal citation omitted).

⁷⁸ English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22 (note).

⁷⁹ *Id.*

⁸⁰ *Id.* O. 19, r. 6 (“In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items if necessary) shall be stated in the pleading . . .”).

⁸¹ *Id.* O. 19, r. 22 (note).

Reference to the forms in Appendix C of the English Rules⁸² confirms the view set forth in the notes discussed above. For example, one finds there the following model allegation of the defendant's knowledge:

3. The wilful default on which the plaintiff relies is as follows:—

C.D. owed to the testator 1000*l.*, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. *The defendants were aware of this fact*, but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.⁸³

No facts from which it might be inferred that the defendants had such knowledge are offered anywhere within this model form. In another instance of pleading knowledge—this time within a complaint for a “fraudulent prospectus”—Appendix C offered the following example:

4. The prospectus contained misrepresentations, of which the following are particulars:—

(a) The prospectus stated “. . . .” whereas in fact

(b) The prospectus stated “. . . .” whereas in fact

(c) The prospectus stated “. . . .” whereas in fact

5. *The defendant knew of the real facts* as to the above particulars.

6. The following facts, *which were within the knowledge of the defendants*, are material, and were not stated in the prospectus⁸⁴

The next form in Appendix C, which is for a “fraudulent sale of a lease,” similarly contained an unadorned and unsupported allegation of the defendant's knowledge. It read as follows: “The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by fraudulently representing

⁸² *Id.* O. 19, r. 5 (“The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings . . .”).

⁸³ The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § II, No. 2 (emphasis added).

⁸⁴ *Id.* § VI, No. 13 (emphasis added).

to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, *to the defendant's knowledge*.”⁸⁵

Allegations of malice—like allegations of knowledge—were protected from particularized pleading by Order 19, Rule 22;⁸⁶ thus, it is helpful to find an example of such pleadings in Appendix C as well. The malicious prosecution form read as follows: “The defendant *maliciously* and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon . . .”⁸⁷ Here, consistent with Order 19, Rule 22, we find no greater specificity than was presented in the context of the allegations of the defendant’s knowledge outlined above.

English caselaw. The scant but available contemporaneous decisions of English courts interpreting and applying the pleading rules confirm that they did not require the pleading of any facts substantiating the basis for condition-of-the-mind allegations. *Glossop v. Spindler*⁸⁸ is particularly illustrative. In that case, the plaintiff alleged—in paragraph one—that the defendant maliciously printed and published in a newspaper certain defamatory matter and—in paragraph two—that “the defendant, on previous occasions, and in furtherance of malicious motives on his part towards the plaintiff, maliciously printed and published of the plaintiff various statements and paragraphs in the said newspaper, and these, for convenience of reference, are set forth in the appendix hereto.”⁸⁹ The defendant sought to have paragraph two and the appendix stricken as a violation of the pleading rules.⁹⁰ The court ruled that the allegation of paragraph two itself was sufficient, in that “it contained a statement of material facts upon which the plaintiff would rely at trial as constituting malicious motives.”⁹¹ However, the court also ruled that the appendix must be stricken because “it contained the evidence to prove the alleged

⁸⁵ *Id.* § VI, No. 14 (emphasis added).

⁸⁶ English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

⁸⁷ The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § VI, No. 15 (emphasis added).

⁸⁸ (1885) 29 SJ 556 at 556 (Eng.).

⁸⁹ *Id.*

⁹⁰ *Id.* at 557.

⁹¹ *Id.*

facts in paragraph 2, and was, therefore, a violation of ord. 19, r. 4.”⁹² Two things are worth noting here. First, Rule 4, which was cited by the Court, supplied the ordinary pleading standard, which required “only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . but not the evidence by which they are to be proved”⁹³ Providing additional details beyond the allegation of malicious intent violated that rule. Second, when the plaintiff went above and beyond what was required, offering (in an appendix) additional facts from which malicious intent could be inferred, that was not lauded as helpful to the presentation of the case but was challenged by the defendant as a pleading offense and thrown out by the court as inappropriate. Thus, not only were facts from which malice might be inferred not required of pleaders under Order 19, Rule 22, the pleading of such factual detail appears to have been affirmatively prohibited by Order 19, Rule 4.⁹⁴

*Herring v. Bischoffsheim*⁹⁵ offers similar insight into the minimal pleading burden under the English Rules in the context of an allegation of fraudulent intent. There, the plaintiff’s claim was that the prospectus issued by the defendant was fraudulent to the knowledge of the defendant company; the plaintiff offered extensive evidentiary details in support of that allegation. The court, in response to a motion to strike these details

⁹² *Id.*

⁹³ English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4. A “material fact” might be described as what in the United States previously was referred to an “ultimate fact” under code pleading, as opposed to evidentiary facts. *See, e.g., In re Dependable Upholstery Ltd* (1936) 3 All ER 741 at 745–46 (Eng.) (holding an allegation that dividends were paid from an improper source to be a “material fact” under Rule 4 and that plaintiffs would not be ordered to give particulars of that fact, which would merely disclose the evidence by which that fact was intended to be proved). *But see* Millington v. Loring (1880) 6 CPD 190 at 190, 194 (Eng.) (“[I]n my opinion those words [‘material facts’] are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial.”). Thus, in *Glossop v. Spindler* the “material fact” is that the publication was with malicious intent, while the evidentiary facts are those details on which the ultimate fact of malicious intent is based. *Glossop v. Spindler* (1885) 29 SJ 556 at 557 (Eng.). An innovation of the Federal Rules of Civil Procedure was to avoid distinguishing between ultimate and evidentiary facts by abandoning any reference to pleading facts altogether. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 242 (2d ed. 1947).

⁹⁴ *See also* Gourard v. Fitzgerald (1889) 37 W.R. 265 (Eng.) (rejecting a lower court’s order for particulars pertaining to the plaintiffs’ allegation that statements were maliciously published by the defendants).

⁹⁵ [1876] WN 77 (Eng.).

from the statement of the claim, agreed with the defendant that the pleading violated Order 19, Rule 4, and permitted the plaintiff to amend.⁹⁶ In doing so, the court wrote,

It is unnecessary for the statement of claim to state the motives which led to the issuing of the prospectus, or the scheme of which it is a part. It is sufficient to state generally that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.⁹⁷

Finally, we have some evidence of how allegations of knowledge generally were permitted under these rules. In *Sargeaunt v. Cardiff Junction Dry Dock & Engineering Co.*,⁹⁸ the court rejected a request for particulars setting out how certain knowledge on the part of the defendant came to exist, citing and relying on Order 19, Rule 22 in the process. In *Griffiths v. The London & St. Katharine Docks Co.*,⁹⁹ the court reported that the plaintiff alleged that the defendant company “knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door” without further elaborating the facts supporting the allegation.¹⁰⁰ No fault was found with this allegation; the claim only failed because the plaintiff failed to allege also that he was unaware of the said defective condition, a critical element of stating the negligence claim asserted in the case.¹⁰¹

From the previous discussion, it is readily apparent that the progenitor of Rule 9(b)'s conditions-of-the-mind clause—Order 19, Rule 22 of the English Rules (and the English cases that applied that rule)—give lie to the notion that Rule 9(b) may properly be interpreted to require the pleading of facts that make state-of-mind allegations plausible. That the 1938 rulemakers cited to the English rule in the notes accompanying Rule 9(b) can reasonably be read as evidence of their intent to embrace the associated English practice of not requiring pleaders to allege facts from which conditions of the mind might be inferred. But Rule 9(b)'s

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ [1926] WN 263, 264 (Eng.) (“[T]he plaintiff had no right under the rule [Order 19, Rule 22] to obtain the particulars asked for, and they must be refused.”).

⁹⁹ (1884) 12 QBD 493 (Eng.).

¹⁰⁰ *Id.* at 494.

¹⁰¹ *Id.* at 496.

admonition must also be understood in the wider context of the liberal general pleading ethos of the English Rules embraced by the drafters of the 1938 rules.¹⁰² As Charles Clark, reporter to the original rules committee, noted at the Cleveland Institute on Federal Rules:

I think there is no question that the rules can not [sic] be construed to require the detailed pleading that was the theory, say, in England in 1830 About the only time when this specialised detailed pleading was really tried was in England in the 1830's, after the adoption of the Hilary Rules. The Hilary Rules were the first step in the procedural reform in England, and they got the expert Stephen to write the rules. He went on the theory, which many experts have, that what you want is more and better and harsher rules, and never at any time in the history of English law was pleading so particularised, and never were the decisions so strict and technical, and never was justice more flouted than in that short period in the '30's, . . . which led immediately to greater reform, finally culminating in the English Judicature Act and the union of law and equity.¹⁰³

In other words, the pleading reforms brought about by the English Judicature Acts, which were a response to the highly particularized pleading regime of the Hilary Rules, were the inspiration for much of what Charles Clark and the 1938 drafters were trying to do with their new pleading rules. But the result of the *Iqbal* revision of Rule 9(b)—and the antecedent rewriting of the ordinary pleading standard of Rule 8(a)(2) in *Twombly*—is that we have regressed very nearly to the state of affairs that the 1938 rule reformers sought to save us from. That this was done without due regard for the previously-reviewed evidence of Rule 9(b)'s proper meaning is problematic. Equally (if not more) disconcerting,

¹⁰² A.B.A., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (Edward H. Hammond ed., 1938) (“I would say this, that I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful.”).

¹⁰³ A.B.A., RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220–22 (William W. Dawson ed., 1938); see also JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98 (5th ed. 2019) (discussing the Hilary Rules and their development).

however, is that the *Iqbal* interpretation of Rule 9(b) is at variance with the policies that underlie the rule, a topic to which we now turn.

III. THE AFFRONT TO THE POLICY BEHIND RULE 9(b)

By applying the plausibility fact-substantiation standard to allegations of conditions of the mind, this heightened pleading standard is being applied to the very kinds of allegations Rule 9(b)'s second sentence was quite obviously crafted to protect.¹⁰⁴ Requiring pleaders to provide the particulars of a person's state of mind is not something that all pleaders will be able to do without the benefit of discovery,¹⁰⁵ making the imposition of such a requirement at the pleading stage unfair.¹⁰⁶ This is particularly true for plaintiffs asserting discrimination claims, who are more likely (than fraud plaintiffs or public figure defamation plaintiffs, for example) to lack the resources to overcome the information asymmetry that exists at the pleading stage.¹⁰⁷ Wrongful conduct is already something not likely to be broadcast; wrongful intentions—which lurk within a person's mind—are even more likely to be obscured from external view. The drafters of Rule 9(b) understood this, agreeing with the English system that requiring complainants to articulate facts

¹⁰⁴ WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301 (“[T]he trend seems to be an embrace of the more rigid pleading requirements for conditions of mind that the second sentence of Rule 9(b) was designed to suppress.”).

¹⁰⁵ *Id.* (“The concept behind this portion of Rule 9(b) is an understanding that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery.”).

¹⁰⁶ See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 160 (2008) (“[T]o the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal. It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain . . .”).

¹⁰⁷ See, e.g., *Means v. City of Chicago*, 535 F. Supp. 455, 460 (N.D. Ill. 1982) (“We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, *i.e.*, that there was an official policy or a de facto custom which violated the Constitution.”).

substantiating an alleged condition of the mind would be unreasonable.¹⁰⁸ In a system in which the right to petition courts for redress is constitutionally protected by the Petition Clause of the First Amendment,¹⁰⁹ the pleading standard must be one that avoids blocking potentially legitimate claims solely based on the inability of claimants to articulate supporting facts—such as those pertaining to conditions of the mind—that it would be nearly impossible for them to know.¹¹⁰ As we have seen, Rule 9(b)'s second sentence was designed with this concern in mind, as was Rule 11(b)'s allowance of making “factual contentions [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”¹¹¹ The *Iqbal* fact-substantiation interpretation of Rule 9(b) thus has pushed the system over the line that the Petition Clause was designed to protect, something that a reparative revision to Rule 9(b) could address.¹¹²

An additional consideration suggesting that imposing a heightened burden for condition-of-the-mind pleading is problematic from a policy perspective derived from the *Iqbal* Court's endorsement of the use of “judicial experience and common sense” to inform judges' plausibility assessments.¹¹³ Research has shown that people make decisions based on various biases and categorical or stereotypical reasoning, particularly when they lack complete information about an individual or a situation.

¹⁰⁸ See *supra* Part II.

¹⁰⁹ U.S. CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”); see also *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

¹¹⁰ See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 29–30 (2009) [hereinafter Spencer, *Understanding Pleading Doctrine*] (“[R]equiring particularized pleading in these types of cases [e.g. discrimination cases] effectively prevents some claimants from seeking redress for what could be legitimate grievances. If the constitutional line is drawn at permitting procedural rules to bar ‘baseless’ claims that lack a ‘reasonable basis’—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases.” (quoting *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983))).

¹¹¹ FED. R. CIV. P. 11(b)(3).

¹¹² See Spencer, *Understanding Pleading Doctrine*, *supra* note 110, at 30 (“Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.”).

¹¹³ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

Jerry Kang and his collaborators explained this phenomenon in the context of the 12(b)(6) motion to dismiss after *Iqbal*:

[W]hen judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.

....

Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas.¹¹⁴

The “judicial experience and common sense” that the Court empowered judges to rely upon in assessing claims necessarily complicates the now-imposed duty to offer facts substantiating

¹¹⁴ Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160, 1162 (2012).

conditions of the mind because pleaders will have to overcome the categorical schemas dominant within the judicial class.¹¹⁵ Thus, we see Justice Kennedy himself providing exhibit number one: In *Iqbal*, he found insufficient facts to substantiate the allegation that Ashcroft was the “principal architect” of the discriminatory policy, “and that Mueller was ‘instrumental’ in adopting and executing it,” but credited the allegation that “the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER”¹¹⁶ Because both sets of allegations were articulated with the same level of specificity, it cannot be—as Justice Kennedy suggested—that the difference between them is that the former are conclusory and the latter are factual.¹¹⁷ Rather, Justice Kennedy is applying a schema that tells him that it is plausible for the FBI Director to have directed the arrests and detention of thousands of Arab Muslim men, and for the FBI Director and the Attorney General to have “cleared” the policy of holding those men in restrictive conditions, while it is not plausible to believe—without substantiating facts—that the same

¹¹⁵ Spencer, *Iqbal and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–98 (“Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority’s new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites.”); *Hearing*, *supra* note 52, at 13 (“Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge’s background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual’s cultural predispositions as are judgments about adjudicative facts.”).

¹¹⁶ *Iqbal*, 556 U.S. at 681.

¹¹⁷ *Id.* at 699 (Souter, J., dissenting) (“[T]he majority’s holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory.”); *see also* Spencer, *Iqbal and the Slide Towards Restrictive Procedure*, *supra* note 3, at 193 (“These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say ‘Mr. Smith was the “principal architect” of the Chrysler building,’ that would be a non-conclusory factual claim, as would the statement that ‘Ms. Smith “approved” the design plans for the Chrysler building.’ These statements are factual because they make claims about what transpired and who took certain actions.”).

men designed and had a hand in the execution of a discriminatory arrest and detention policy.¹¹⁸

Because it is well documented that the use of categorical thinking and explicit and implicit biases infect all of us¹¹⁹—including judges¹²⁰—and because among those biases are background assumptions about the behaviors and tendencies of members of various groups—whether those groups are public officials, racial,¹²¹ ethnic,¹²² or religious groups,¹²³

¹¹⁸ See *Iqbal*, 556 U.S. at 682 (indicating that because “Arab Muslims” were responsible for the September 11 attacks, an “obvious alternative explanation” for the arrests in question was Mueller’s “nondiscriminatory intent” to detain aliens “who had potential connections to those who committed terrorist acts”).

¹¹⁹ See, e.g., JERRY KANG, NAT’L CTR. FOR STATE COURTS, *IMPLICIT BIAS: A PRIMER FOR COURTS* (2009), <https://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx> [<https://perma.cc/WYQ3-4X27>].

¹²⁰ See, e.g., Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) (“Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued, how corporations are implicitly perceived, and how fundamental legal principles are unconsciously intertwined with group assumptions. This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered.”); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009) (finding among judges a strong implicit bias favoring Caucasians over African Americans); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010) (“I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.”).

¹²¹ See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (showing biases connecting African-American faces with perceptions of the presence of a weapon).

¹²² See, e.g., Levinson, Bennett & Hioki, *supra* note 120, at 89–92 (discussing implicit bias against Asians).

¹²³ See, e.g., *id.* at 110–11 (“The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant.”).

cultural minorities,¹²⁴ or women¹²⁵—allegations of discriminatory intent (for example) will run up against judicial presumptions of non-discrimination, which research has proven are unwarranted.¹²⁶ Nevertheless, because of the presumption of non-discrimination, a pleader will be under a particularly stringent burden to offer facts that dislodge judges from this presumption if it is hoped that they will accept an allegation of discrimination as plausible. As I have previously argued,

[o]nce we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do. When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished.¹²⁷

Freeing pleaders from the obligation to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible is necessary if we wish to give such claimants the opportunity to access a judicial process in which they can employ the tools of discovery to further substantiate and vindicate legitimate claims.

¹²⁴ Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

¹²⁵ See, e.g., Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005) (finding study participants shifted their valuation of the worth of various credentials to preference a male in selecting a police chief).

¹²⁶ See, e.g., Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (showing that identical applicants with White-sounding versus Black-sounding names received fifty percent more callbacks for interviews).

¹²⁷ Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7, at 1734.

More broadly, an interpretation of Rule 9(b) that obligates pleaders to substantiate condition-of-mind allegations with supporting facts is inconsistent with any sound theory of what worthwhile procedural rules should be designed to accomplish. If we want rules that promote the classic law enforcement objectives of general and specific deterrence, as well as the reification of abstract legal rules and the pacification of the governed that comes from its perception of systemic legitimacy and efficacy, then those rules must be—or at least must be seen to be—facilitative of efforts to vindicate transgressions of the law. No rule—or interpretation thereof—that by design shields many wrongdoers from culpability on the basis of the inability of their accusers to perform the metaphysical task of mind reading will succeed at permitting the translation of our laws as written into meaningful prohibitions that would-be transgressors will be inclined to respect.

IV. RESTORING RULE 9(b)

We have seen that the *Iqbal* majority's interpretation of Rule 9(b)—and the lower courts' subsequent application of it—are inconsistent with the proper and original understanding of Rule 9(b). Further, we have seen that the more faithful understanding of the rule laid out in this Article has the benefit of reflecting a wiser approach to the kind of pleading obligations that are sensible to impose with respect to state-of-mind allegations. Rule 9(b) should thus be restored to its intended meaning, which can happen in one of two ways. The first would be for the Supreme Court to correct its error in *Iqbal* in a future case concerning the application of Rule 9(b). Lower courts, equipped with the insight it is hoped this Article will provide, could (and should) make an effort to interpret and apply Rule 9(b) in ways that honor the language, history, and intent behind it. However, because both of these responses seem unlikely, a second approach—a restorative amendment to Rule 9(b)—should be pursued.

To revise Rule 9(b) to eliminate *Iqbal*'s requirement that sufficiently alleging conditions of the mind requires the statement of well-pleaded facts that render the allegation plausible, the rule should be amended as follows:

(b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the

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

This revised language borrows directly from Order 19, Rule 22—the original source of the admonition that was promulgated as the second sentence of Rule 9(b) in 1938. It also has the benefit of directly and unambiguously addressing what has become problematic about lower court application of Rule 9(b)—the imposition of a requirement to state facts that provide the basis for condition-of-the-mind allegations.

An accompanying committee note for this revision would need to be crafted to ensure that there is no room for courts—including the Supreme Court—to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*. The following may be a possible approach:

Subdivision (b). Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term “generally” in Rule 9(b)’s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)’s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to “state any supporting facts” as is found in

Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.

To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted “maliciously” or “with fraudulent intent” or “with the purpose of discriminating against the plaintiff on the basis of sex,” or that the defendant “had knowledge of X.” For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, “On March 1, [year], defendant [*name of defendant 1*] conveyed all of defendant's real and personal property to defendant [*name of defendant 2*] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.”

Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

Were Rule 9(b) to be revised in this manner, one might argue that it would entirely undo the *Iqbal* and *Twombly* regime, permitting conclusory legal allegations to receive credit that permits claims to proceed without having to demonstrate plausibility. Not so. Take *Twombly* itself, for instance. There the key allegation was that the defendants entered into an unlawful agreement to exclude certain players from the market; the Court's beef was that there were not sufficient facts to which one could point that would assure courts that that allegation was more than mere speculation.¹²⁸ The proposed revision of Rule 9(b) would not alter this result because the allegation of an unlawful agreement is not

¹²⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566 (2007) (“We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.”).

a condition of the mind that would be covered by Rule 9(b). Rather, it is an allegation pertaining to something that the defendants have done.¹²⁹ Thus, the Court would have still been able to hold (under its plausibility pleading approach) that the complaint fell short under Rule 8(a)(2).

Amended Rule 9(b) would comport with the result that the Court produced in *Swierkiewicz v. Sorema N.A.*,¹³⁰ a result the Court endorsed in *Twombly*. In *Swierkiewicz*, the plaintiff alleged that he had been discriminated against in employment based on his nationality but—in the district court’s words—“ha[d] not adequately alleged circumstances that support an inference of discrimination.”¹³¹ The Court disagreed and found the complaint to be sufficient.¹³² As the *Twombly* Court explained it, “*Swierkiewicz*’s pleadings ‘detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination’” and indicated that “[w]e reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege ‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to relief.”¹³³ The proposed revision of Rule 9(b) simply honors the approach to pleading discrimination endorsed by the Court in *Swierkiewicz* and *Twombly*—specific facts substantiating an allegation of discrimination are not necessary; the sufficiency of a discrimination complaint will rest on whether the facts alleged beyond those pertaining to conditions of the mind plausibly show entitlement to relief. In the context of *Swierkiewicz*’s discrimination claim, by alleging that he had been fired and replaced with a younger person of a different nationality, coupled with his allegations of negative age-based comments from his supervisor,¹³⁴ *Swierkiewicz* crafted a complaint that satisfied the Rule 8(a)(2) standard without having to provide the substantiation of

¹²⁹ *Id.* at 551 (reporting that the plaintiff alleged that the defendants “ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another”).

¹³⁰ 534 U.S. 506 (2002).

¹³¹ *Id.* at 509.

¹³² *Id.* at 515.

¹³³ *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz*, 534 U.S. at 508, 514).

¹³⁴ *Swierkiewicz*, 534 U.S. at 508–09.

discriminatory intent that the defendants and lower courts had demanded.

That said, amending Rule 9(b) as proposed would alter the outcome in *Iqbal*. A key requirement for being able to state a claim against the government officials in *Iqbal* was that their conduct was done with discriminatory intent. Justice Kennedy declared that a bald allegation of discriminatory intent was not entitled to the assumption of truth because it was conclusory and not supported by well-pleaded facts.¹³⁵ He reached this conclusion by interpreting Rule 9(b)'s second sentence as imposing a plausibility requirement as described above.¹³⁶ However, Justice Kennedy acknowledged that a rule obligating the Court to accept an allegation of discriminatory intent as true would require a different result: "Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."¹³⁷ Allegations of discriminatory intent, like all allegations pertaining to a defendant's state of mind, are factual contentions because they pertain to experienced reality rather than to the legal consequences that flow therefrom. Thus, once conditions of the mind are permitted to be simply stated under revised Rule 9(b), those allegations of fact will be entitled to benefit from the accepted assumption-of-truth rule that the Court continues to endorse.¹³⁸

Similarly, revised Rule 9(b) would undo the position that the circuit courts have taken in this field, abrogating the decisions in which they have dismissed claims based on a determination that substantiating facts must

¹³⁵ *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009) ("These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' As such, the allegations are conclusory and not entitled to be assumed true." (citations omitted)).

¹³⁶ See *supra* Section I.A.

¹³⁷ *Iqbal*, 556 U.S. at 686. Were there to be an interest in providing a greater degree of protection against litigation for defendants who are potentially entitled to qualified immunity (as may have characterized the defendants in *Iqbal*), it would be appropriate to vindicate that interest through an amendment to the Federal Rules (or via a legislative enactment) tailored to such cases, not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b).

¹³⁸ *Id.* at 678 (referring to "the tenet that a court must accept as true all of the allegations contained in a complaint"); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation omitted)).

be offered to support allegations pertaining to conditions of the mind. This, of course, is by design and is the principal purpose behind the revision. Thus, in a case like *Biro*,¹³⁹ in which the Sixth Circuit required the plaintiff to offer facts substantiating the allegation of actual malice,¹⁴⁰ the result would be different. There, the plaintiff alleged as follows regarding actual malice:

Biro generally alleged that each of the New Yorker defendants “either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them,” and that they “acted with actual malice, or in reckless disregard of the truth, or both.”¹⁴¹

Malice and knowledge are conditions of the mind protected from particularized pleading by Rule 9(b). As revised, Rule 9(b) would treat the quoted allegations as sufficient. As in *Iqbal*, crediting these allegations as true would result in rendering the complaint sufficient under Rule 8(a)(2). Indeed, there are certainly a great many cases in which crediting allegations of condition of the mind as true will render them impervious to attack under Rule 8(a)(2). If such a result is not desired, then making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue.¹⁴²

¹³⁹ 807 F.3d 541 (6th Cir. 2015).

¹⁴⁰ *Id.* at 542.

¹⁴¹ *Id.* at 543.

¹⁴² Codifying the *Iqbal* interpretation of Rule 9(b)'s second sentence could be achieved by revising it to read as follows: “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally by setting forth the circumstances from which the condition may be inferred.” Codification might also be achieved by deleting the second sentence of Rule 9(b).

CONCLUSION

Revising promulgated federal rules through judicial decision making is a perilous¹⁴³ and illegitimate¹⁴⁴ business. After *Twombly* and *Iqbal*, one cannot know what Rule 8(a)(2)'s "short and plain statement of the claim showing entitlement to relief" is, nor can one know what Rule 9(b) means when it permits a party to allege conditions of the mind "generally," without consulting the judicial interpretation of those rules by courts, notwithstanding the divergence of the latter from the text of the former.¹⁴⁵ If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another,¹⁴⁶ then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation. Stated differently, given that the *Iqbal* interpretation of Rule 9(b) and that which it has spawned among lower courts is manifestly

¹⁴³ *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting) ("The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.").

¹⁴⁴ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) ("A requirement of greater specificity . . . 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation'" (quoting *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993))).

¹⁴⁵ My view, as expressed extensively in previous work, is that the Court's interpretation of Rule 8(a)(2)—like its interpretation of Rule 9(b)—diverges from the meaning supported by all relevant textual and historical evidence. See Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7; Spencer, *Plausibility Pleading*, *supra* note 7. Restoring the intended meaning of Rule 8(a)(2) could be achieved by revising it as follows: "a short and plain statement of the claim ~~showing that articulating~~ the pleader's grounds is entitled to ~~for~~ relief . . ." Other approaches have been put forward as well. See, e.g., Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 979–83 (2012) (providing multiple suggestions for revising Rule 8(a)(2) to restore it to its pre-*Twombly* meaning). Unfortunately, it appears that ship has sailed. Hopefully, however, there remains the possibility that the misinterpretation of Rule 9(b) can be repaired.

¹⁴⁶ See Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80–81 (2006) ("[T]he rich context of common law procedural rules . . . function in conjunction with the 1938 Rules to determine the actual function of the federal district courts These Other Federal Rules of Civil Procedure . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.").

counter to the intended meaning of Rule 9(b) and to all available textual evidence, the rulemakers have a duty *to at least consider* whether the rule should be revised in a way that better tracks how courts interpret and apply the rule, or be revised to correct the errant construction. Doing nothing, though, should not be an option—unless we¹⁴⁷ want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice.¹⁴⁸ None of us should want that, although I fear that doing nothing is precisely the most likely thing that we will do.¹⁴⁹

¹⁴⁷ I currently serve as a member of the Judicial Conference Advisory Committee on Civil Rules, which bears responsibility for considering proposals to amend the Federal Rules of Civil Procedure. The views expressed in this piece are my own and do not reflect the position of the Committee or its members.

¹⁴⁸ See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369 (2010) (“[P]rocedure’s central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure’s overarching, unified goal is to facilitate and validate the substantive outcomes desired by society’s dominant interests; procedure’s veneration of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social out-groups and ensure desired results.”).

¹⁴⁹ This sentiment arises from my experience as a member of the Rules Committee. Whether it be due to the prioritization that necessarily arises in the context of limited deliberative capacity and bandwidth, the institutional conservatism that comes from being a committee dominated by members of the judiciary, or the awkwardness associated with rebuffing the work of the Court (and the Chief Justice) under whose aegis we operate, the Rules Committee in modern times has shied away from undertaking liberalizing, access-promoting reforms in response to interpretive drift in a restrictive direction. See Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 927 (2020) (“The second theme—institutional actor timidity—demonstrates how the Committee is quite timid of its role in the Rules Enabling Act process. That process requires the work of other institutional actors, and one of the most fraught relationships is between the Supreme Court and the Committee. After all, the Committee’s members are appointed by the Chief Justice, the work of the Committee is delegated from the Court to the Committee, and the Court is part of the process as its approval is required for an amendment to be adopted.”). As Charles Clark pointed out long ago, it is not surprising that the judiciary will constantly turn back to restrictive pleading, but it is our job to periodically press for corrective measures that will maintain the access-facilitating ethos that the rules were originally intended to institutionalize. See Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1941, 1942, 1943) (“With the development of code pleading, from the Field Code first adopted in New York in 1848 to the present time, the emphasis was shifted from the detailed issue-pleading of the common law to a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case. Notwithstanding this history, however, courts recurrently turn back to the course of requiring details. Such a return, on the whole, is not surprising, for all rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment. Moreover, the pressure from one side to force admissions from the opponent and the court’s desire to hurry up adjudication and avoid lengthy trials tend somewhat to push in this same direction. It is

necessary, however, always to bear in mind that nowadays we are not willing to enforce harsh rules or to sacrifice a party for his lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions.”).

TAB 17

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4310

RULES 26(b) (5) (A) & 45(e) (2) : PRIVILEGE LOGS
Suggestion 20-CV-R

4311 The Lawyers for Civil Justice propose that Rule 26(b) (5) (A) be
4312 amended to add specifics about how parties are to provide details
4313 about materials withheld from discovery due to claims of privilege
4314 or protection as trial-preparation materials. The submission
4315 focuses on a problem that can produce waste. But it is not clear
4316 that any rule change will helpfully change the current situation.

4317 The basic difficulty is that an extremely detailed listing of
4318 the withheld materials may sometimes be unworkable or extremely
4319 costly to produce without providing significant benefit to the
4320 parties or the court.

1993 Adoption of Rule 26(b) (5)

4321

4322 Before 1993, parties withheld materials covered by a privilege
4323 from discovery without enumerating what was withheld. Often they
4324 relied on some sort of "general objection" that no privileged
4325 materials would be produced. Indeed, since Rule 26(b) (1) says only
4326 "nonprivileged matter" is within the scope of discovery, one might
4327 have asserted that the objection was not needed. In any event, it
4328 would often be very difficult for other parties to determine what
4329 had not been turned over based on a claim of privilege. There were
4330 suspicions that sometimes parties were overly aggressive in their
4331 privilege claims.

4332 In 1993, therefore, Rule 26(b) (5) (A) was added. It now
4333 provides:

4334 When a party withholds information otherwise discoverable
4335 by claiming that the information is privileged or subject
4336 to protection as trial-preparation material, the party
4337 must:

4338 (i) expressly make the claim; and

4339 (ii) describe the nature of the documents,
4340 communications, or tangible things not produced or
4341 disclosed — and do so in a manner that, without
4342 revealing information itself privileged or
4343 protected, will enable other parties to assess the
4344 claim.

4345 This provision (modeled on a similar provision added to
4346 Rule 45 in 1991) sought to dispel the uncertainty that existed
4347 before it went into effect, but did not seek to impose a heavy new
4348 burden on responding parties. Hence, the committee note
4349 accompanying the 1993 amendment advised:

4350 The rule does not attempt to define for each case what
4351 information must be provided when a party asserts a claim
4352 of privilege or work product protection. Details

4353 concerning time, persons, general subject matter, etc.,
4354 may be appropriate if only a few items are withheld, but
4355 may be unduly burdensome when voluminous documents are
4356 claimed to be privileged or protected, particularly if
4357 the items can be described by categories.

4358 Notwithstanding this directive, there is reason to worry that
4359 overbroad claims of privilege still occur. As Judge Grimm noted in
4360 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265
4361 (D. Md. 2008): “[B]ecause privilege review and preparation of
4362 privilege logs is increasingly handled by junior lawyers, or even
4363 paralegals, who may be inexperienced and overcautious, there is an
4364 almost irresistible tendency to be over-inclusive in asserting
4365 privilege protection.”

4366 But privilege logs — the customary expectation for complying
4367 with Rule 26(b)(5)(A) — were a poor solution to the problem, as
4368 Judge Grimm also recognized:

4369 In actuality, lawyers infrequently provide all the basic
4370 information called for in a privilege log, and if they
4371 do, it is usually so cryptic that the log falls far short
4372 of its intended goal of providing sufficient information
4373 to the reviewing court to enable a determination to be
4374 made regarding the appropriateness of the
4375 privilege/protection asserted without resorting to
4376 extrinsic evidence or in camera review of the documents
4377 themselves.

4378 *Id.*

4379 For further discussion, see 8 Fed. Prac. & Pro. § 2016.1.

4380 *2008 Advisory Committee Consideration*

4381 At the April 2008 Advisory Committee meeting, Prof. Gensler
4382 (then the academic member of the Advisory Committee) raised
4383 concerns about the actual experience implementing Rule 26(b)(5)(A).
4384 An excerpt of the April 2008 meeting minutes is included in the
4385 appendix to this report. For the November 2008 meeting, Prof.
4386 Gensler provided a memorandum about these issues, and Prof. Marcus
4387 also provided a memorandum. An excerpt of the November 2008 agenda
4388 book is included in the appendix to this report.

4389 At the November 2008 meeting, there was further discussion,
4390 including reference to the local rule in the District of
4391 Connecticut. This discussion was about both the content of
4392 privilege logs and the timing for them. One point made was:
4393 “Vendors have become insistent that electronic screening software
4394 can do the job at much lower cost.” Several members reported that
4395 the parties usually work out arrangements that cope with the
4396 potential difficulties. The matter was continued on the Advisory
4397 Committee’s agenda, but no further action has been taken. An
4398 excerpt of the November 2008 meeting minutes is included in the

4399 appendix to this report.

4400 *Pertinent Post-1993 Rule Changes*

4401 Since 1993, other rule changes have, however, added provisions
4402 that could affect the possible burden of complying with
4403 Rule 26(b) (5) (A).

4404 First, in 2006 Rule 26(b) (5) (B) was added, providing that any
4405 party could make a belated assertion of privilege, after
4406 production, which would require all parties that received the
4407 identified information to sequester the information unless the
4408 court determined that the privilege claim was unsupported. At the
4409 same time, Rule 26(f) was amended to add what is now in
4410 Rule 26(f) (3) (D), directing that the parties' discovery plan
4411 discuss issues about claims of privilege. But these rule changes
4412 did not precisely address the question whether production
4413 constituted a waiver, particularly a subject-matter waiver.

4414 Second, in 2008 Congress enacted Evidence Rule 502. In
4415 Rules 502(d) and 502(e), that rule gives effect to party agreements
4416 that production of privileged material will not constitute a waiver
4417 of privilege. In addition, even in the absence of an agreement,
4418 Rule 502(b) insulates inadvertent production against privilege
4419 waiver if the producing party "took reasonable steps to prevent
4420 disclosure." Rule 502 does directly address the question whether a
4421 waiver has occurred.

4422 Owing to these post-1993 rule changes, therefore, one may
4423 conclude that the burdens of complying with Rule 25(b) (5) (A) have
4424 abated somewhat. A significant concern had been that failure to log
4425 a particular item would work a waiver even if the item was not
4426 produced. But it seemed that courts finding such waivers did so
4427 only as a sort of sanction for disregard of the Rule 26(b) (5) (A)
4428 obligation, not for a simple slip-up. Due to Rule 26(b) (5) (B),
4429 there is now a procedure to retrieve a mistakenly-produced
4430 privileged item, leaving it to the party that obtained the item to
4431 seek a ruling in court that it is not privileged. Rule 502, then,
4432 directs that no waiver be found for inadvertent production of a
4433 privileged item if reasonable steps were taken to review before
4434 production, and that even if reasonable steps were not taken the
4435 parties could guard against waiver by making an agreement under
4436 Rule 502(d). In short, the pressure of a waiver due to oversight —
4437 particularly the risk of a subject-matter waiver — has abated
4438 considerably since 1993.

4439 Meanwhile, it may be that technology now exists to provide a
4440 useful assist to the parties in preparing a privilege log.
4441 Technology-assisted review (TAR) is often or routinely employed to
4442 review large volumes of electronically-stored information to
4443 identify responsive materials. As discussed in 2008-09 by the
4444 Advisory Committee, software was then being promoted as effectively
4445 identifying not only responsive materials, but also materials that
4446 might be claimed to be privileged. It may be that such programs

4447 could then also generate at least a draft privilege log.

4448 Nonetheless, there have also been criticisms of the reported
4449 requirement of some courts that parties prepare a "document-by-
4450 document" privilege log. As Judge Facciola observed in *Chevron*
4451 *Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

4452 [I]n the era of "big data," in which storage capacity is
4453 cheap and several bankers' boxes of documents can be
4454 stored with a keystroke on a three inch thumb drive,
4455 there are simply more documents that everyone is keeping
4456 and a concomitant necessity to log more of them. This, in
4457 turn, led to the mechanically produced privilege log, in
4458 which a database is created and automatically produces
4459 entries for each of the privileged documents. * * *

4460 But, the descriptor in the modern database has
4461 become generic; it is not created by a human being
4462 evaluating the actual, specific contents of that
4463 particular document. Instead, the human being creates one
4464 description and the software repeats that description for
4465 all the entries for which the human being believes that
4466 description is appropriate. * * * This raises the term
4467 "boilerplate" to an art form, resulting in the modern
4468 privilege log being as expensive as it is useless.

4469 *Cost of Responding to Discovery and Withholding*
4470 *Privileged Materials without Preparing a Privilege Log*

4471 It seems worth noting that preparing the privilege log may
4472 often be a relatively minor cost in comparison to responding to
4473 discovery of ESI more generally. Whether or not a privilege log is
4474 prepared, much work is necessary to respond to discovery of ESI.
4475 Responsive materials must be located in what is sometimes an
4476 enormous quantity of digital data. In addition, either
4477 simultaneously or after the responsive materials are extracted, the
4478 specific items potentially covered by privilege must be identified
4479 and set apart.

4480 After those potentially privileged items are identified, a
4481 legally trained person must verify that it would indeed be
4482 legitimate to withhold them from production on that ground. And
4483 then care must be taken at least to keep a record of what was
4484 withheld on this ground. It would seem that all of these steps
4485 would have been required under the pre-1993 rules, and that they
4486 would continue to be necessary if Rule 26(b)(5)(A) were amended. So
4487 it may be that the additional cost of preparing a privilege log is
4488 not a large part of this overall cost of responding to discovery,
4489 even though preparing a document-by-document log may in many cases
4490 require a disproportionate effort, or at least be a waste of time.

4491

LCJ Submission

4492 The LCJ submission stresses the difficulties of privilege logs
4493 in an era of ESI, emphasizing Judge Facciola's views. Indeed, along
4494 with Jonathan Redgrave, Judge Facciola proposed in 2010 that "the
4495 majority of cases should reject the traditional document-by-
4496 document privilege log in favor of a new approach that is premised
4497 on counsel's cooperation supervised by early, careful, and rigorous
4498 judicial involvement." *Facciola & Redgrave Asserting and*
4499 *Challenging Privilege Claims in Modern Litigation: The Facciola-*
4500 *Redgrave Framework*, 4 Fed. Cts. L. Rev. 19 (2010). Implementing
4501 what Judge Facciola urged by rule could be difficult, however.

4502 The LCJ submission describes some local district court rules
4503 about privilege logs, and also some state court rules. It
4504 acknowledges the good sense of what the committee note to the 2006
4505 amendment to Rule 26(f) said about discussion and cooperation among
4506 counsel, but reports that "the suggestion has been largely
4507 ignored." It also urges that a rule provide for "presumptive
4508 exclusion of certain categories" of material from privilege logs,
4509 such as communications between counsel and the client regarding the
4510 litigation after the date the complaint was served, and
4511 communications exclusively between in-house counsel or outside
4512 counsel of an organization. Invoking proportionality, it emphasizes
4513 that "flexible, iterative, and proportional" approaches are more
4514 effective and efficient than document-by-document privilege
4515 logging. But even though the 1993 committee note accompanying
4516 Rule 26(b) (5) (A) recognized that detailed logging is not generally
4517 appropriate, "the case law has largely missed the Committee's
4518 perspicacity." One might say that the Advisory Committee's urgings
4519 did not produce the desired outcome.

4520 The specific LCJ proposal seems more limited. It is to add the
4521 following to Rule 26(b) (5) and also to Rule 45(e) (2) on subpoenas:

4522 If the parties have entered an agreement regarding the
4523 handling of information subject to a claim of privilege
4524 or of protection as trial-preparation material under Fed.
4525 R. Evid. 502(e), or if the court has entered an order
4526 regarding the handling of information subject to a claim
4527 of privilege or of protection as trial-preparation
4528 material under Fed. R. Evid. 502(d), such procedures
4529 shall govern in the event of any conflict with this Rule.

4530 *Would a Rule Amendment Improve Matters?*

4531 There is a limit to what rules can prescribe. The more general
4532 concern with proportionality calls for common-sense judgments about
4533 what discovery is really warranted under the circumstances of
4534 specific cases. That is difficult or impossible to prescribe in the
4535 abstract in a rule.

4536 It may be that improvement by rule of the handling of what
4537 Rule 26(b) (5) (A) requires is not really possible because so much

4538 depends on the circumstances of the individual case. "Presumptive
4539 exclusion of certain categories" (not actually proposed by the
4540 submission, as quoted above) could introduce additional grounds for
4541 litigation about whether the categories apply in specific
4542 circumstances. And it may be worth noting something said during the
4543 November 2008 Advisory Committee meeting (minutes, pp. 14-15):

4544 An observer suggested that an effort to come up with a
4545 rule will only intensify costs. There is no real problem.
4546 "People work it out." The log is the last thing produced.
4547 And in some cases the parties may tacitly agree not to
4548 produce them at all, or to generate them only for
4549 particular categories of documents.

4550 Alternatively, one might urge that Rule 26(b)(5)(A) should be
4551 abrogated. Perhaps the experience for more than a quarter century
4552 under this rule shows that it did not work, or does not now work.
4553 This submission does not urge doing that, and it is likely that
4554 valid concerns about unrevealed but overbroad claims of privilege
4555 mean that the rule should be retained.

4556 But it is not clear that a rule can do more than the rule
4557 already does, particularly when augmented by the directive in
4558 Rule 26(f)(3)(D), calling for the parties to address "any issues
4559 about claims of privilege." And it seems that the committee notes
4560 accompanying the original rule in 1993 and the revision of
4561 Rule 26(f) in 2006 speak to the concerns raised by the LCJ
4562 submission.

4563 The question for discussion during the October 2020 meeting is
4564 whether the problems are so severe as to warrant trying to draft a
4565 rule amendment, and whether a rule amendment would likely improve
4566 matters.



**SUGGESTION FOR RULEMAKING
to the
ADVISORY COMMITTEE ON CIVIL RULES**

**PRIVILEGE AND BURDEN: THE NEED TO AMEND RULES 26(b)(5)(A) AND 45(e)(2)
TO REPLACE “DOCUMENT-BY-DOCUMENT” PRIVILEGE LOGS WITH
MORE EFFECTIVE AND PROPORTIONAL ALTERNATIVES**

August 4, 2020

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Suggestion for Rulemaking to the Advisory Committee on Civil Rules (“Committee”), recommending amendments to Rule 26(b)(5)(A) and Rule 45(e)(2) of the Federal Rules of Civil Procedure (“FRCP”) that would modernize the procedure for withholding otherwise discoverable information under claims of privilege or other protection and replace “document-by-document” privilege logs with more effective and proportional alternatives. Rule 25(b)(5)(A), adopted prior to the explosion of electronically stored information (“ESI”), has remained untouched for over twenty-five years. The time has come to amend rule 26(b)(5)(A) to reflect best practices and eliminate the disparities among local rules.

I. INTRODUCTION

“[T]he modern privilege log [is] as expensive to produce as it is useless.”² This conclusion – widely shared by judges, litigants, and litigators – is based on common experience with producing, receiving, and ruling on “document-by-document” privilege logs. Importantly, this indictment of the status quo is not a castigation of counsel preparing logs but a critique of prevailing practices and existing rules. The inherent difficulties in describing applicable privileges for all withheld documents individually have been compounded by the geometric growth of ESI, often resulting in claims by requesting parties that privilege logs fail to meet the standard of Rule 26(b)(5)(A)(ii) or provide sufficient information to resolve privilege claims.

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C 2012).

These challenges provoke a large amount of satellite litigation unrelated to the merits of the case.³

The burdens of preparing privilege logs, the inherent futility of many logging exercises, and the resulting collateral disputes arise from Rule 26(b)(5)(A) and its case law progeny. Some courts interpret the Rule as establishing a *de facto* default to “document-by-document” logs by interpreting the “expressly make the claim” language to require document-by-document logging. While the 1993 Advisory Committee Note indicates that alternative approaches could be considered, few litigants or courts follow that advice. That such a “default” expectation exists is evident in a plethora of cases requiring that producing parties must provide “document-by-document” logs in order to maintain claims of privilege.

Recognizing the inefficiencies of document-by-document privilege logs and collateral disputes, several district courts have adopted local rules or guidance that embrace the flexibility intended by the Advisory Committee Note. Consequently, a patchwork of different standards has emerged, resulting in today’s lack of uniformity among federal districts.⁴

The Committee should modernize the procedures for privilege logs to provide greater procedural clarity and consistency and make them more useful, efficient, and proportional to the needs of the case. The amendments proposed in Attachment A and Attachment B (the “Proposed Amendments”) are targeted to reduce the disputes that ultimately require judicial attention and resolution as well as promote procedural consistency and predictability without imposing an inflexible standard for form and content. The Proposed Amendments motivate and enable parties (and subpoenaed non-parties) to customize logging procedures and log content proportional to the needs of each case, while assuring the appropriate scope of information subject to logging, clarifying the standards, and reserving a role for the court in the event that the parties need guidance. The Proposed Amendments endorse: (1) categorical logs where appropriate in cases (with sampling and provisions to ascertain whether privilege claims are factually and legally sound); (2) iterative logging (moving from broad categories or summary logs to more detailed logs for subsets of important, material documents); (3) excluding from logging categories of communications that are facially privileged; (4) alternative logging protocols for particular types of linked/serial communications (e.g., emails); (5) procedures for privilege challenges and limitations of challenges to truly material and unique information; and (6) other procedures and protocols that either technology or the creativity of parties, counsel, and the bench may devise.

³ The authors used a Westlaw search (lasted updated on 1/9/2020) in the ALLFEDS databases using the following search syntax “privilege /s index log /s insufficient waiv! fail! & date(aft 10/01/2006)” to find cases where there was an attack on a privilege log as being insufficient, a failure, or should result in a waiver of privileges. The search pulled back 4,018 cases and more than 10,000 “trial court documents.” A cursory examination of selected cases demonstrates the extraordinary amount of time and effort invested in logging, logging disputes, and court involvement in resolving these disputes.

⁴ See *The Sedona Conference Commentary on Protection of Privileged ESI*, 17 *SEDONA CONF. J.* 95, 156 (2016) (“The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs.”).

II. BACKGROUND

Since 1993, Rule 26(b)(5)(A) and Rule 45(e)(2) have directed litigants and non-parties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that “will enable other parties to assess the claim.”⁵ The *de facto* default method of doing so (reflected in most relevant case law) is for the withholding entity to prepare a log of all withheld records on a “document-by-document basis.”⁶ But a comprehensive document-by-document logging method should be used only infrequently, when clearly justified by the needs of the case and the materiality of the information. Such logs are expensive to produce and inefficient in conveying useful information,⁷ and they frequently lead to disputes that require *ex parte* and *in camera* reviews by courts. The default to document-by-document logging is based, in part, on a flawed premise that each document (or portion of document) should be treated with equal detail when, in reality, documents and the foundation of the privilege and protection claims differ greatly. Some categories of documents and communications are by their authorship, exchange, or content transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 has rendered the current practices unworkable.

Although the Committee has retooled many rules to equip parties, counsel, and the courts to address discovery issues related to ESI, Rule 26(b)(5) largely has been left behind. And despite

⁵ Specifically, Fed. R. Civ. P. 26(b)(5)(A) provides:

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:

(i) expressly make the claim;

(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.

⁶ See *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 159 comment 10.h (2018) (“[T]he precise type and amount of information required to meet the general standard set forth in Rule 26(b)(5)(A)(ii) varies among courts...”).

⁷ See Hon. John M. Facciola & Jonathan M. Redgrave, ASSERTING AND CHALLENGING PRIVILEGE CLAIMS IN MODERN LITIGATION: The Facciola-Redgrave Framework, 4 FED. CTS. L. REV. 19 (2010) (“The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel’s cooperation supervised by early, careful, and rigorous judicial involvement.”); see also *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265 (D. Md. 2008) (emphasis added):

In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves. *Few judges find that the privilege log is ever sufficient to make the discrete fact-findings needed to determine whether a privilege/protection was properly asserted and not waived.*

the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging,⁸ rulemaking is required to provide guidance about optional methods due to the continued adherence to inflexible, archaic standards.

Adopting the Proposed Amendments would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to develop new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extracting information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

III. CURRENT PROCUDRES GOVERNING PRIVILEGE LOGS ARE OVERBURDENSOME, DISPROPORTIONAL, AND OFTEN UNHELPFUL

A. Document-by-Document Privilege Logs are Very Time Consuming and Expensive to Produce.

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly and wasteful parts of pretrial discovery in civil litigation,⁹ and many courts have interpreted current rules 26(b)(5)(A) and 45(e)(2) as making document-by-document logs the default form. The costs associated with creating traditional privilege logs have become a significant - possibly the largest - category of pretrial spending for litigants in document-intensive litigation.¹⁰ The Sedona Conference has recognized that “[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more. . . .”¹¹ Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document

⁸ FED. R. CIV. P. 26(b)(5) advisory committee’s note to 1993 amendment:

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described categories.

⁹ See New York State Bar Association, REPORT OF THE SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION, at 73 (June 23, 2012) (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.”).

¹⁰ *The Sedona Conference, Commentary on Protection of Privileged ESI*, supra note 4, at 155 (“Privilege logging is arguably the most burdensome and time-consuming task a litigant faces during the document production process.”).

¹¹ *The Sedona Conference, Commentary on Protection of Privileged ESI*, supra note 4, at 103; see also New York State Bar Association, *Report of the Special Committee on Discovery and Case Management in Federal Litigation*, at 73 (June 23, 2012) (“Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document intensive case, especially one with many e-mails and e-mail strings.”).

without disclosing privileged or protected information. In jurisdictions where all emails in an email chain must be separately itemized on a privilege log, the degree of difficulty is increased many fold.¹² For example, metadata that can be used to populate the log entry automatically, e.g., author and recipients, is available only for the most recent email in a chain, and information for all other emails in the chain must be manually entered on the log. Even in cases with relatively modest quantities of discoverable documents and ESI, this labor-intensive procedure results in substantial costs.¹³

B. Document-by-Document Privilege Logs Are, By Their Nature, Rarely Proportional to the Needs of the Case.

The resources devoted to identifying, logging and resolving disputes about privileged documents are often out of proportion to the needs of the case, particularly when the parties do not have or anticipate disputes over withheld documents. It is a rare case in which privileged documents, whether the claim is sustained or overruled, are introduced as evidence and have any discernible effect on the outcome of the litigation. Although there are exceptional instances where documents withheld as privileged are central to resolving the issues, the current default of “boiling the ocean” is unjustified when rules with sufficient flexibility (such as the Proposed Amendments) would enable targeted identification and adjudication when appropriate.

A proportional approach is perhaps even more important for non-parties facing the prospect of producing a privilege log pursuant to Rule 45. While Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it. There is no current mechanism in Rule 45 to facilitate scaled and proportional approaches to privilege logs by non-parties.

The logic behind revising Rule 45 is highlighted by the January 2020 release of The Sedona Conference’s revised Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition (Public Comment Version).¹⁴ The document specifically notes the need to consider alternative logging:

¹² See *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D 669, 674 (D. Kan. 2005). The court in *In re Universal Serv. Fund* recognized:

requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel. And, of course, that task adds considerable expense for the clients involved; even for very well-financed corporate defendants such as those in the case at bar, this is a very significant drawback to modern commercial litigation. But the court finds that adherence to such a procedure is essential to ensuring that privilege is asserted only where necessary to achieve its purpose.

Id.

¹³ See *First Horizon Nat’l Corp. v. Houston Cas. Co.*, No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268 at *6 (W.D. Tenn. Oct. 5, 2016) (“[p]laintiffs assert that production of a document-by-document privilege log would cost them \$150,000 and take three to four weeks.”) (plaintiff’s log in *First Horizon* was to describe 5,941 documents, a cost of \$25.25 per entry. ECF No. 186, Plaintiff’s Opposition).

¹⁴ Available at https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas.

Practice Pointer 15. Rule 45(e)(2)(A) and (B) require a non-party subpoena recipient to, among other things, expressly make a “claim [of privilege] and the basis for it” and set forth a process for the handling of the inadvertent production of such information. The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party, where appropriate, should agree to alternatives to the traditional privilege log.¹⁵

C. Document-by-Document Privilege Logs Frequently Fail to Assist Parties or Courts to Resolve Privilege Issues.

Privilege disputes are most often collateral to the issues in the case and often involve form over substance. Unfortunately, document-by-document privilege logs are frequently of marginal value to the requesting party and the court in assessing the privilege claims, despite the time, effort and money spent preparing them.¹⁶ Privilege logs also rarely ‘enable other parties to assess the claim’ as contemplated by Rule 26(b)(5). Nor do the logs achieve the other goal of the rule - to ‘reduce the need for *in camera* examination of the documents.’ “Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production. In short, the procedure and process for protecting privileged ESI from production is broken.”¹⁷

¹⁵ Available at https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas at p.43.

¹⁶ *The Sedona Principles*, *supra* note 6, at p. 81 (“[o]ften, the privilege log is of marginal utility.”); *id* at p. 159, Comment 10.h (“[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege.”); *Auto. Club of New York, Inc., v. Port Authority of New York and New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (“With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.”) (internal citation omitted); *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 155. (“[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs ‘raise[] the term “boilerplate” to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.’”).

¹⁷ *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 103 (internal citation omitted). Judge Paul Grimm previously recognized the current incentive for collateral disputes:

Requesting parties also know of the limited utility of privilege logs (for they likely have served similar privilege logs in response to their adversary's discovery requests), and thus, when they receive the typical privilege log, they are wont to challenge its sufficiency, demanding more factual information to justify the privilege/protection claimed. This, in turn, is often met with a refusal from the producing party, and it does not take long before a motion is pending, and the court is called upon to rule on the appropriateness of the assertion of privilege/protection, often with the producing party's “magnanimous” offer to produce the documents withheld for *in*

D. Disparate Local Rules Regarding Privilege Logs Demonstrate the Need for Amendments to the FRCP that Update and Unify Privilege Log Practices.

In the absence of new national rulemaking many district courts across the country have attempted to address the problems with Rules 26 and 45 by adopting local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging.¹⁸ While some of these rules reduce the burdens in creating logs, others create new burdens. And while some are consistent with each other, others are in conflict.¹⁹ But all indicate a need to modernize the current regime and address procedural inconsistencies that result in uncertainty and the consequential inability to predict and meet differing logging procedures. Here is a sampling:

- In the District of Connecticut, Local Rule of Civil Procedure 26(e) reduces the scope of privilege logs by providing that a party need not prepare a privilege log for “written or electronic communications between a party and its trial counsel after commencement of

camera review. *In camera* review, however, can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned.

Victor Stanley, Inc., 250 F.R.D. at 265.

¹⁸ Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g., Asghari-Kamrani v. U.S. Auto. Ass’n*, No. 2:15-cv-478, 2016 WL 8243171, at *1–4 (E.D. Va. Oct. 21, 2016) (finding party’s categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be “unduly burdensome for no meritorious purpose”); *Companion Prop. and Cas. Ins. Co. v. U.S. Bank Nat’l Ass’n*, No. 3:15-cv-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016); *Manufacturers Collection Co., LLC v. Precision Airmotive, LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a “document-by-document listing.... would be unduly burdensome” and provide “no material benefit to Precision in assessing whether a privilege claim is well grounded.”); *First Horizon National Corp.*, 2013 WL 11090763, at*7 (permitting categorical privilege log).

¹⁹ LCJ has conducted a review of local rules and guidelines pertinent to the scope, form and content of privilege logs. The review reflects the disparate approaches among districts. Although pertinent local district court rules can be classified in a number of ways, LCJ has identified four general groupings that have emerged:

(1) Federal district courts in 28 states do not address Rule 26(b)(5)(A)(ii) in their local rules. Accordingly, each judge and magistrate may apply the current rule in accordance with their interpretation of whether a document-by-document log is required and whether the content of the log complies with the (A)(ii) standard.

(2) Local district court rules or guidelines in 13 jurisdictions expressly follow the (A)(ii) standard and either require document-by-document logs or document-by-document logs are the *de facto* default.

(3) The local rules or guidelines in two jurisdictions emphasize the importance of addressing privilege logs at the parties’ 26(f) discovery conference.

(4) Ten jurisdictions emphasize alternatives to document-by-document logging, specifically exclude certain categories of attorney-client privileged communications and trial preparation materials from logging, and, in several instances mandate discussion of privilege logs at the 26(f) conference, but generally do not expressly address or modify the 26(A)(ii) standard.

the action and the work product material created after commencement of the action.”²⁰ The local rule further provides that “[t]he parties may, by stipulation narrow or dispense with the privilege log requirement, on the condition that they agree not to seek to compel production of documents that otherwise would have been logged.”²¹

- In the Southern and Eastern Districts of New York, the Committee Note to Local Rule 26.2 recognizes that, with the proliferation of emails and email chains, traditional privilege logs are expensive and time-consuming to prepare. To address the problem, the Committee Note states that parties should cooperate to develop efficient ways to communicate the information required by Local Rule 26.2 without the need for a traditional log and otherwise proceed in accordance with Rule 1 to ensure a just, speedy and inexpensive termination of the case. The rule states, “For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.”²² The Western District of New York has adopted the same local rule.²³
- The District of Colorado’s ESI Discovery Guidelines specifically addresses the escalating costs of document-by-document privilege logs, urges counsel to confer in good faith “in an effort to identify types of document (*e.g.*, email strings, email attachments, duplicates, or near-duplicates, communications between counsel and a client after litigation commences) that need not be logged on a document-by-document basis pursuant to FED. R. CIV. P. 26(b)(5)(A) or at all, if the parties so agree. “The end-result should be a more useful log for a narrowly defined range of documents, thereby minimizing the need for judicial intervention.”²⁴
- The Southern District of Florida’s detailed local rule both expands the requirements for logging while also exempting post-complaint materials:
 - (i) The party asserting the privilege shall in the objection to the interrogatory or document demand, or subpart thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state’s privilege rule being invoked; and

²⁰ D. Conn. Civ. R. 26(e).

²¹ *Id.*

²² S.D.N.Y. Civ. R. 26.2(c).

²³ W.D.N.Y. Civ. R. 26(d)(4).

²⁴ D. Colo. Guidelines Addressing the Discovery of Electronically Stored Information 5.1.

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents or electronically stored information, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word, MS Excel); (2) general subject matter of the document or electronically stored information; (3) the date of the document or electronically stored information; and (4) such other information as is sufficient to identify the document or electronically stored information for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document or electronically stored information, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(b) For oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and the place of communication; and (3) the general subject matter of the communication.

(C) This rule requires preparation of a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a 44 claim of privilege or work product protection except the following: written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action.²⁵

- District of New Mexico Local Rule 26.6 provides 21 days to challenge entries on a privilege log.²⁶
- The District of Maryland promulgated “Principles for the Discovery of Electronically Stored Information in Civil Cases” recognizing that discovery of ESI is a source of “cost, burden, and delay” and instructing parties to apply the proportionality standard to all phases of ESI discovery.²⁷ The Principles contemplate conferral amongst the parties to

²⁵ S.D. Fla. R. 26.1(B) and (C).

²⁶ See *Sedillo Elec. v. Colorado Cas. Ins. Co.*, No.15-1172 RB/WPL, 2017 WL 3600729, at *7 (D.N.M. Mar. 9, 2017) (holding that a challenge to a privilege log is subject to Rule 26.6).

²⁷ District of Maryland Principles for the Discovery of Electronically Stored Information in Civil Cases 1.01 and 1.02.

determine whether categories of information may be excluded from logging and explore alternatives to document-by-document privilege logs.²⁸

- The District of Delaware created a “Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI)” that contemplates the parties will confer to determine “whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged.”²⁹
- A judge in the Northern District of Ohio has a case management order stating: “Where the dispute involves claims of attorney-client privilege or attorney work product, it is not necessary, unless I order otherwise, to prepare and submit a privilege log.”³⁰

In parallel to such local rulemaking by federal districts, many state courts are also modernizing procedures for privilege logs. For example, the New York Commercial Division recognizes a preference for categorical privilege logs and requires the parties to meet and confer to discuss “whether any categories of information may be excluded from the logging requirement.”³¹ The Commercial Division guides parties to agree, where possible, to utilize a categorical approach to privilege designations.³² To the extent the requesting party refuses to agree to a categorical approach in favor of a document-by-document privilege log, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys’ fees, incurred with respect to preparing the document-by-document log.³³

Similarly, the New Jersey Complex Business Litigation Program has adopted a preference for the use of categorical designations in privilege logs to reduce the time and cost associated with document-by-document privilege log preparation.³⁴

²⁸ *Id.* 2.04(b).

²⁹ District of Delaware Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI). Similarly, the Model Stipulated Order Regarding Discovery of Electronically Stored Information for Standard Litigation” in the Northern District of West Virginia clarifies that the use of a categorical privilege log is acceptable. (“Communications may be identified on a privilege log by category, rather than individually, if agreed upon by the parties or ordered by the Court.”).

³⁰ Judge Carr Civil Cases - Case Management Preferences.

³¹ *See* Rules of the Commercial Division of the Supreme Court [22 NYCRR] § 202.70, Rule 11-b.

³² “The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs.” *See id.*

³³ *Id.* at 11-b(2).

³⁴ N.J. R. 4:104-5(c).

IV. AMENDING THE PRIVILEGE LOGGING RULES WOULD ENCOURAGE NATIONWIDE BEST PRACTICES AND DELIVER NEEDED PROCEDURAL UNIFORMITY

A. Encouraging Meaningful Meet-and-Confers and Enabling Early Judicial Management Would Lead to Sensible Handling of Privilege Issues.

The 2006 Committee Notes to Rule 26(f) recommend that parties address issues concerning privilege during the Rule 26(f) conference. Unfortunately, the suggestion has been largely ignored, and the current practice appears to have been largely parties proceeding in silence at their own peril. At the same time, early discussions when the matter has not been fully framed for discovery could be counterproductive. The Proposed Amendments contemplate that the parties take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.³⁵ The discussion may be initiated at the parties' 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to is best incorporated in a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. Such agreements are likely to be proportional to the needs of the case and would reduce, if not eliminate, satellite litigation over collateral disputes regarding the sufficiency of privilege logs. If needed, court guidance regarding the parameters of the legal and factual contours of privilege as applied to the matter at the outset of discovery would get the parties heading in the right direction and reduce the burden on judicial resources including *in camera* review.

B. Presumptive Exclusion of Certain Categories of Documents and ESI Would Improve the Effectiveness of Privilege Logs and Help Ensure Proportionality.

Some categories of documents and ESI are facially privileged or protected and can be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. Similarly, the Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel or outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

³⁵ The Proposed Amendments to Rules 26(b)(5)(A) and 45(e)(2) do not expressly incorporate recommendations regarding the parties' meet and conferral process and the court's involvement when and if necessary. LCJ believes that Advisory Committee Notes are more appropriate for such recommendations and permit the flexibility required for parties to address issues as the case progresses.

C. Flexible, Iterative and Proportional Approaches Are More Effective and Efficient than Document-by-Document Privilege Logging.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information is needed to assess the privilege claims.³⁶ Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed logging (i.e. document-by-document privilege logs) is appropriate when only a few items are being logged, but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. Unfortunately, the case law has largely missed the Committee's perspicacity. The time has come to expand this correct analysis into the Rule text.

Iterative logging prioritizes the most important areas of inquiry. This practical application of proportionality mirrors what courts and local rules have done to tier discovery that has been widely accepted as a means to reduce burdensome ESI discovery.³⁷ This approach also recognizes the reality that identifying and asserting privileges is an inherently difficult task³⁸ that

³⁶ The proposed amended rules substitute “understand” for “assess” which better reflects the intent of the initial identification and the concepts of flexible and iterative logging set forth herein.

³⁷ See *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (citing The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010), the court ordered parties in longstanding case to meet and confer on phasing of discovery “to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action”). For examples of local rules and guidelines that encourage phasing discovery as a means to achieve proportionality, see Northern District of California *Guidelines for the Discovery of Electronically Stored Information*, (as a potential Rule 26(f) topic “where the discovery of ESI is likely to be a significant cost or burden”); Eastern District of Michigan *Model Order Relating to the Discovery of Electronically Stored Information*, Principle 2.01(4) (“the potential for conducting discovery in phases or stages as a method for reducing costs and burden”).

³⁸ “The analysis of any privilege is... historical, common law based, and judge-made. The benefit of codification – uniform rules that apply on a national basis, the hallmark of the rest of the Federal Rules of Evidence – is lost. This

should not made even more cumbersome by a process proven to yield a higher number of disputes than resolutions.

D. Prioritization of Privilege Claims Reduces the Need for Judicial Intervention.

By prioritizing the most important issues, categorical and iterative logging procedures reduce the number of privilege claims at issue between the parties. Under the Proposed Amendments, parties (and non-parties) would be empowered to address procedures for challenging and resolving challenges to claims of privilege. Such procedures could include meet-and-confers to address samples or categories of claims in which the producing party can provide additional information regarding the factual and legal bases of the claims(s) without detailed document logging. Such flexible procedures are sure to reduce the number of claims subject to motions to compel and adjudication of claims requiring *in camera* review.

E. Amending the Rules Governing Privilege Logs Would Enhance Parties' and Courts' Ability to Identify Specious Claims.

Some defenders of document-by-document logging assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Setting aside that such conduct would violate the rules of ethics in every jurisdiction, the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. Flexible rules such as the Proposed Amendments would allow for new mechanisms for accountability, such as the use of sampling procedures and a challenge process,³⁹ although all stakeholders must recognize that identifying and describing privileged information is an inexact science and there must be room for good faith disputes and error.⁴⁰ It is also important to note that document-by-document logs have often been seen as inherently flawed no matter how well-intended the parties and counsel involved⁴¹

creates a dramatic need for [guidance] that must exhaustively cover all the relevant judicial opinions for differences in approach, from the most nuanced to outright contradiction of each other... [This guidance should be] as thorough an analysis of the case law as can be imagined to lead judges and lawyers through a difficult forest.” Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court for the District of Columbia, *Forward* to 1 David M. Greenwald et al., *Testimonial Privilege*, at xxiii, xxiv (2015-2016 ed. 2015).

³⁹ The Facciola-Redgrave Framework, *supra* note 7, at 52-53.

⁴⁰ See, e.g., *Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of the United States*, 406 F.3d 867, 878 (7th Cir. 2005) (reversing district court's imposition of discovery sanctions based on the magistrate judge's determination that a significant number of sampled documents on defendant's log were not privileged and stating that “[defendant] was sanctioned for having too many good-faith differences of opinion with the magistrate judge. That is unacceptable. Simply having a good-faith difference of opinion is not sanctionable conduct.”); *Ackner v. PNC Bank, Nat'l Ass'n*, No. 16-CV-81648, 2017 WL 1383950, at *3 (S.D. Fla. Apr. 12, 2017) (“[A]s there has been a good faith dispute [over privileged documents] . . . an award of costs and attorney's fees would be unjust.”); *Rogers* at *3 (“[B]ecause Defendants put forth a cogent argument, supported by caselaw, that the [relevant document] was protected by the attorney-client privilege and work product doctrine, an award of costs and fees is inappropriate.”).

⁴¹ See, e.g., *Victor Stanley, Inc.*, 250 F.R.D. at 264-65 (noting limitations and challenges to privilege logs). See also The Facciola-Redgrave Framework, *supra* note 7, at 19 (“The volume of information produced by electronic

F. Amending the Rules Would Provide an Opportunity to Include a Helpful Cross-Reference to Federal Rules of Evidence 502(d) and 502(e).

Rule 502 of the Federal Rules of Evidence is one of the most beneficial yet least used tools for an improved privilege log process because it protects all parties from inadvertent waivers. One of the main drivers for the rule's adoption was the recognition that "the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information."⁴² Unfortunately, many observers have recognized that the rule is underutilized in practice.⁴³ An explicit cross-reference to FRE 502, such as that included in the Proposed Amendments, would improve the handling of privilege log issues by increasing awareness among practitioners and providing an important roadmap for its use.

V. CONCLUSION

Rules 26(b)(5)(A) and 45(e)(2) establish a *de facto* default obligation to prepare document-by-document privilege logs. Notwithstanding the 1993 Committee Note suggesting that other

discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure."). Similarly, any process must recognize that the obligation to protect client confidences necessarily and typically yields initially conservative calls and over-inclusion of documents in the privilege net in large document productions. *Cf. American Nat. Bank and Trust Co. of Chicago*, 406 F.3d at 878-79 (Because privileged attorney-client communications are "worthy of maximum legal protection, it is "expected that clients and their attorneys will zealously protect documents believed, in good faith, to be within the scope of the privilege.") (internal quotation omitted).

⁴² U.S. Judicial Conference's Letter to Congress on Evidence Rule 502 (Sept. 26, 2007). *See also* A BILL TO AMEND THE FEDERAL RULES OF EVIDENCE TO ADDRESS THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, U.S. Rep. No. 110-264, at 2-3 (Feb. 25, 2008):

In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

⁴³ A 2010 survey of federal magistrate judges found that "[a]most 6 in 10 respondents...indicated that the parties rarely or never employ FRE 502(d)." Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure, 11 SEDONA CONF. J. 201, 212 (Fall 2010). This level of awareness may not have changed much in the intervening years: "Despite the obvious benefits of agreeing to a Rule 502 order, I have found that the bar in general is largely uninformed about the rule and what it offers. So, to avoid problems down the line, the standard discovery order that I issue contains a Fed. R. Evid. 502(d) order that protects them automatically from inadvertent waiver of these important protections." Hon. Paul W. Grimm, District Judge, U.S. District Court for the District of Maryland, *Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases*. 51 Akron L. Rev. 721, 739 (2017). *See also* *Arconic Inc. v. Novelis Inc.*, No. 17-1434, 2019 WL 911417 at *3 (W.D. Pa. Feb. 26, 2019) for a similar example of 'making the horse drink' approach ("[t]he court's model Rule 26(f) report adopts Rule 502(d) as the default standard and provides a model order in Local Rule 16.1. An overwhelming majority of parties in civil cases in this district choose the default standard and a Rule 502(d) order is entered.").

procedures might be employed, this entrenched default remains by far the common expectation and practice. Local districts have embraced alternatives resulting in a “swiss-cheese” approach to privilege logging that defies the Rule’s goal of uniformity. The status quo puts substantial burdens on the parties, non-parties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. In light of the 2015 FRCP amendments and consistent with the spirit of those amendments, the time is ripe for the Committee to replace the default logging obligation with a modern approach such as the Proposed Amendments that encourages the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoiding later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, “enable of the parties [and the court] to assess the claim[s].”

Attachment A: Proposed Amendment to Rule 26(b)(5)

(5) Claiming Privilege or Protecting Trial-Preparation Materials

(A) *Information Withheld:* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party, unless otherwise agreed to by the parties or ordered by the court, must:

- (i) expressly make the claim; and
- (ii) furnish information, without revealing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter, to enable other parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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

Attachment B: Proposed Amendment to Rule 45(e)(2)

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material, unless otherwise agreed to or ordered by the court, must:

- (i) expressly make the claim; and
- (ii) furnish information, without disclosing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter that will enable the parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

If the person and 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.

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Excerpt from April 2008 Minutes

Professor Gensler has suggested that the Committee investigate the advisability of adopting a national rule on privilege logs. Practice under Rule 26(b)(5)(A) is now governed in large part by local rules. That may not be a good thing. Loss of privilege for failure to comply with one local rule can easily mean loss of the privilege for all purposes. The national rule sends no message, or perhaps mixed messages, on questions like the time to provide the privilege log. It would be useful to learn whether practitioners find problems in this area. One Committee member observed that the subject at least deserves consideration. Privilege-log practice is intertwined with e-discovery, which has effected a sea change in dealing with privilege and privilege logs. Compiling privilege logs is the biggest expense in discovery today; it can easily run up to a million dollars in a complex case. A second member concurred – privilege logs are a source of huge expense, satellite litigation, and traps for the unwary. It was agreed that Professor Gensler will prepare a memorandum to support further inquiry.

It was further suggested that Professor Marcus should carry on his exploration of the ways in which the e-discovery amendments are working out with an eye to determining whether there are problems that need to be fixed. Professor Marcus pointed out that evaluating the development of e-discovery practice will be a difficult task. "Big bucks are involved." One widely quoted estimate is that annual revenues for consultants on e-discovery compliance will soon reach four billion dollars. Privilege logs are an example. The rule has stood unchanged since 1993. Some vendors of e-discovery products say that it is easy to compile a log if only you buy their product. It is difficult to get reliable, dispassionate advice on e-discovery in general. It may be equally difficult if the focus is narrowed to privilege logs. "Looking hard may be a good thing, but it will be hard to do anything."

The perspective shifted a few degrees with the observation that it is a good idea to begin looking at these topics. But the "shifting sands" problem is always present. Evidence Rule 502 is at least well on the way to adoption by Congress. One impact may be that the resulting protection against inadvertent privilege waiver will increase the pressure to reply promptly to discovery requests, affecting the time to prepare a privilege log. Technology changes, whether in hard- or software, could change still further both practice and the problems of practice. There is no question that the time will come when it is important to look hard at all aspects of e-discovery. The first challenge will be to know when

APPENDIX
Excerpt from the 2008 Meeting Minutes

the time has come. It may be too soon now. Dissatisfactions are bound to arise now, but the need will be for a systematic inquiry. The "when" and "how" of the inquiry remain uncertain. It may be premature to designate a Subcommittee until the Committee has a good view of the landscape as a whole.

A Committee member agreed that the passage of time will be beneficial. The e-discovery rules have been good. Their intersection with things like privilege logs has had a material effect on the economics of law practice. Large firms now have "staff lawyers" or "contract lawyers" who work full time reviewing documents for privilege and responsiveness. The expense is substantial.

It is an unusual dynamic. Another Committee member noted that consulting firms are growing up. They offer services directly to general counsel, at a stated price per page. These consulting firms may take the place of staff lawyers or contract lawyers hired by law firms.

It was noted that the American College of Trial Lawyers is funding research into the actual cost of discovery. The project is just beginning, but it may provide information about the cost of privilege logs.

Thomas Willging noted that the Federal Judicial Center has "a pretty full workload," but might be able to assist a discovery project. The 1997 survey that supported earlier discovery amendments might provide a model.

MEMORANDUM

To: The Honorable Mark Kravitz
Chair, Advisory Committee on Civil Rules

From: Steve Gensler

Date: October 13, 2008

Re: Issues Regarding Assertion of Privilege and Work-Product Protection

Privileged information is not discoverable, even if relevant. Fed. R. Civ. P. 26(b)(1). The discovery rules also grant a rebuttable protection to material that qualifies for work-product protection under Rule 26(b)(3).

In 1993, Rule 26 was amended to add subdivision (b)(5). It requires parties withholding otherwise discoverable information on the basis of privilege or work-product to “expressly make the claim” and to describe the documents or information withheld in a manner that will allow others to scrutinize the claim (but without so much detail that the privilege or work-product protection is thereby waived by disclosure). Fed. R. Civ. P. 26(b)(5).¹

In the ensuing 15 years, several questions have arisen regarding compliance with Rule 26(b)(5), including:

- (1) What must be furnished in order to meet its requirements?;
- (2) When must that material be furnished?; and
- (3) What is the consequence of failing to timely furnish the required information?

Ultimately, it may be that only the second question would be profitably addressed by rule language. I provide background on all three below, however, in order to place the issues in context.

¹ In 2006, new subdivision (b)(5)(B) was added as part of the e-discovery package. It supplies a mechanism for parties to assert privilege or work-product protection *after* it has been produced. Fed. R. Civ. P. 26(b)(5)(B). This provision is not at issue here.

I. Background.

A. What Must Be Furnished to Meet the Requirements of Rule 26(b)(5)?

Rule 26(b)(5) requires the party claiming privilege or work-product protection to “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.”

It does not expressly require a privilege log. Partly this is because privilege and work-product protection can apply to non-document communications. For example, it would not make sense for a party asserting a privilege objection at a deposition or in an interrogatory answer to do so via a privilege log. Moreover, the Advisory Committee notes to the 1993 amendment suggest a desire for flexibility to accommodate the varied circumstances in which a privilege or work-product protection issue might arise. For example, the manner of asserting privilege might reasonably differ depending on whether a party was withholding an entire document or supplying a document with slight redactions.

Nonetheless, it has become customary for litigants and courts to expect that parties will supply privilege logs when they withhold documents or ESI due to a claim of privilege or work-product protection. The friction point tends to be the level of detail required. Courts universally reject “naked” or “boilerplate” objections that supply no detail whatsoever. And courts increasingly are criticizing the insufficiency of the details that are provided. *See, e.g., Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 263-267 (D. Md. 2008).

It is important to note that, ultimately, there are two separate questions concerning the specificity of privilege and work-product claims. The first is the level of detail required for the withholding party to make the claim. That is clearly addressed by Rule 26(b)(5). The second is the level of proof required to sustain the claim if it is challenged (and the parties cannot work it out) and presented to the court either by way of a motion for protective order or a motion to compel production. That issue is not, I think, addressed by Rule 26(b)(5), which requires enough detail to “enable *other parties* to assess the claim,” but which does not speak to the burden of sustaining the claim before a court.

B. When Must the Party Make the Claim of Privilege or Work-Product Protection and Furnish the Information Required by Rule 26(b)(5)?

Rule 26(b)(5) does not expressly state when the party claiming privilege or work-product protection must either: (1) make its claim; or (2) supply the required information.

Courts consistently hold that the claim must be made at the time for responding to the discovery request in question. First, courts generally view this as implicit in Rule 26(b)(5). Second, courts point to timing provisions in other discovery rules. Under Rule 33, for example, all objections to interrogatories must be “stated with specificity” in the response. Fed. R. Civ. P. 33(b)(4). Similarly, Rule 34 requires a party responding to a document request to either state that inspection will be permitted or to “state an objection, including the reasons.” Fed. R. Civ. P. 34(b)(2)(B). Courts generally read these provisions as collectively requiring parties to at least assert their claims of privilege or work-product protection at the time the discovery response is due.

The more complicated question is when the detailed information – generally, the privilege log – is due. Some courts have held that, absent a court order or party agreement, the privilege log is due when the discovery response is due. *See, e.g., Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP*, 2006 WL 1295409 at *1 (S.D. N.Y. 2006) (applying Local Civil Rule 26.2(c)²). Other courts hold that the withholding party may supply the detailed information within a reasonable time, thereby “perfecting” the claim of privilege. The Ninth Circuit is the only circuit to have addressed this issue. It adopts the “reasonable time” test but picks the discovery response due date as the default reasonable time. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); *see also Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 695 (M.D. Fla. 2005) (following Burlington Northern).

There are substantial practical issues here. In large document productions, it is probably impossible to produce a privilege log within the default 30-day response period. Moreover, it makes sense to allow parties to claim privilege initially – and get on with the production of the unobjected to materials – and then follow up with the supporting details later.

C. What Is the Consequence of Failing to Make or Perfect a Timely and Sufficient Claim of Privilege or Work-Product Protection?

Rule 26(b)(5) says nothing about the consequence of failing to make or perfect a timely and sufficient claim of privilege or work-product protection. The Advisory Committee notes to the 1993 amendment suggest that waiver might result, but do so in passing and without elaboration.

² Local Civil Rule 26.2(c) provides: “Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, [a privilege log] shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court.”

The specific discovery rules present a mixed bag. Rule 33 states that “[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.” Fed. R. Civ. P. 33(b)(4). In contrast, Rule 34 does not mention waiver.³

For the most part, the courts recognize waiver as a possible but not automatic consequence. Rather, the courts look at many factors to determine whether waiver is appropriate under the circumstances, including how much detail was provided in a timely fashion and whether the document production was particularly difficult in its magnitude or otherwise. *See Burlington Northern & Santa Fe Railway Co. v. U.S. District Court for the District of Montana*, 408 F.3d 1142, 1147-49 (9th Cir. 2005); *First Savings Bank, F.S.B. v. First Bank System, Inc.*, 902 F. Supp. 1356, 1360-65 (D. Kan. 1995) (extensive discussion of waiver factors).

D. Subpoenas.

Rule 45(d)(2) is parallel to Rule 26(b)(5). It contains its own timing provisions which, unfortunately, have caused confusion in the courts.

Under Rule 45(c)(2)(B), a party may respond to a subpoena duces tecum with objections. The objections must be served within 14 days. Rule 45 does not expressly address whether a privilege log must be filed within that 14-day period. One district court has held that the privilege log may be provided within a reasonable period but has selected the 14-day deadline is the default deadline for what is reasonable. *See Universal City Development Partners, Ltd. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 698 (M.D. Fla. 2005)

The situation is further complicated by a possible ambiguity in Rule 45. Under Rule 45(c)(3), a party may move to quash a subpoena. The motion to quash must be filed before the time to comply with the subpoena. Oftentimes, the return date on the subpoena is longer than 14 days. Many courts hold that the failure to make objections within 14 days waives the ability to rely on those objections in a motion to quash. Other courts hold that a party may either object under Rule 45(c)(2)(B) or move to quash under Rule 45(c)(3). The research I have done so far has not identified any cases discussing when a party who moves to quash on the basis of privilege or work-product protection must supply a privilege log.

II. Topics for Consideration.

Neither the level of detail required nor waiver seem to be good candidates for new rules. Given the myriad contexts in which claims of privilege and work-product protection arise, it is unlikely that a new rule could express in general language any meaningful guidance about what details are required for any particular claim. Waiver

³ Rule 32 provides that “correctable” errors in deposition questions are waived if not made at that time. Fed. R. Civ. P. 32(d)(3)(B).

also seems to be a topic that will defy general expression, and it is a topic further complicated by questions of rulemaking authority.

New rule language clarifying when the details supporting a claim of privilege must be provided seems more promising, at least at this stage of the inquiry. The existing rules do seem to be delinquent in not supplying a coordinated answer to the timing question. In particular, it would seem helpful for Rule 26(b)(5) and Rule 34 to provide a clear signal to parties about when to furnish the detailed information justifying their claims of privilege. The need for clear guidance is highlighted by the possibility of waiver should the court later conclude that the claim was not sufficiently justified in a timely fashion.

Whether we can identify rule language that would improve upon what the courts have been doing is perhaps a different question. While there might be any number of possible ways to clarify the due date, I will mention two here.

One option would be to require that the privilege log be supplied within the time required to respond to the discovery request absent a court order or party agreement. This approach would assume that, in most cases, the preparation of the privilege log is not so difficult that it cannot be provided with the discovery response. And in those cases where it is impractical to do so, the party will know that it needs to either work out the due date with the opposing party or obtain a court order setting a later due date. This appears to be the approach adopted by the Local Civil Rules of the Southern District of New York.

Another option would be to expressly allow the privilege log to be supplied within a reasonable time of the production. Courts and parties would then be left to determine what was reasonable under the circumstances of each case.

In any event, articulating a clear deadline for submitting privilege logs or their equivalent would not intrude into the waiver arena. Courts would remain free to determine whether the failure to meet the deadline warrants a finding of waiver under the circumstances.

If we were to propose a new rule setting a deadline applicable to claims under Rule 26(b)(5), it would make sense to propose a parallel change to Rule 45.

MEMORANDUM

To: Steve Gensler
CC: Mark Kravitz, Ed Cooper
From: Rick Marcus
Date: Oct. 11, 2008
Re: Rule 26(b)(5)(A)

This memo addresses the ideas you raise in your draft memo for the Advisory Committee. I thought it would be worthwhile to write down my reactions should we move forward -- educated by a discussion with the Advisory Committee -- on how (and whether) this rule might be revised. And I thought you might find them of interest.

Your message prompted me to go back and re-read § 2016.1 of vol. 8 of Fed. Prac. & Pro., which I originally wrote more than 15 years ago before Rule 26(b)(5)(A) went into effect. It actually reads fairly well, and foresees some of the issues to be resolved. I guess the question now is whether, with 15 years experience, it's come time to resolve those issues by rule in light of diverse judicial responses. At least the Ninth Circuit regards those rulings as quite diverse:

A survey of district court discovery rulings reveals a very mixed bag, running the gamut from a permissive approach where Rule 26(b)(5) is construed liberally and blanket objections are accepted, to a strict approach where waiver results from failure to meet the requirements of a more demanding construction of Rule 26(b)(5) within Rule 34's 30-day limit. In general, a strict per se waiver rule and a permissive toleration of boilerplate assertions of privilege both represent minority ends of the spectrum.

Burlington Northern Ry. Co. v. U.S. District Court, 408 F.3d 1142, 1148 (9th Cir. 2005), cert. denied, 126 S.Ct. 428.

Since 1993, it appears about 100 reported cases have dealt with the rule, but the number of unreported cases is probably larger. You mention that criticisms of the lack of specifics in the rule have increased, but it seems to me that Judge Grimm's citations in the *Victor Stanley* case include quite a few that predate the rule. Maybe this is just a longstanding problem.

To my mind, the background for this discussion includes a number of things, and I'll mention several of them. The starting point for the rulemaking response to this problem was the 1991 amendment of Rule 45, which produced a requirement that was then added to Rule 26(b) in 1993. Before that, "boilerplate" privilege objections would be all that would normally be provided about what was held back on grounds of privilege. It might be worthwhile to ask whether anyone on the Advisory Committee thinks going back to that regime would be desirable. If not, it is important to keep in mind why the current regime is preferable. For some background, see Cochran, *Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims*, 13 Rev. Litig. 219 (1994).

My recollection is that during the April meeting we heard some remarkable estimates of the cost of preparing a privilege log -- \$1 million in cases of the dimensions some of our lawyer members handle. I wonder how much of that cost is due to the provisions of Rule 26(b)(5)(A). I recall a number of discussions of privilege waiver a decade and more ago during which some lawyer members would decry the idea of a "quick peek" whether or not that would work a waiver because "I'm not going to let the other side look at anything until I look at it, and I'm not going to let the other side look at anything I have a legal right to withhold."

Those discussions from long ago cause me to wonder whether the advent of Rule 26(b)(5)(A) really changed things so much. It could be that, without the rule, producing parties had to spend a lot of time and money reviewing the documents for responsiveness and privilege and culling the privileged ones before production. I imagine they had to do something to keep track of what they held back in case the matter came up later, and (presumably) keep track of why they believed these things were privileged. That sounds a lot like what is necessary to produce a privilege log. For a description of such a review in one case from the 1970s, see *Transamerica Computer Co. v. International Bus. Mach. Corp.*, 573 F.3d 646, 649 (9th Cir. 1978).

After all that work was done, I'm not sure how much more work would have been necessary to prepare a privilege log, and it is quite unclear to me how that work could add up to \$1 million in costs. I suspect that the estimates we heard about included activities parties felt they had to do before 1993.

But before 1993, it is probably true that challenges to privilege claims were less frequent. Rule 26(b)(5)(A) makes it a lot clearer what has been held back than was true before. And I suspect that obtaining the kind of information Rule 26(b)(5)(A) requires be disclosed through formal discovery was very difficult. So it was probably easier back then to make unjustified claims for privilege and withhold more. It would be interesting (but not possible) to know whether the opaqueness of discovery then regarding what was held back on grounds of privilege led to a larger number of unjustified assertions of privilege. It does seem clear that the rulemakers then regarded the existing practice as inadequate.

It may be that in the E-Discovery age document review has become so much more costly to do everything that the previous attitude that "I won't let the other side see something until I've looked at it" has passed from the scene. But if that's so, it would seem to me that, given the passage of Fed. R. Evid. 502, the possibility of "sneak peek" agreements could reduce that cost a lot by permitting the producing party to limit its attention to the things the other side says it really wants. Maybe the digital age has made the "sneak peek" irrelevant because there isn't a "peek" -- you just provide CDs with all the stuff to the other side. Otherwise, I would think one value of the sneak peek would be to reduce privilege review costs.

In any event, I would think that the digital age also could conceivably reduce some costs of complying with Rule 26(b)(5)(A). Indeed, I have attended E-Discovery events where vendors claim to have programs that can reliably identify privileged materials. I would think that relatively expeditious methods could be developed to produce some log-like listing for those identified materials, seemingly minimizing the costs of complying with Rule 26(b)(5)(A).

The privilege log idea was borrowed from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, where it was developed to require agencies responding to FOIA requests to reveal what they had not turned over on claims that they could withhold that material. I wonder whether that FOIA requirement has remained viable in that context as we arrived at the digital age.

So it seems to me there is a lot to ponder here, and also that the variety of situations in which privilege logs are prepared makes designing a rule that provides a lot of direction quite difficult. With that background, a few more specific reactions:

(1) What must be furnished: The rule is, of course, quite delphic. It requires that the “nature” of the material be described “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” The 1993 Committee Note acknowledged that “[t]he rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection.” It also notes that the wisdom of requiring specifics about each item depends on how much material is involved.

As you note, there are two issues -- the level of detail needed in the log, and the level of proof to back up the claim if challenged. It seems to me that we hope that the first issue is the only one that need be considered for most withheld material; ordinarily the other side should simply back off because the propriety of the privilege claim is clear enough. That's in a way consistent with our inclusion of Rule 26(b)(5)(B), which says that a privilege claim made after production requires all parties to return or quarantine the material unless they challenge the claim. Again, the hope is that there usually won't be a challenge, and that this will be the end of the matter.

The second issue is probably not within our Committee's jurisdiction so far as claims of privilege are concerned. Dealing with the question how to evaluate a crime/fraud challenge to the attorney-client privilege, the Court in *United States v. Zolin*, 491 U.S. 554 (1989), invoked Fed. R. Evid. 501 and “the developing federal common law of evidentiary privileges.” *Id.* at 574. Perhaps our rulemaking on this topic would be appropriate as a regulation of discovery rather than privilege, but it seems initially to me that this argument is probably weaker on this question (the degree of proof needed) than on the inadvertent waiver issues new Rule 502 addresses.

Putting that aside, I think that some flexibility or slippage is probably not a bad thing here. Compared to what was true before 1993, the privilege log seems a step forward even if sometimes too general. Insisting that it be very detailed in all cases would probably drive up the costs I discussed above, but not be useful if it's true most assertions are not challenged right now. And however we tighten up the required showing, I doubt we could cut off the possibility that a court called upon to make a determination when there is a challenge to a privilege claim would not ask for more. In camera review can be a big burden for a court, and it is probably going to lean on the party whose objections have made that task necessary to provide all the help it can.

So I suspect that the most we can do is what we have done -- to call for enough information to “enable other parties to assess the claim.” Once the parties do that and push forward, I think our Committee may well be out of the ball game in terms of devising rules for handling the privilege claim itself.

(2) Timing for providing the log: On one level, you could argue that the rule does include a timing provision, because it says specifics must be provided “[w]hen a party withholds information” on grounds of privilege. That's probably fairly easy with depositions and interrogatories. In a deposition, that happens when the question is objected to and the witness's lawyer (as still permitted by Rule 30) instructs the witness not to answer. Until 1993 (i.e., back in the old days when I was a lawyer), that was followed by a number of questions from the lawyer taking the deposition to probe the assertion of privilege. Perhaps that has changed, and nowadays in depositions the witness's lawyer not only instructs the witness not to answer but also proceeds and volunteers the information that backs up the privilege claim. If so, I wouldn't be surprised if the other side nevertheless asks the witness about these things anyway. With the interrogatory response, the time to say what you are not revealing is presumably when you provide the answer.

With Rule 34 requests, however, things are a good deal more complicated. It seems to me that parties may often provide their Rule 34(b)(2) response a considerable time before they provide the actual documents. With electronically stored information, indeed, our recent amendments require that sequence, because they say that the responding party must declare what form it intends to use for electronically stored information before producing the information. The idea is to permit the other side to object and go to the court before actual production. I suspect that it is often true that the Rule 34(b) response comes in a long time before the actual production occurs. One reason for this time lag is that during that time lag the actual review of documents for responsiveness and privilege occurs. Taking the \$1 million figure for preparation of a privilege log that we have heard, I can't see how that kind of cost could be generated within the 30 days now allowed for the Rule 34(b) request. (Maybe that shows I'm out of touch with today's billing rates.)

So my suspicion is that, for a significant number of cases, the Rule 34(b) response comes in well before the actual production. Indeed (besides the question of form for electronically stored information), there may be a considerable advantage in getting any global disputes about what will be produced that can be resolved on the basis of the Rule 34(b) response out of the way before the document gathering is commenced or fully done. If that's right, a rule saying the log has to be done at the same time is probably not a good idea.

The alternative of saying the log should be provided a reasonable time after the Rule 34(b) response is probably much better, but I'm not sure how much that adds to where the courts probably are now. In some cases, a reasonable time may be no time. If only 100 pages of material are involved, why should it take long to pull the three privileged documents and to provide the specifics about them that Rule 26(b)(5)(A) requires? With a terabyte of electronically stored information, things are obviously different. So I approach this topic with diffidence.

(3) Consequences of noncompliance: My thinking is that Rule 37 is the place to look for consequences of noncompliance, and that in general Rule 37(b) should be the resource. My take back in 1993 was that some cases seemed too harsh even then in finding waivers due to failure to provide a log. On one level, those most sensitive to the limitations of 28 U.S.C. § 2074(b) could say that the addition of 26(b)(5)(A) in 1993 raised issues of rulemaking power because they added a requirement that could, if disobeyed, lead to loss of privilege protection. I don't think anyone has gone that far, and suspect that whatever we might do now would not magnify the risk of waiver. So the rulemaking power issue seems to me a bit tangential.

But that does not explain what we could offer that would improve on the multifactor attitudes seemingly displayed by cases under the current rule. Unless the responding party was really flaunting its obligations, I suspect that courts usually say the main consequence of failure initially to satisfy the log requirements is to supplement the log with the needed information. And that strikes me as a reasonable response.

(4) Subpoenas: Whatever the arguments for an understanding attitude toward responding parties with regard to timing and contents of a privilege log, and the consequences of failure to do things right, it seems to me that we should be more accommodating toward those nonparties served with subpoenas.

Maybe a starting point here would be to ask whether the addition of a log requirement to Rule 45 in 1991 was a mistake. Probably the answer is that nonparties are, if anything, more likely to make overbroad claims of privilege, and that the log requirement is therefore important.

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Excerpt from November 2008 Minutes

Discovery Privilege Logs

At the April meeting Professor Gensler observed that the cases show confusion about several aspects of privilege log practice, and suggested that the Committee might want to explore the possible opportunities to address one or more troubling issues. The practicing lawyers agreed that problems do arise, but were uncertain whether there is much opportunity to provide solutions by rule provisions.

Professor Gensler volunteered to explore the matter and report to the Committee. Judge Kravitz thanked him for providing a terrific memorandum to launch the topic. Professor Gensler began by noting that "anxiety and frustration are out there," anxiety arising from uncertainty about the mechanics of complying with Rule 26(b)(5)(A) requirements and frustration at the expense. Most of the expense seems to arise from screening documents for privilege, work product, and other grounds for protection. It is not clear that rules changes can address this problem, although new Evidence Rule 502 may reduce fears about inadvertent privilege waiver.

The questions of mechanics begin with the need to say what is being withheld from discovery and why. At first blush, these questions of how to comply appear to begin with the seeming gap in the failure of Rule 26(b)(5)(A) even to refer to a privilege log. But it seems clear that the manner of asserting privilege will depend on the mode of discovery. Assertions of privilege at deposition will be made on the spot. With Rule 34 requests, responses will vary with the circumstances. Withholding a single document is quite different from withholding many documents; producing part of a document in redacted form is different from withholding the entire document. There does not seem to be much room to improve on the directions now provided by the rule.

The question of timing is less certain. It seems clear that the claim of privilege must be made when responding to the discovery request. It is not as clear when the elements required by Rule 26(b)(5)(A) must be provided. This uncertainty seems to arise most persistently with document production. The possible choices include insistence that the required information be provided at the time of responding to the document request; or that it be provided at the time of producing; or that it be provided within a reasonable time from the response or from the production.

The consequences of failing to comply properly or timely in making the assertion or providing the log also are uncertain. The

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1993 Committee Note refers to Rule 37(b)(2) sanctions, and adds that withholding materials without the required notice "may be viewed as a waiver of the privilege or protection." In practice, courts seem to take a flexible approach. The case law tends to say that waiver is possible, but courts consider many factors. The usual result is a stern direction to comply, but waiver may be found. Here too it is unclear whether any rule revisions would provide for anything different than courts are doing now.

That leaves the possibility of amending the rule to provide clear directions as to timing. The most likely approach would be to establish a clear provision subject to alteration by agreement of the parties or court order. Similar provisions could be added to Rule 45, subject to the complication that Rule 45 remains obscure on the opportunity to present a belated - untimely - objection in the guise of a motion to quash.

Discussion began with the observation that the District of Connecticut has a local rule addressing the timing requirements. There do not seem to be any problems.

A practitioner noted that in the last couple of years clients have started to "push back hard" on the costs of screening documents. Some clients take the chore inside. It may be divided up among contract attorneys rather than firm associates, or farmed out to independent screening firms. Vendors have become insistent that electronic screening software can do the job at much lower cost- the software may have developed to a point about equal to screening by a first-year associate. The cost of screening is being reduced. As for privilege logs themselves, the rule itself seems OK. The parties often reach informal agreements. "You want it before the depositions. Usually it is the last thing produced before depositions." One reason for delay is that documents that on their face seem privileged may be unprotected because they have been circulated outside the privilege circle. It may be that nonparties deserve greater consideration and protection than parties, but it would be better to put off consideration for a year.

Another practitioner also noted that there are software programs for identifying privileged documents. At least one in-house lawyer for a client believes that software can screen at least as well as people. Screening takes as much time for a lawyer as it does for a judge, and the task is expanded across far more documents than will be logged or disputed after being logged. In most big document cases it is possible to work out serial production of documents and serial production of privilege logs. The great fear driving the huge amounts of time is subject-matter waiver. As massive volumes of documents come to be involved,

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correspondingly enormous amounts of time have been required. And it could be even worse – Georgia state-court rules, for example, require an affidavit to support every claim of privilege. All of this can engender boilerplate objections to the log, then review by a special master or magistrate judge, further review by a district judge, and then collateral-order appeals. But there is not a big body of law on abuse of privilege claims.

It was suggested that one reason to keep this topic on the agenda is to see what consequences flow from new Evidence Rule 502. Lawyers are beginning to craft Rule 502 agreements to protect discovery responses.

It was recalled that in the 1980s there was a move to expedite the process by agreeing to a “quick peek” at less sensitive documents without waiver. The next step would be a no-waiver quick peek at sensitive documents, but on an “eyes only” basis. “That got slapped down.” Perhaps that can be revived.

Review by outside vendors was noted again. They can do a first review of documents identified by a software program. “They will give you a price per page.” But there are reasons to be reluctant. “I cannot imagine relying on a vendor for the final review.” A judge noted that he had recently had a hearing in a case in which the software screening failed miserably – it failed to identify a thousand privileged documents.

Another judge noted that party agreements work in big, sophisticated cases. But it would be useful to have rule guidance for smaller scale, less sophisticated litigation.

Still another judge observed that the problems that arise are not those of timing but of failure to produce a log at all. Yet another judge said that he does not encounter log problems.

An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. “People work it out.” The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents. Consider a case that claims an ongoing conspiracy: is counsel obliged to create a log for every letter written to the client while the litigation carries on?

A lawyer member suggested that the only default time that would not be unreasonably early would be “within a reasonable time.”

Occasional references to Rule 33 interrogatory answers were picked up at the close of the discussion. Those who spoke agreed

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that privilege logs are not used for interrogatory answers –the answers simply provide nonprivileged information.

The discussion concluded by agreeing that the Rule 45 privilege log questions would be among those considered by the Rule 45 working group, and that the remaining questions would be carried forward on the agenda.

TAB 18

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4567 **RULE 45: NATIONWIDE SUBPOENA SERVICE STATUTES**

4568 *Suggestion 20-CV-H*

4569 This suggestion focuses on the interaction of the 2013
4570 amendments to Rule 45 and the provision of the False Claims Act
4571 (FCA), 31 U.S.C. § 3731(a), that: "A subpoena requiring the
4572 attendance of a witness at trial or hearing conducted under section
4573 3730 of this title may be served at any place in the United
4574 States."

4575 Rule 45 was amended in a number of ways effective December 1,
4576 2013, as described in more detail below. This submission urges that
4577 it inadvertently undercut § 3731(a) and some other statutes. On its
4578 face, this seems curious because, as amended in 2013, Rule 45(b)(1)
4579 provides that "A subpoena may be served at any place within the
4580 United States." So it seems to say the same thing as the FCA. But
4581 it may have worked a change, though the evidence of that is
4582 limited.

4583 *The 2013 Amendments*

4584 The Advisory Committee undertook a long and careful review of
4585 Rule 45 under the leadership of Judge David Campbell, who described
4586 the existing rule as a "three ring circus" that was difficult to
4587 use. To serve a subpoena, one had to have it issued by the district
4588 court in the district where it would be served, and to have it
4589 served in that district. With witnesses who did not move around
4590 much, that might not present too much difficulty, but if the party
4591 seeking to serve the subpoena did not know for sure where to locate
4592 the witness, that could present difficulties in getting a subpoena
4593 from the right district and getting it served in that district.

4594 In addition, there were multiple provisions, strewn throughout
4595 the rule, on where compliance could be required. So that could
4596 complicate the challenge for the attorney serving the subpoena, who
4597 not only had to get a subpoena from the correct district court and
4598 have it served within the district, but also make sure that the
4599 place of compliance conformed to Rule 45's provisions. At least one
4600 of those required checking state law for the state in which the
4601 federal court sat, for if the state courts of that state could
4602 require state-wide compliance, then so could a federal court
4603 subpoena, even if the other provisions of Rule 45 did not so
4604 authorize.

4605 To uncomplicate Rule 45, the amendments changed the rule's
4606 requirements to remove the need to get a subpoena issued from the
4607 district where it was to be served, and instead the forum court
4608 could issue a subpoena which, under Rule 45(b)(1), can now be
4609 served anywhere in the United States. The various place-of-
4610 compliance provisions were relocated to present Rule 45(c)(1),
4611 which provides:

4612 A subpoena may command a person to attend a trial, hearing, or
4613 deposition only as follows:

4614 (A) within 100 miles of where the person resides, is
4615 employed, or regularly transacts business in
4616 person; or

4617 (B) within the state where the person resides, is
4618 employed, or regularly transacts business in
4619 person, if the person

4620 (i) is a party or a party's officer; or

4621 (ii) is commanded to attend a trial and would not
4622 incur substantial expense.

4623 Thus, under current Rule 45(c)(1)(B) the former need to consult
4624 state law no longer applies.

4625 Regarding place of compliance, the amendments did resolve a
4626 conflict among the courts about whether a subpoena could compel the
4627 attendance at trial of a party witness not within the geographic
4628 limits prescribed by the rule. As explained in the committee note:

4629 Because Rule 45(c) directs that compliance may be
4630 commanded only as it provides, these amendments resolve
4631 a split in interpreting Rule 45's provisions for
4632 subpoenaing parties and party officers. *Compare In re*
4633 *Vioxx Products Litigation*, 438 F. Supp.2d 664 (E.D. La.
4634 2006) (finding authority to compel a party officer from
4635 New Jersey to testify at trial in New Orleans), with
4636 *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D.
4637 La. 2008) (holding that Rule 45 did not require
4638 attendance of plaintiffs at trial in New Orleans when
4639 they would have to travel more than 100 miles from
4640 outside the state). Rule 45(c)(1)(A) does not authorize
4641 a subpoena for trial to require a party or party officer
4642 to travel more than 100 miles unless the party or party
4643 officer resides, is employed, or regularly transacts
4644 business in person in the state.

4645 As noted below, one of the pre-amendment cases cited in the
4646 submission appears to address the idea adopted in the *Vioxx* case
4647 that an employee of a corporation can be compelled to attend a
4648 distant trial by a subpoena served on the employer. But that court
4649 did not embrace the idea.

4650 Before amendment in 2013, Rule 45(b)(2)(D) authorized *service*
4651 "at any place . . . that the court authorizes on motion and for
4652 good cause, if a federal statute so provides." Since Rule 45(b)(2)
4653 now says that "[a] subpoena may be served at any place within the
4654 United States," that reference to federal statutory authority was
4655 not carried forward.

4656 The 2013 Rule 45 amendments did quite a few other things,
4657 including introducing the possibility under Rule 45(f) of a
4658 transfer of a subpoena-related motion from the district in which
4659 compliance was required consistent with Rule 45(c) to the forum
4660 court. That provision and several other provisions attracted
4661 considerable commentary, including written comments from:

4662 The Department of Justice
4663 The American College of Trial Lawyers, Federal Civil Procedure
4664 Committee
4665 36 "leadership" representatives of the ABA Section of
4666 Litigation
4667 The Federal Magistrate Judges' Association
4668 The State Bar of Michigan, U.S. Courts Committee
4669 The New York State Bar Ass'n Commercial and Federal Litigation
4670 Section
4671 The U.S. Equal Employment Opportunity Commission
4672 The State Bar of California Committee on Federal Courts
4673 The Litigation Section of the Los Angeles County Bar Ass'n
4674 The Defense Research Institute
4675 The Lawyers for Civil Justice

4676 No comment raised a concern about the effect of the amendments
4677 on statutory provisions for nationwide compliance with subpoenas in
4678 FCA cases.

4679 The current submission seeks to restore the provisions of
4680 former Rule 45(b)(2)(D) by adding a new (c) to Rule 45(c)(1) as
4681 follows:

4682 (c) at any other place that the court authorizes on
4683 motion and for good cause, if a federal statute so
4684 provides.

4685 *FCA Subpoena Background*

4686 On April 6, 1978, Assistant Attorney General Patricia Wald
4687 wrote to the Speaker of the House, transmitting a proposed bill
4688 that she said would solve a serious problem for the Government
4689 because: "Under Rule 45(e)(1) [of the pre-2013 rule] the power of
4690 the district courts to issue trial subpoenas is limited to the
4691 confines of the district." She offered examples, including
4692 fraudulent claims for FHA mortgage insurance claims in Detroit.
4693 Under the FCA, proceedings would have to be brought where the
4694 defendants are "found." That presented the Department with
4695 problems:

4696 Many of those brokers and salesmen [involved in the
4697 fraudulent transactions] have moved to California, or
4698 other jurisdictions far removed from the Eastern District
4699 of Michigan. Because of the 100-mile limitation on
4700 effective service under Rule 45(e)(1), Federal Rules of
4701 Civil Procedure, we are unable to subpoena essential
4702 witnesses from Detroit.

4703 Congress passed the proposed bill, and the provision has been
4704 relocated to § 3731(a), quoted above.

4705 *Case Law*

4706 There are not a lot of cases on whether the 2013 amendment
4707 caused a problem, but the submission says that the amendment has
4708 caused a conflict in the case law and that "the conflict has also
4709 caused confusion among current U.S. Attorneys practicing in the
4710 Civil Division." As noted below, a report back from DOJ might be a
4711 good way to gauge the importance of this issue, which DOJ did not
4712 point up in 2011-12.

4713 What seems to be the most thoughtful and leading case is *U.S.*
4714 *v. Wyeth*, 2015 WL 8024407 (D. Mass. Dec. 4, 2015), in which the
4715 court in an FCA case held that the statutory mandate for nationwide
4716 compliance applied despite the 2013 amendments to Rule 45. The
4717 court noted some other statutes that might present similar issues:
4718 15 U.S.C. § 23 (antitrust suits); 38 U.S.C. § 1984(c) (disputes
4719 involving veterans' insurance); 18 U.S.C. § 1965(c) (RICO). It also
4720 noted some competing case law authority that is discussed below in
4721 the memorandum. Here is the court's reasoning:

4722 For each of these parallel statutes, not only service but
4723 also nationwide enforcement of subpoenas is generally
4724 understood to be authorized. This is so even though they
4725 speak only of "service" or "issuing" of a subpoena. While
4726 it can be dangerous to assume that language in one part
4727 of the United States Code has the same effect in every
4728 statute, it is clear that language like that of § 3731(a)
4729 not only can authorize both nationwide service and
4730 nationwide enforcement of a subpoena, but usually does.
4731 These parallel provisions show that the text of §
4732 3731(a), although it refers only to service of the
4733 subpoena, does not compel the interpretation advanced in
4734 *Siemens* [discussed below]; rather, the kind of language
4735 used in § 3731(a) generally allows nationwide service and
4736 enforcement of subpoenas.

4737 On this textual basis alone, I would be likely to find,
4738 with the great majority of courts, that the False Claims
4739 Act allows a court to compel testimony from witnesses
4740 from anywhere in the United States. Any remaining
4741 ambiguity is resolved by the legislative history of §
4742 3731(a). The legislative history of § 3731(a) supports
4743 the holdings of the majority of district courts that
4744 enforcement of a False Claims Act subpoena is not subject
4745 to the geographical limitation now found in Fed. R. Civ.
4746 P. 45[(c)]. Section 3731(a) was added to the False Claims
4747 Act in 1978, under the title "An Act to provide for
4748 nationwide service of subpoenas in all suits involving
4749 the False Claims Act." The House Committee report makes
4750 clear that the purpose of this legislation, which came at
4751 the recommendation of the Department of Justice, was to

4752 facilitate the prosecution of False Claims Act cases by
4753 ensuring that witnesses from across the country could be
4754 brought into court by subpoenas. The same report
4755 emphasized that the language of § 3731(a) was modeled
4756 after Federal Rule of Criminal Procedure 17(e), which
4757 grants a nationwide subpoena power in criminal matters.
4758 The clear intent and effect of § 3731(a) is to authorize
4759 courts to compel witness testimony nationwide.

4760 *Id.* at *3-4.

4761 Certainly the Supersession Clause would theoretically permit
4762 the 2013 Rule 45 amendment to supersede this statutory provision,
4763 but equally surely that was not intended, and Congress was not told
4764 that any supersession was in train.

4765 The possibly contrary cases cited in the submission do not
4766 seem strongly to undermine this analysis. The one cited in the
4767 quotation above is from 2009, before the 2013 amendment to Rule 45
4768 went into effect. In *U.S. v. Siemens AG*, 2009 WL 1657429 (D.V.I.
4769 June 12, 2009), defendant in a False Claims Act suit brought in the
4770 Virgin Islands moved to transfer to the Eastern District of
4771 Pennsylvania. In the course of granting the motion to transfer (not
4772 directly ruling on whether to require attendance at trial under the
4773 statute), the court dealt with the question whether witnesses
4774 located in the E.D. Pa. (where defendant's headquarters were
4775 located) could be compelled by subpoena to show up for trial in the
4776 Virgin Islands. Disagreeing with an E.D. Pa. decision, the court
4777 said that under Rule 45 "mere service of a trial or deposition
4778 subpoena does not confer the right to enforce such subpoena." This
4779 decision does not address the statutory argument made in the *Wyeth*
4780 case quoted above, and if the *Siemens* court's argument was right in
4781 2009 the 2013 amendment did not change things. Indeed, Rule 45 said
4782 in 2009 what the submission recommends that it be amended to say
4783 again.

4784 The other case is *Guenther v. Novartis Pharmaceutical Corp.*,
4785 297 F.R.D. 659 (M.D. Fla., Aug. 16, 2013), also a pre-amendment
4786 case (the amendment became effective on Dec. 1, 2013). In that
4787 False Claims Act case, plaintiffs served subpoenas for trial
4788 testimony by two Novartis employees who resided and worked in New
4789 Jersey. They served Novartis's registered agent in Florida, not the
4790 employees in New Jersey (though after the 2013 amendment came into
4791 effect they could have served a subpoena from the Florida court in
4792 New Jersey under current Rule 45(b)(1)). Plaintiffs claimed that
4793 these two employees were officers of the company, which Novartis
4794 denied. It seems that the plaintiffs were urging an interpretation
4795 of Rule 45 like the one adopted in the *Vioxx* decision cited by the
4796 2013 committee note quoted above, which the amendment rejected.
4797 Also rejecting that view of Rule 45, the court held that service of
4798 a subpoena on the company's registered agent in Florida did not
4799 require attendance at trial of two of the company's employees (or
4800 officers) who lived and worked in New Jersey. Instead, the then-
4801 existing 100 mile limit applied. There is no citation to § 3731(a)

4802 in the decision, or any indication that the private plaintiffs
4803 invoked it as a statutory source of authority to subpoena the New
4804 Jersey witnesses for trial in Florida. Had they been relying on the
4805 statute, which already authorized nationwide service of subpoenas,
4806 plaintiffs would presumably have served the employees in New
4807 Jersey.

4808

A Way Forward

4809 It is uncertain whether the current state of the law has
4810 caused confusion among Assistant U.S. Attorneys. It is clear that
4811 DOJ did not emphasize any such concern in its comments on the 2013
4812 Rule 45 amendments. But if this change has indeed caused a problem
4813 in FCA cases or in cases governed by statutes with similar
4814 provisions, serious consideration of an amendment along the lines
4815 proposed is in order. For the present, however, the question is
4816 whether there is a real problem.



May 22, 2020

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

Re: Proposed Amendment to Rule 45(c)(1) Regarding Subpoenas

Dear Mrs. Womeldorf:

We write to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 45(c)(1) regarding compliance with subpoenas.

Rule 45 governs the federal practice of issuing and responding to subpoenas. Specifically, Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. *See* Fed. R. Civ. P. 45(c)(1). We propose an amendment to reconcile a discrepancy that has arisen since Rule 45 was last amended in 2013. The 2013 Amendment was intended to “collect[] the various provisions on where compliance can be required and simplif[y] them.” Fed. R. Civ. P. 45 Committee Note. Instead, the 2013 Amendment has led to confusion among federal courts with respect to compliance with nationwide subpoenas as authorized by specific federal statutes, such as the False Claims Act (“FCA”). The amendment proposed herein harmonizes federal statutes with the amended text of Rule 45(c)(1) by re-instituting language from the former Rule 45(b)(2)(D) that existed prior to 2013.

DISCUSSION

I. Proposed Amendment to Rule 45(c)(1)

We respectfully submit the following proposed amendment to Rule 45(c)(1) for the Committee’s consideration¹:

¹ We defer to the Committee to decide the optimal stylistic placement of our proposed amendment, either as a new provision inserted as Rule 45(c)(1)(B) or added to the end as Rule 45(c)(1)(C) as shown.

Rule 45. Subpoena

* * *

(c) Place of Compliance

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense; or

(C) at any other place that the court authorizes on motion and for good cause, if a federal statute so provides.

Currently Rule 45(c)(1) establishes that a subpoena may only compel a person to attend a hearing, trial, or a deposition within 100 miles of the location where the subpoenaed person resides, is employed, or regularly transacts business in person. This rule is in conflict with federal statutes that authorize nationwide subpoena compliance—in other words, the authority of a federal court to compel witnesses anywhere in the United States to testify before it.

A simple amendment to Rule 45 would resolve this conflict. We propose amending Rule 45(c)(1) to allow nationwide subpoena compliance as long as 1) authorized by federal statute and 2) good cause exists. Such an amendment would be minimally invasive and return the statute to its original effect prior to the 2013 Amendment. It would also resolve the current disagreement among courts in regards to the proper interaction between federal statutes authorizing nationwide subpoena compliance and Rule 45(c)(1) in its current form. *Compare Guenther v. Novartis Pharm. Corp.*, 297 F.R.D. 659, 660 (M.D. Fla. 2013) (prohibiting enforcement of nationwide subpoenas) *with United States v. Wyeth*, 2015 WL 8024407, at *3 (D. Mass. Dec. 4, 2015) (allowing enforcement of a nationwide subpoena under the FCA).

II. The 2013 Amendment—Intended to Simplify Rule 45—Also Substantively Changed It

The 2013 Amendment to Rule 45—although intended as a stylistic change to simplify and clarify subpoena power²—caused an unintended, substantive change to subpoena compliance.

The purpose of the 2013 Amendment was to simplify Rule 45, as established in the Committee Note published alongside the rule. *See* Fed. R. Civ. P. 45 Committee Note (“The goal of the present

² *See, e.g.,* Michael P. Daly & David A. Solomon, *Recent Amendments Offer Treats to Those Tired of Rule 45's Tricks*, Faegre Drinker (Oct. 31, 2013) (“Attorneys wishing to serve a federal subpoena have historically had to navigate a complex web of rules regarding issuance, service and compliance that were either confusing or amusing, depending on one’s point of view.”); Charles S. Fax, *Taking the Fun Out of Rule 45*, ABA (Sept. 8, 2012) (“Rule 45(c)(1) clarifies that a trial subpoena, deposition subpoena, and documents-only subpoena are returnable only within the state or within 100 miles of where the witness lives, works, or regularly does business, even if the witness is a party or a party’s officer, or, in the case of a trial subpoena, elsewhere if such witness would not incur “substantial expense.”).

amendments is to clarify and simplify the rule.”). The Committee explicitly identified where specific, substantive changes were made to the rule. *See id.* (“Rule 45(a)(4) is added to highlight and slightly modify a notice requirement[.]”). Otherwise, the majority of changes were meant to be stylistic. In particular, the Committee noted that Rule 45(c) was created to “collect[] various provisions on where compliance can be required and simplif[y] them.” *Id.* Therefore, the purpose of creating Rule 45(c) was to collect in a new subdivision the previously scattered provisions regarding place of compliance. These changes resolved a conflict that arose after the 1991 Amendment about a court’s authority to compel a party or party officer to travel long distances to testify at trial. *See id.*

This understanding of the 2013 Amendment is further reinforced by the minutes from the April 11–12, 2013 Civil Rules Advisory Committee meeting, which make one substantive mention of Rule 45: “The first observation was that the pending amendments of Rule 45 raised questions about the distance witnesses should be compelled to travel to attend a hearing or trial. The Committee concluded that the current limits should remain undisturbed, even though the 100-mile rule goes back to the Eighteenth Century.” Thus, the 2013 Amendment was not intended to make any substantive changes, but rather reinforce the long-standing “100-mile” rule for determining required compliance to an issued subpoena.

However, the amended version of Rule 45 omitted former Rule 45(b)(2)(D), which authorized service “at any place . . . that the court authorizes on motion and for good cause, *if a federal statute so provides.*” Fed. R. Civ. P. 45(b)(2)(D) (2007) (amended 2013) (emphasis added).³ Although it is not clear from the historical record why this specific provision was dropped, commentators note that the omission was likely an inadvertent error. *See U.S. v. Wyeth*, 2015 WL 8024407, at *3 (“In the 2013 revisions to Federal Rule of Civil Procedure 45, however, textual support in the rule has disappeared. *In what seems to be an oversight of the revisers*, the provision of the Rule which allowed for the operation of statutes that expand a court’s subpoena power, like § 3731(a), was dropped from the current Rule.”) (emphasis added). The record shows that the Committee never discussed purposefully eliminating the substance contained in former Rule 45(b)(2)(D). *See id.* (“The 2013 revisions to Rule 45 involved wholesale revision of the text of the rule but were not intended substantively to alter the locations where a court’s subpoena power could extend.”).

III. The 2013 Amendment to Rule 45 Conflicts with Federal Statutes

The amended Rule 45, at least based on a textual reading, prohibits a subpoena from commanding attendance outside of 100 miles from where a witness resides, is employed, or regularly transacts business in person (aside from specific enumerated exceptions). Yet, this puts the rule in direct conflict with many federal statutes that authorize nationwide service and compliance with subpoenas. The most notable example, and the most currently debated in the courts, is the False Claims Act. 31 U.S.C. §§ 3729–3733. The FCA is a federal law that imposes liability on parties who defraud government programs. Under the FCA, whistleblowers have the opportunity to be rewarded for disclosing fraud that results in a financial loss to the federal government. FCA claims often arise in the healthcare space.

³ See Appendix for comparison of prior Rule 45 and the 2013 Amendments to Rule 45.

Notably, the FCA provides that a subpoena “requiring the attendance of a witness at a trial or hearing being conducted under [the FCA] may be served at any place in the United States.” 31 U.S.C. § 3731(a) (emphasis added). If Rule 45 is read—as it is currently written—to prohibit compliance with a subpoena outside the 100-mile rule, then Rule 45 effectively neuters the FCA and other federal statutes that authorize nationwide service of subpoenas. These other federal statutes include the Clayton Act (15 U.S.C. 22), the Federal Trade Commission Enforcement Action (15 U.S.C. 53); Securities Act of 1933 (15 U.S.C. 77v(a)), Securities Exchange Act of 1934 (15 U.S.C. 78aa(a)); Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. 1965(d)), and Employment Retirement Income Security Act of 1974 (29 U.S.C. 1132(e)(2)).⁴

This conflicting interaction between Rule 45 and federal statutes has resulted in differing opinions among federal courts. The majority of courts addressing this issue have ruled that, in contravention of Rule 45(c)(1)’s literal text, a federal statute can still authorize nationwide subpoena service and compliance, reasoning that the removal of former Rule 45(b)(2)(D) was likely “an oversight of the revisers.” See *Wyeth*, 2015 WL 8024407, at *3; see also *United States ex rel. Lutz v. Berkeley Heartlab, Inc.*, 2017 WL 5624254, at *3 (D.S.C. Nov. 21, 2017); *Johnson v. Bay Area Rapid Transit Dist.*, 2014 WL 2514542, at *2 (N.D. Cal. June 4, 2014). However, other courts have ruled that Rule 45(c)(1)’s text controls, explicitly disallowing nationwide compliance of subpoenas even when authorized by federal statute. See *Guenther*, 297 F.R.D. at 660; *U.S. ex rel. Thomas v. Siemens AG*, 2009 WL 1657429, at *2 (D.V.I. June 12, 2009).

This confusion is not limited to the courts. Anecdotal evidence confirms that the conflict has also caused confusion among current Assistant U.S. Attorneys practicing in Civil Divisions. This conflict and the ensuing confusion can easily be remedied by amending Rule 45 to include a federal statute exception to the normal subpoena compliance rule.

Furthermore, the Advisory Committee’s recent adoption of a similar amendment to Rule 12(a)(1)—arising out of a minor timing conflict with the federal FOIA statute—suggests that our proposed amendment would likely be adopted. See Agenda Book, Advisory Committee on Rules of Civil Procedure, page 219 (April 2020).

IV. The Proposed Amendment Resolves Uncertainty and Upholds the Purpose of Rule 45 and Federal Statutes

The proposed amendment would resolve the uncertainty outlined above, explicitly allowing nationwide subpoena service and compliance when authorized by federal statute and where good cause exists. This resolution to the uncertainty upholds both the original purpose of Rule 45 and of the several federal statutes that authorize nationwide subpoena compliance.

The FCA is the federal government's primary tool in combating fraud against the government—and nationwide subpoenas are essential to accomplishing this goal. In his analysis of a False Claims Act

⁴ Although the precise formulations vary, these federal statutes generally use language addressing how “process” (or a “summons”) may be “served.”

case, Judge Woodlock found that “[t]he legislative history of [the FCA] supports the holdings of the majority of district courts that enforcement of a False Claims Act subpoena is not subject to the geographical limitation now found in [Rule 45].” The provision authorizing nationwide subpoenas was added to the FCA under the title “An Act to provide for nationwide service of subpoenas in all suits involving the False Claims Act.” Pub. L. No. 95–582, 92 Stat. 2479 (1978). The House Committee report states that the purpose of the legislation was to facilitate the prosecution of FCA cases by ensuring that witnesses from across the country could be brought into court by subpoena. *See* H.R. Rep. No. 95-1447 (1978).

History also illuminates the purpose of nationwide subpoenas. At the end of World War I, the Department of Justice (DOJ) actively prosecuted defense contractors that were defrauding the government. But, the DOJ faced difficulties in ensuring the appearance and testimony of necessary witnesses. *See* James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 35 (1992). In 1978, DOJ formally asked Congress to give it the authority for nationwide subpoenas, specifically requesting that the FCA’s subpoena provision be modeled after the nationwide subpoena authority found in criminal procedure rules. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). This reflects the importance DOJ assigned to securing witnesses for trial to assist the government’s prosecution of fraud and the importance of reinstating the regime supported by Rule 45 prior to the 2013 amendments.

As further protection, the proposed amendment also includes a “good cause” requirement. Prior to 2013, former Rule 45(b)(2)(D) would have superimposed such a good cause requirement. Such a requirement provides procedural limits on the situations in which subpoenas may be enforced. The requirement provides protection “to avoid the imposition of undue burden on persons subject to a subpoena.” *Wyeth*, 2015 WL 8024407, at *4. Although courts have not aligned on a precise definition of “good cause,” *see State Farm Ins. Co. v. Roberts*, 398 P.2d 671, 674 (Ariz. 1965) (“What constitutes ‘good cause’ depends to a considerable degree upon the particular circumstances of each case and upon considerations of practical convenience”), at least in the context of a witness who is not a party to a lawsuit, “good cause” is interpreted as a requirement to show that a subpoena is not “unreasonable or oppressive,” *see* 5 Moore’s Fed. Proc. 1722-23 (Rev. Ed. 1964). Leaving the discretion to judges to decide when “good cause” exists to enforce a nationwide subpoena strikes the proper balance between an undue burden and upholding congressional intent manifested in federal statutes.

We recognize that some commentators may argue that Rule 45’s 100-mile limitation *should* in fact trump federal nationwide subpoena provisions, in order to ensure consistency and fairness for all subpoenaed witnesses, regardless of the underlying source of the claim. However, history has demonstrated that securing witnesses is critical to the enforcement of certain federal statutes. *See* H.R. Rep. No. 95-1447, at 7-8 (1978). Congress intentionally and explicitly included nationwide subpoena provisions in these statutes out of recognition of the difficulties federal prosecutors faced in ensuring witnesses for trial.

We also recognize that an additional concern with re-instituting the former Rule 45(b)(2)(D) is that, combined with current Rule 45(b)(1), the proposed amendment could impose an undue burden on subpoenaed parties. Rule 45(b)(1) provides that fees for one day’s attendance and mileage are to be paid

by the subpoenaing party, but these fees are not mandatory for any subpoena issued “on behalf of the United States.” *See* Fed. R. Civ. P. 45(b)(1). This leaves room for potential abuse by federal agencies subpoenaing witnesses from far distances and refusing to cover their associated travel costs. However, the benefits of the proposed amendment outweigh this minor concern, which should ultimately be mitigated by the ability of a federal court to invoke the “good cause” requirement where it finds undue burden on subpoenaed parties.

CONCLUSION

For the foregoing reasons, we urge the Committee to recommend adoption of the proposed amendment to Rule 45(c)(1). Please let us know if we can provide any more information regarding this proposal. We thank the Committee on Rules of Practice and Procedure in advance for its consideration on these matters.

Sincerely,
Phebe Hong, Harvard Law School Class of 2021

[REDACTED]

Maxwell Hawley, Harvard Law School Class of 2021

[REDACTED]

Appendix

Comparison of Prior Rule 45 and the 2013 Amendments to Rule 45: Key Provisions

Old Rule 45(b)(2)	Current Rule 45(b)(2)
<p><i>(b) Service.</i></p> <p><i>(2) Service in the United States.</i> Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:</p>	<p><i>(b) Service.</i></p> <p><i>(2) Service in the United States.</i> A subpoena may be served at any place within the United States.</p>
(A) within the district of the issuing court;	[Omitted]
(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;	[Omitted]
(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or	[Omitted]
(D) that the court authorizes on motion and for good cause, if a federal statute so provides.	[Omitted]

Old Rule 45(c)	Current Rule 45(c)
[Did not exist]	<p><i>(c) Place of Compliance.</i></p> <p><i>(1) For a Trial, Hearing, or Deposition.</i> A subpoena may command a person to attend a trial, hearing, or deposition only as follows:</p> <p>(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or</p> <p>(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person (i) is a party or a party’s officer; or (ii) is commanded to attend a trial and would not incur substantial expense.</p> <p><i>(2) For Other Discovery.</i> A subpoena may command:</p> <p>(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and</p> <p>(B) inspection of premises at the premises to be inspected.</p>

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TAB 19

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4817
4818

SEALING COURT RECORDS
Suggestion 20-CV-T

4819 Prof. Eugene Volokh (UCLA) has submitted a proposal for
4820 adoption of a Rule 5.3 on sealing of court records, on his own
4821 behalf and also on behalf of the Reporters Committee for Freedom of
4822 the Press and the Electronic Frontier Foundation. The rule proposal
4823 is presented in the Appendix to this memorandum.

4824 The focus of this rule proposal is sealing of materials filed
4825 in court. In a broad sense, it focuses on a topic that has been on
4826 the Advisory Committee's agenda repeatedly over the last few
4827 decades. In the mid-1990s, there were two published drafts of
4828 possible amendments to Rule 26(c) that would have modified the
4829 standards for protective orders, in part by addressing the question
4830 of stipulated protective orders and filing confidential materials
4831 under seal pursuant to such rules. These proposals drew much
4832 attention and caused some controversy, and were eventually
4833 withdrawn. In March 1998, the Advisory Committee concluded that it
4834 would no longer pursue possible rule amendments on this topic.

4835 Meanwhile, in Congress there have been various versions of a
4836 Sunshine in Litigation Act during recent decades, directed toward
4837 protective orders regarding materials that might bear on public
4838 health.

4839 Around 15 years ago, the Standing Committee appointed a
4840 subcommittee made up of representatives of all advisory committees
4841 that responded to concerns then that federal courts had "sealed
4842 dockets" in which all materials filed in court were kept under
4843 seal. The FJC did a very broad review of some 100,000 matters of
4844 various sorts, and found that there were not many sealed files, and
4845 that most of the ones uncovered resulted from applications for
4846 search warrants that had not been unsealed after the warrant was
4847 served.

4848 In short, there has been considerable controversy and concern
4849 about sealed court files and discovery confidentiality, but the
4850 civil rules have not been amended to address those concerns.

4851 The civil rules do not have many provisions about sealing
4852 court files. Rule 5(d) does direct that various disclosure and
4853 discovery materials not be filed in court until they are used in
4854 the action. When filing does occur, that can raise an issue about
4855 filing confidential materials under seal. Rule 5.2 provides for
4856 redactions from filings and for limitations on remote access to
4857 electronic files to protect privacy. In that context, Rule 5.2(d)
4858 does say that the court "may order that a filing be made under seal
4859 without redaction." The committee note to that provision says that
4860 it "does not limit or expand the judicially developed rules that
4861 govern sealing."

4862 This submission, however, does propose a rule governing
4863 sealing that might limit or expand such judicially developed rules.

4864 An initial question might be whether there is a need for such a
4865 rule. Prof. Volokh's cover letter says that "[e]very federal
4866 Circuit recognizes a strong presumption of public access" that is
4867 "founded in both the common law and the First Amendment." It adds
4868 that more than 80 districts have adopted local rules governing
4869 sealing, and says that the rule proposal "borrows heavily from
4870 those local rules." Footnotes to the proposal provide voluminous
4871 case law authority for these propositions and cite a large number
4872 of existing local rules.

4873 According to the cover letter, nevertheless "a uniform rule
4874 governing sealing is needed; despite these local rules and the
4875 largely unanimous case law disfavoring sealing, records are still
4876 sometimes sealed erroneously."

4877 There is no question that inappropriate sealing of court
4878 records is an important concern. But it is not clear that the
4879 problem is so widespread that an effort to develop a national rule
4880 is warranted. And if one were, it is worth noting, that would
4881 likely make all the cited local rules invalid. See Rule 83(a)(1)
4882 ("A local rule must be consistent with — but not duplicate —
4883 federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075
4884 [the Rules Enabling Act]").

4885 If there is a problem that warrants an effort to develop a
4886 national rule, the draft by Prof. Volokh (attached as an appendix
4887 to this agenda memo) would require extensive work. The following
4888 are examples of some of the issues:

4889 Possible additional burdens on courts: Various features of the
4890 proposal require courts to make "particularized findings."
4891 Rule 52(a)(1) directs a court after a nonjury trial to enter
4892 findings of fact and conclusions of law. Rule 23(b)(3) does say a
4893 court should certify a class only on finding that the superiority
4894 and predominance of common questions standards are met (though it
4895 does not have a specific findings requirement). It is not clear
4896 that there is a "particularized findings" requirement elsewhere in
4897 the civil rules. Cases under Rule 26(c) do say that a party seeking
4898 a protective order must make a particularized showing to justify
4899 entry of the order. See 8A Fed. Prac. & Pro. § 2035 at 157-58. But
4900 these cases do not require the court to make particularized
4901 findings when entering such an order.

4902 Motion or objection by any "member of the public" without a
4903 need first to move to intervene: The rule would empower any "member
4904 of the public" to make a motion to unseal documents filed under
4905 seal "at any time." The proposed rule would explicitly excuse a
4906 motion to intervene for this purpose. There is a developed body of
4907 case law on intervention to challenge the seal on filed materials.
4908 See 8A Fed. Prac. & Pro. § 2044.1. This rule would evidently
4909 supplant that body of case law.

4910 Challenges to sealing would be authorized by any "member of
4911 the public" at any time: The rule would direct that a motion is

4912 timely at any time, "regardless of whether the case remains open or
4913 has been closed." With CM/ECF it may be that accessing a closed
4914 case presents little difficulty, but such open-ended re-opening of
4915 cases is not the norm in the rules. Compare Rule 60(c)(1) (limiting
4916 a motion under Rule 60(b) to "a reasonable time," and for mistake,
4917 newly discovered evidence, or fraud to one year).

4918 Defining "member of the public" could be challenging: The
4919 draft does not provide a more specific definition. Ordinarily a
4920 proposed intervenor under Rule 24 must make some showing in support
4921 of a motion to intervene. If that is not required, it could become
4922 important to determine who is a "member of the public" entitled to
4923 challenge filing under seal without intervening. Would that right
4924 belong only to U.S. citizens or permanent residents? Would there be
4925 a ground for such a "member of the public" to show some recognized
4926 interest in the contents of the sealed filing?

4927 Materials filed under seal would automatically be "deemed
4928 unsealed" 60 days after "final disposition" of a case: This "final
4929 disposition" standard might resemble the final judgment standard
4930 for appeals. It likely means completion of all trial court
4931 proceedings and exhaustion or disregard of any proceedings on
4932 direct appeal, including a petition for certiorari. It might be
4933 taken to resemble Rule 54(a) ("Judgment" as used in these rules
4934 includes a decree and any order from which an appeal lies"). But
4935 surely that standard would not apply if there were an appeal under
4936 28 U.S.C. § 1292(a)(1) (preliminary injunctions) or § 1292(a)(2)
4937 (appointing receivers). It presumably would not apply to
4938 interlocutory orders certified for immediate appeal by the district
4939 court under 28 U.S.C. § 1292(b). How it would work in cases
4940 gathered pursuant to an MDL transfer if final judgment were entered
4941 in some but not all is uncertain. Whether the "final disposition"
4942 occurs only after all appeals have been exhausted might raise
4943 questions. It is not clear who would monitor these developments; if
4944 after a notice of appeal was filed, for example, there were a
4945 settlement, the clerk's office might not be aware of that
4946 development and the need to set the "60 days clock" running.

4947 Motions to renew the seal are presumptively invalid unless
4948 filed more than 30 days before automatic unsealing: Coupled with
4949 the automatic unsealing mentioned above, this provision could mean,
4950 in effect, that 31 days after "final disposition" of a case the
4951 court would be without power to keep the materials under seal.

4952 A special website, or a "centralized website" might be
4953 required: The proposal seems to direct that there be some special
4954 method of posting motions to seal, and suggests that "a centralized
4955 website maintained by several courts" might be useful. It also
4956 directs that this posting occur "within a day of filing."

4957 A review of the proposal in the Appendix will likely suggest
4958 other issues. It does not seem that these issues must arise merely
4959 because a sealing rule is promulgated. To the contrary, a rule
4960 could likely be drafted that would not raise the specific issues

4961 identified above. But any such rule might be expected to generate
4962 considerable controversy. For example, trade secrets and other
4963 commercially valuable information are placed under seal with some
4964 frequency. Limiting that protection might prompt serious concerns.
4965 Although there may presently be occasions in which sealing
4966 decisions appear, in retrospect, to be debatable, that alone does
4967 not make this topic different from others governed by the rules, on
4968 which it may sometimes happen that a court makes a decision later
4969 found to be erroneous.

4970 Besides considering whether there is a need for such a rule,
4971 one might also reflect on how the rule would relate to existing and
4972 future case law on these subjects. The submission emphasizes that
4973 the case law is based on the Constitution and a common law right of
4974 access. Those grounds for access have developed over decades, and
4975 can be found in many cases cited in footnotes in the submission. If
4976 a rule were adopted, that might raise questions about whether it is
4977 different from that case law. If in a given circuit the case law is
4978 arguably more permissive about filing under seal and does not
4979 require all that a rule requires, does that mean the rule is
4980 supplanting that case law? If the rule is solely implementing the
4981 case law, does the rule change if the case law changes?

4982 Developing a rule would call for considerable further work.
4983 The question for the Advisory Committee at the October 2020 meeting
4984 is whether there is a need to do that work.

4985

Suggestion 20-CV-T (footnotes omitted)

4986 The rule proposal is supported by some thirty-two footnotes,
4987 but those are not included in this memorandum. They offer abundant
4988 authority in decided cases and also cite many local rules.

4989

Proposed New Civil Rule 5.3

4990 (a) PRESUMPTION OF PUBLIC ACCESS TO COURT RECORDS. Unless the
4991 court orders otherwise, all documents filed in a case
4992 shall be open to the public (except as specified in
4993 Rule 5.2 or by statute). Motions to file documents under
4994 seal are disfavored and discouraged. Redaction and
4995 partial sealing are forms of sealing, and are also
4996 governed by this rule, except insofar as they are
4997 governed by Rule 5.2. [Proposed Advisory Committee Note:
4998 This rule is intended to incorporate the First Amendment
4999 and common-law rights of access, and to provide at least
5000 as much public access as those rights currently provide.]

5001 (b) REQUIREMENTS FOR SEALING A DOCUMENT. At or before the
5002 time of filing, any party may move to seal a document in
5003 whole or in part.

5004 (1) Any party seeking sealing must make a good faith
5005 effort to seal only as much as necessary to protect
5006 any overriding privacy, confidentiality, or
5007 security interests. Sealing of entire case files,
5008 docket sheets, or entire documents is rarely
5009 appropriate. When a motion to seal parts of a
5010 document is granted, the party filing the document
5011 must file a publicly accessible redacted version of
5012 the document.

5013 (2) If the interests justifying sealing are expected to
5014 dissipate with time, the party seeking sealing must
5015 make a good faith effort to limit the sealing to
5016 the shortest necessary time, and the court must
5017 seal the document for the shortest necessary time.

5018 (3) There is an especially strong presumption of public
5019 access for court opinions, court orders,
5020 dispositive motions, pleadings, and other documents
5021 that are relevant or material to judicial
5022 decisionmaking or prospective judicial
5023 decisionmaking.

5024 (4) Because sealing affects the rights of the public,
5025 no document filed in court may be sealed in whole
5026 or in part merely because the parties have agreed
5027 to a motion to seal or to a protective order, or
5028 have otherwise agreed to confidentiality.

5029 (c) RETROACTIVE SEALING. Sealing of a document that has
5030 already been openly filed is allowed only in highly
5031 unusual circumstances, such as when information protected
5032 under Rule 5.2 is erroneously made public.

- 5033 (d) PUBLIC FILING OF MOTIONS TO SEAL. A motion to seal must
5034 be publicly filed and must include a memorandum that:
- 5035 (1) Provides a general description of the information
5036 the party seeks to withhold from the public.
- 5037 (2) Demonstrates compelling reasons to seal the
5038 documents, stating with particularity the factual
5039 and legal reasons that secrecy is warranted and
5040 explaining why those reasons overcome the common
5041 law and First Amendment rights of access.
- 5042 (3) Explains why alternatives to sealing, such as
5043 redaction, are inadequate.
- 5044 (4) States the requested duration of the proposed seal.
- 5045 (e) NOTICE AND WAITING PERIOD.
- 5046 (1) Motions to seal shall be posted on the court's
5047 website, or on a centralized website maintained by
5048 several courts, within a day of filing.
- 5049 (2) The court shall not rule on the motion until at
5050 least 7 days after it is posted, so that objections
5051 may be filed by parties or by others, unless the
5052 motion explains with particularity why an emergency
5053 decision is required.
- 5054 (f) ORDERS TO SEAL. If a court determines that sealing is
5055 necessary, it must state its reasons with particularized
5056 findings supporting its decision. Orders to seal must be
5057 narrowly tailored to protect the interest that justifies
5058 the order. Orders to seal should be fully public except
5059 in highly unusual circumstances; and if they are in part
5060 redacted, any redactions should be narrowly tailored to
5061 protect the interest that justifies the redaction.
- 5062 (g) UNSEALING, OR OPPOSING SEALING.
- 5063 (1) Sealed documents may be unsealed at any time on
5064 motion of a party or any member of the public, or
5065 by the court sua sponte, after notice to the
5066 parties and an opportunity to be heard, without the
5067 need for a motion to intervene.
- 5068 (2) Any party or any member of the public may object to
5069 a motion to seal, without the need for a motion to
5070 intervene.
- 5071 (3) The motion to unseal or the objection to a motion
5072 to seal shall be filed in the same case as the
5073 sealing order or the motion to seal, regardless of
5074 whether the case remains open or has been closed.
- 5075 (4) All sealed documents will be deemed unsealed 60
5076 days after the final disposition of a case, unless
5077 the seal is renewed.
- 5078 (5) Any motion seeking renewal of sealing must be filed
5079 within 30 days before the expected unsealing date,
5080 and the moving party bears the burden of
5081 establishing the need for renewal of sealing.

TAB 20

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5082 **RULE 15(a): TIME FOR PLEADING AMENDMENTS AS A MATTER OF COURSE**
5083 *Suggestion 19-CV-Z*

5084 This topic is another example of a recurring dilemma. The text
5085 of Rule 15(a)(1) can easily be improved by substituting "no later
5086 than" for "within," as explained below. The amendment would
5087 eliminate any risk that "within" will be read to mandate an
5088 unintended and absurd gap in the period for amending a pleading
5089 once as a matter of right. But the risk may be more a creation of
5090 fine-grained reading than an actual problem in practice. Does the
5091 opportunity to improve the rule text warrant invoking the
5092 rulemaking process?

5093 Rule 15(a) was amended in 2009 to make several changes in the
5094 provision that allows one amendment of a pleading as a matter of
5095 course. The earlier rule cut off the right on service of a
5096 responsive pleading. That meant that the pleader might make a long-
5097 delayed amendment after a motion to dismiss was made, argued, and
5098 submitted for decision. The 2009 amendments allowed 21 days to
5099 amend after service of a responsive pleading and also brought
5100 several Rule 12 motions into the rule, terminating the right to
5101 amend once as a matter of course 21 days after service of the
5102 motion. These times were not cumulative. The right to amend
5103 terminated after expiration of whichever period was earlier.
5104 Serving a motion to dismiss before filing a responsive pleading,
5105 for example, cut off the right after 21 days with no opportunity to
5106 revive after service of a later responsive pleading.

5107 All of that seems sound. The question arises from the use of
5108 "within" to introduce both 15(a)(1)(A) and (B):

- 5109 (1) *Amending as a Matter of Course.* A party may amend
5110 its pleading once as a matter of course within:
5111 (A) 21 days after serving it, or
5112 (B) if the pleading is one to which a responsive
5113 pleading is required, 21 days after service of
5114 a responsive pleading or 21 days after service
5115 of a motion under Rule 12(b)(e), or (f),
5116 whichever is earlier.

5117 "Within" appeared in the predecessor of (A) before the Style
5118 Project, and was carried forward in the Style Project. "Within"
5119 (then) 20 days after serving the pleading works well. "Before" was
5120 used in the earlier versions that allowed one amendment as of right
5121 before, but only before, a responsive pleading was served.
5122 Introducing a right to amend after service of a responsive pleading
5123 or a Rule 12 motion led to adopting "within" for both (A) and (B).

5124 Suggestion 19-CV-Z submits that "within" creates an
5125 indefensible result by creating a dead zone in the many cases in
5126 which a responsive pleading or Rule 12 motion is not served within
5127 21 days after service of the pleading to be amended. Under
5128 Rule 15(a)(1)(A), the right to amend once as a matter of course
5129 ends 21 days after serving the pleading. That is "within" 21 days

5130 after service of the pleading. After that, the pleader cannot rely
5131 on Rule 15(a)(1)(A), but must instead resort to seeking consent or
5132 leave of the court under Rule 15(a)(2). But the right to amend once
5133 as a matter of course revives under Rule 15(a)(1)(B) upon service
5134 of a responsive pleading or motion. That makes little sense. Far
5135 better to allow the amendment as a matter of right all the way
5136 through the period from serving the pleading until 21 days after
5137 service of the responsive pleading or Rule 12 motion.

5138 The reading of "within" that suspends and then revives the
5139 right to amend once as a matter of course indeed is foolish. The
5140 question is whether this reading is so foolish that it will not
5141 often be considered, and will not be taken seriously. It may be
5142 hoped that "within" will be understood to make evident sense in
5143 this context – any time until the 21 days after service of a motion
5144 under Rule 12(b), (e), or (f), whichever is earlier.

5145 There may be little need to amend the rule text to ensure the
5146 sensible interpretation. But the problem is easily remedied. The
5147 Style Consultants agree that the intended meaning can be clearly
5148 expressed by substituting "no later than" for "within."

ARTHUR B. SPITZER
915 15TH STREET, NW – 2ND FLOOR
WASHINGTON, DC 20005
301-775-4000
ARTSPITZER@GMAIL.COM

September 19, 2019

Hon. John D. Bates
United States District Judge
United States Courthouse
333 Constitution Avenue, NW
Washington, DC 20001

Re: Amending as a matter of course under Fed. R. Civ. P. 15(a)(1)

Dear Judge Bates,

I write to you in your capacity as Chair of the Advisory Committee on Civil Rules.

For the second time in several months, I'm in a position of planning to file an amended complaint in a case well after the complaint was filed, but also well before the defendants have answered or filed a motion to dismiss. Rule 15(a)(1) provides that the opportunity to amend a complaint as a matter of course exists for 21 days after filing a complaint ((a)(1)(A)), and for a period of 21 days after an answer or certain motions are filed ((a)(1)(B)), but it does not provide such an opportunity during any intermediate period, thus requiring a plaintiff to file a motion for leave to file an amended complaint even if a defendant has not answered or filed one of the specified motions. The justification for that on-off-on-again sequence is difficult to discern.

Perhaps the Rules Committee assumed that the periods during which an amended complaint could be filed as a matter of course would be adjacent, because answers or motions to dismiss would be filed within 20 days after service of the summons and complaint. But that's very often not the case. As you know, federal defendants get 60 days to respond, and other defendants often seek and get extensions of time to respond. In other cases, motions for preliminary injunctions may take weeks or months to resolve, and frequently no answer or motion to dismiss is filed during that time. Yet I can't think of a good reason why a plaintiff that wishes to amend its complaint shouldn't be able to do so once as a matter of course at any time before an answer or motion to dismiss is filed, as well as within 21 days after such a filing (which was an excellent change in 2009).

I therefore wonder whether it would make sense to amend Rule 15(a)(1) to provide:

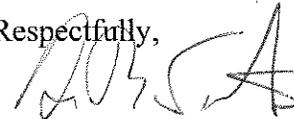
Hon. John D. Bates
September 19, 2019
Page two

(1) *Amending as a Matter of Course*. A party may amend its pleading once as a matter of course ~~within~~:

(A) within 21 days after serving it, or

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

Respectfully,

A handwritten signature in black ink, appearing to read 'A. B. Spitzer', written over the word 'Respectfully,'.

Arthur B. Spitzer

TAB 21

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5149
5150

RULE 72(b) : CLERK MAIL OR SERVE
Suggestion 20-CV-F

5151 Suggestion 20-CV-F suggests that one provision in Rule 72(b)
5152 should be amended to conform to Criminal Rule 59(b)(1).

5153 Rule 72(b)(1) addresses a magistrate judge's recommended
5154 disposition of a dispositive motion or a prisoner petition
5155 challenging conditions of confinement. It concludes with this: "The
5156 clerk must promptly mail a copy to each party."

5157 Criminal Rule 59(b)(1) addresses a magistrate judge's
5158 recommendation for disposing of dispositive matters. It concludes
5159 with this: "The clerk must immediately serve copies on all
5160 parties."

5161 "Mail" in Rule 72(b) seems unnecessarily confining.
5162 Rule 77(d)(1) includes this:

5163 (1) *Service.* Immediately after entering an order or
5164 judgment, the clerk must serve notice of the entry,
5165 as provided in Rule 5(b), on each party who is not
5166 in default for failing to appear. * * *

5167 This amendment makes sense. When a suitable package of
5168 amendments is being published for comment, it may be useful to
5169 include a proposal to amend Rule 72(b). The amendment might combine
5170 parts of Criminal Rule 59(b)(1) with parts of Rule 77(d)(1): "The
5171 clerk must immediately serve a copy on each party, as provided in
5172 Rule 5(b)."

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From: Patty Barksdale
Sent: Tuesday, May 05, 2020 11:27 AM
To: Julie Wilson
Cc: Jennie Allen
Subject: Suggested Correction to Fed. R. Civ. P. 72(b)

Hello Ms. Wilson.

I have one other matter for consideration.

Fed. R. Civ. P. 72(b), addressing a report and recommendation by a magistrate judge on a dispositive matter states, “The clerk must promptly mail a copy to each party.”

The criminal counterpart, Fed. R. Crim. P. 59(b)(1), states, “The clerk must immediately serve copies on all parties.”

Why are the two different? Shouldn’t Rule 72(b) be the same as Rule 59(b)(1) to bring in the service rules when parties are on CM/ECF? (And as a picky matter of style, shouldn’t Rule 59(b)(1) be in the singular, not the plural?)

Thank you for your consideration of these further rule musings.

Patricia D. Barksdale
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

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TAB 22

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MEMORANDUM

To: Judicial Conference Advisory Committee on Civil Rules
From: Jason A. Cantone & Emery G. Lee III
RE: Status of Mandatory Initial Discovery Pilot Study
Date: August 24, 2020

As of June 1, 2020, the three-year Mandatory Initial Discovery Pilot (MIDP) period ended in both the District of Arizona and the Northern District of Illinois, but many pilot cases remain pending in both districts. To identify the total universe of pilot cases, FJC researchers electronically searched court records in both districts on July 14, 2020. Those searches identified 5,148 pilot cases filed in Arizona and 12,142 pilot cases filed in Northern Illinois. As of that date, 21% of pilot cases in Arizona and 28% of pilot cases in Northern Illinois were still pending. The FJC study continues to monitor these pending cases. For purposes of this memorandum, “pilot cases” include cases identified with the search terms, even if disclosures pursuant to the MIDP were not made.

PILOT STUDY ACTIVITIES

A. Closed-Case Attorney Surveys

At regular intervals, the FJC surveys attorneys in any pilot cases that have been closed since the last survey administration to evaluate their experiences. We provided the advisory committee with a report on the closed-case surveys in the fall of 2019.¹ Since then, closed-case surveys have been conducted in November 2019 and, most recently, in August 2020. The August 2020 surveys, covering the period from November 1, 2019, through July 30, 2020, included cases terminated during the COVID-19 pandemic. Despite this, the response rates for the August 2020 surveys—34% in Arizona and 38% in Northern Illinois—were consistent with the response rates from November 2019: 36% and 35%, respectively.

1. Emery G. Lee III & Jason A. Cantone, Report on the Mandatory Initial Discovery Pilot: Results of Closed-Case Attorney Surveys, Fall 2017–Spring 2019 (Federal Judicial Center 2019), available at <https://www.fjc.gov/sites/default/files/materials/49/Mandatory%20Initial%20Discovery%20Pilot%20Report.pdf>.

B. Docket Data Collection

In addition to the closed-case surveys, FJC researchers have been collecting data from a random sample of pilot cases in both districts. This is a continuing effort, given that many pilot cases are still pending; to date, the study includes information regarding 772 terminated pilot cases in Arizona and 1,234 terminated pilot cases in Northern Illinois.

One caveat before proceeding: Because many pilot cases are still pending in the participating courts, data collection is incomplete. Analysis of incomplete data can suggest patterns or findings that are not supported by the final analysis. The following summaries are intended to provide the advisory committee with a sense of the data being collected only.

Duration time and disposition method. For sampled cases, the median time from filing to disposition was 231 days (7.6 months) in Arizona and 216 days (7.1 months) in Northern Illinois. These relatively short disposition times suggest that longer-pending pilot cases may have yet to terminate in district court.

The data being collected covers many aspects of the pilot cases, including motions activity and disposition method. Table 1, for example, summarizes how the sampled cases were resolved in district court to date.

Table 1. Disposition of Closed Sampled Cases, by District

Outcome	Illinois Northern (%)	Arizona (%)
Settled	51%	56%
Voluntary dismissal	34%	22%
Rule 12 dismissal	6%	9%
Summary judgment	2%	5%
Trial	0.2%	0.1%
Other	6%	8%
N	1242	772

Pilot participation rates. The pilot participation rate, as measured by the percentage of pilot cases in which notices of the making of pilot disclosures were docketed, was higher in Arizona than in Northern Illinois. This is consistent with the survey results, which also point to higher participation rates in Arizona.

In Arizona, notices of pilot disclosures were docketed in more than half of the sampled cases. Plaintiffs filed a notice of pilot disclosures in 58% of sampled dockets; defendants filed a similar notice in 57% of sampled dockets. The obligation to make pilot disclosures is triggered by the filing of a responsive pleading; a responsive pleading was filed in 81% of sampled Arizona pilot cases (624/772). A plaintiff filed a notice of pilot disclosures in 70% of cases in which at least one defendant filed a responsive pleading. At least one defendant filed a notice of pilot disclosures in 70% of such cases, and **both** a plaintiff and defendant filed a notice in 65% of such cases (404/624).

In Northern Illinois, plaintiffs and defendants filed notices of pilot disclosures in 38% of sampled cases. Again, the obligation to make pilot disclosures is triggered by the filing of a responsive pleading; a responsive pleading was filed in 68% of sampled Northern Illinois pilot cases (840/1242). A plaintiff filed a notice of pilot disclosures in 54% of cases in which at least one defendant filed a responsive pleading. At least one defendant filed a notice of pilot disclosures in 56% of such cases, and **both** a plaintiff and defendant filed a notice in 48% of such cases (402/840).

MIDP disputes. Disputes regarding the parties' respective MIDP disclosure obligations were not common or, at least, were not commonly brought to the court's attention.

Parties may report disputes over MIDP obligations in their Rule 26(f) reports. In Arizona pilot cases, only 34 Rule 26(f) reports informed the court of a dispute over MIDP obligations (8%). In Northern Illinois, only 21 Rule 26(f) reports did so (3%).

Parties may, in some cases, file a motion to compel another party's MIDP disclosures. In Arizona, only one such motion has been observed to date. Seventeen motions to compel have been filed in Northern Illinois, which translates to a rate of about 2% of cases in which a responsive pleading was filed.

Discovery disputes in general. Past committee discussions about measuring the pilot's effects on discovery disputes have indicated that the districts differ with respect to how they handle such disputes, either formally by motion or more informally through a telephonic hearing. The study has worked to account for those different practices. In what follows, the term "discovery dispute" covers any docketed discovery motion, any scheduled telephonic hearing on a discovery matter in lieu of a motion, and other references to disputes over discovery matters in docket entries. The study cannot objectively measure discovery disputes that do not appear on the docket.

In Arizona, where formal discovery motions are discouraged, there was at least one discovery dispute in 29% of cases in which a responsive pleading was filed and in which both a plaintiff and a defendant filed a notice of pilot disclosures; there were more than two disputes in less than

2% of such cases. Discovery disputes, especially those made by motion, were more common in Northern Illinois. In that district, there was at least one discovery dispute in 46% of pilot cases in which a responsive pleading was filed and in which both a plaintiff and a defendant filed a notice of pilot disclosures; there were more than two disputes in 7% of such cases.