MINUTES
CIVIL RULES ADVISORY COMMITTEE
October 17, 2023

The Civil Rules Advisory Committee met on October 17, 2023, in Washington, D.C. Participants included Judge Robin Rosenberg (Advisory Committee Chair) and Judge John Bates (Standing Committee Chair), Advisory Committee members Justice Jane Bland; Judge Cathy Bissoon; Judge Jennifer Boal; Bryan Boynton; David Burman; Professor Zachary Clopton; Chief Judge David Godbey; Judge Kent Jordan; Judge M. Hannah Lauck; Judge R. David Proctor; Joseph Sellers; Judge Manish Shah; Ariana Tadler; and Helen Witt. Professor Richard Marcus participated as Reporter, Professor Andrew Bradt as Associate Reporter, and Professor Edward Cooper as Consultant. Also representing the Standing Committee were Judge D. Brooks Smith, Liaison to the Advisory Committee, Professor Catherine Struve, Reporter to the Standing Committee and Professor Daniel Coquillette, Consultant to the Standing Committee (remotely). Representing the Bankruptcy Rules Committee was Judge Catherine McEwen, liaison to the Advisory Committee. Carmelita Shinn, clerk liaison, also participated. The Department of Justice was also represented by Joshua Gardner. The Administrative Office was represented by H. Thomas Byron III; Allison Bruff; and Zachary Hawari. The Federal Judicial Center was represented by Dr. Emery Lee.

Approximately a dozen observers, including Susan Steinman of the American Association for Justice, Alex Dahl of the Lawyers for Civil Justice, and John Rabiej of the Rabiej Litigation Center, attended the meeting in person. Additional observers attended by Teams. Those observers are identified in the attached list.

Judge Rosenberg began the meeting by noting that the Committee will meet again on April 9, 2024, though the location of this meeting is not presently set. On Oct. 16, the day before this meeting, the first of three public hearings on the two sets of amendment proposals that the Committee has published for public comment was held in Washington, D.C. The other hearings will be on Jan. 16, 2024, and Feb. 6, 2024, and are presently expected to be virtual hearings.

Judge Rosenberg introduced Professor Zachary Clopton of Northwestern Pritzker School of Law, the new academic member of the Committee. He brings an impressive background to this post. He joined the Northwestern faculty as Professor of Law in 2019. Before becoming a law professor, he clerked for the Honorable Diane Wood of the Seventh Circuit, served as an Assistant United States Attorney in Chicago, and worked in the national security group at Wilmer Hale in Washington, D.C. Before joining the Northwestern faculty, he was an Associate Professor at Cornell Law School, and he has also served as a Public Law Fellow at the University of Chicago Law School. His scholarship has appeared or is forthcoming in the Yale Law Journal, Stanford Law Review, NYU Law Review, University of Chicago Law Review, Michigan Law Review, California Law Review, and Cornell Law Review, among others.

Judge Rosenberg also reported that the Oct. 16 hearing was a full-day affair that produced much valuable information for members, whether participating in person or virtually. Summaries of the testimony and the written comments that have been submitted will be forthcoming on a rolling basis, particularly as the later hearings approach. Once the full public comment process is completed, a final summary will be prepared and included in the agenda book for the Committee's

April meeting, when it may be appropriate to decide whether to recommend final adoption of these rule changes.

There was a brief report on the June meeting of the Standing Committee, at which publication of the privilege log and Rule 16.1 proposals was approved. Allison Bruff reported on the pending effective date of amendments the Committee has proposed – to Rules 6, 15, and 72, and a new Rule 87 on emergency measures – all of which are to go into effect on Dec. 1, 2023. Zachary Hawari reported on pending legislative proposals that might affect the rules or rules process. Of particular note is the Protecting Our Courts From Foreign Manipulation Act, which includes provisions dealing with disclosure of third party litigation funding, a topic that has been on the Committee's agenda for some time and which is being currently monitored.

Review of Minutes

The draft minutes included in the agenda book were unanimously approved, subject to corrections by the Reporter as needed.

Report of Discovery Subcommittee

Chief Judge Godbey offered a "30,000 foot view" of the four items the Subcommittee is bringing before the Committee for discussion. None of these is presented for final approval, but on three of them the Subcommittee hopes for feedback from Committee members. These items are:

(1) Manner of serving a subpoena. Rule 45(b)(1) says that serving a subpoena requires "delivering a copy of the subpoena to the named party." There are different interpretations of the rule, particularly about whether this means in-hand service is required. This uncertainty has imposed costs on lawyers and bred conflict in some cases. The report offers a possible approach to amending the rule.

(2) Rule provisions on filing under seal. In 2020-21, the Subcommittee addressed proposals to include in the rules some recognition of limitations on filing under seal. It developed amendment ideas for Rules 26(c) and 5(d) to clarify that protective orders providing for confidential treatment of materials exchanged through discovery are judged by a different standard from requests to file under seal in court, due to the First Amendment and common law rights of access to court files. But as this work was ongoing the Committee was advised that the A.O. had undertaking a project dealing more generally with handing of filing under seal, so the Subcommittee suspended its work on this project pending completion of the A.O. project. Earlier this year, however, the Subcommittee was advised that the A.O. project should not be an impediment to work on possible rule amendments. It appears that the A.O. project will focus principally on handing of sealed materials once they are filed, rather than on the decision whether to permit filing under seal, which has been the primary focus of the Subcommittee's work.

(3) Examining the fruits of the FJC work on the MIDP in the District of Arizona and the Northern District of Illinois. The Subcommittee has carefully examined the very thorough and

impressive research completed by the FJC regarding the pilot project using expanded early disclosure or discovery provisions, and the comparison districts (E.D. Cal. and S.D.N.Y.). Though this excellent project produced much data, no clear basis for proposing further rule amendments at this time has emerged. The Subcommittee does not recommend further work on this project.

(4) Cross-border discovery. Judge Michael Baylson (E.D. Pa.) has submitted a proposal that the Committee initiate a project exploring and developing rules for cross-border discovery. This is the first time this topic has been presented to the full Committee. It seems a challenging undertaking.

Professor Marcus provided some additional introductory remarks on the three topics on which the Subcommittee recommends proceeding.

(1) *Service of Subpoena*

There are notable differences among the courts on what method is required to serve a subpoena under Rule 45(b)(1). One referent on methods of service might be state court practice, and Rules Law Clerk Chris Pryby did an extremely thorough memo on varying state practices that was included in the agenda book. Unfortunately, that report shows that methods of service are "all over the map." In some states, methods include a phone call from the sheriff, or even the coroner. So there is no extant and consistent model for the Federal Rules to follow.

On the other hand, it seems that service of subpoenas has not presented great difficulties with frequency; usually the parties do not want to require that in-hand service, perhaps in part because personal service may actually be unnerving to witnesses, with the result that counsel would often want to avoid it.

The Subcommittee discussion, however, emphasized that uncertainty about methods of service caused notable difficulty and imposed significant costs in some cases. It could enable witnesses, particularly nonparty witnesses, to cause difficulties. Clarification would be desirable.

One possible clarification has been rejected by the Subcommittee – requiring in-hand service in all instances.

Instead (as presented on p. 128 of the agenda book), the Subcommittee has focused on borrowing some Rule 4 provisions for service of original process. Service of original process is not the same as service of a subpoena. On the one hand, it may seem more important to ensure actual notice, given the possibility of default. On the other hand, there is a built-in lag time before an answer is due, and courts are usually lenient even if a deadline is missed.

Subpoenas may on occasion call for much faster action, such as testimony in court in a few days, perhaps in a court far away. And subpoenas can be served on nonparties, who have no prior familiarity with the action. So the formality of in-hand or some substitute method may be important for them. And one could argue that there are significant differences between subpoenas to testify in court and deposition or document subpoenas as part of discovery; the urgency of the former is much more notable.

Because consideration of the subpoena service project is ongoing, the Subcommittee was seeking reactions from the members of the Committee on its proposed approach. As presented on p. 128, it involved authorizing any method permitted under Rules 4(d), 4(e), 4(f), 4(h), or 4(i), which could invoke pertinent state service standards. In addition, it proposed granting the court authority to approve further means of service by an order in the case or perhaps a local rule. The question whether the rule should direct that these alternative methods be "reasonably calculated to give notice" (adopting the standard from the old *Mullane* case) is included in brackets.

A first reaction from a Committee member was that this "sounds like a good idea" – pull in all the methods currently recognized for service of other process. A liaison member agreed, particularly with adopting state practices. This member also favored including the "reasonably calculated" language.

A question was raised – why not include the whole of Rule 4, not just the listed subdivisions? One response was that some provisions of the rule seem duplicative of what is already in Rule 45. Rule 45(b)(1) directs that service be done by a nonparty of age 18 or older. Rule 4(c)(2) says pretty much the same thing. And Rule 4(b) says that the plaintiff can present a summons to the clerk, and that the clerk must issue the summons if properly filled out. The provisions of Rule 45(a)(3) seem somewhat different. Rule 4(a) on the required contents of a summons does not seem useful in the subpoena context.

A different question was raised – the invocation of Rule 4(i) raises possible difficulties. There are significant differences between service on the United States itself and service on a U.S. employee as a party in an official capacity. Moreover, if the federal employee is served as an individual sued individually under Rule 4(i)(3), further complications can arise. Though the Department of Justice seeks to be efficient in the handling of process, it can happen that process is not acted upon immediately upon service. The Department was invited to submit specific comments about these problems.

Another member urged that the *Mullane* "reasonably calculated" language be retained, either in the rule or in the Note. Disputes about whether a subpoena was actually served can be important, and that is the goal to be pursued.

(2) *Filing under seal*

In 2021, the Subcommittee presented its initial thoughts explicit provisions about filing under seal in the rules with changes to Rule 26(c) and the addition of a new Rule 5(d)(5) with regard to the showing required for filing under seal, presented on p. 130 of the agenda book.

One choice made by the Subcommittee is not to try to adopt a rule-based locution of the pertinent standard under the First Amendment or the common law right of access to court filed. For example, there may be some divergence among the circuits about whether some filings (e.g., discovery filings) are not related to the merits of the case and therefore not subject to the ordinary right of access. Whether this is universally recognized is uncertain and not something that need be addressed or resolved by a rule.

Another issue is whether "sealing" always means the same thing. There is at least some indication that some sealed documents are regarded as especially sensitive – "highly confidential" – and that national security concerns may introduce even more concerns about confidentiality.

Moving beyond standards for sealing, there are many potential issues about the procedures to be used in making sealing decisions. To illustrate, the Sedona Conference submitted a model rule that was about seven pages long. A submission from the Knight First Amendment Institute at Columbia University attached a 100-page compilation of local rules that varied a great deal. Some proposed rules were very detailed (though not as long as the Sedona model rule) and others were quite brief.

The agenda materials identify many issues that might be addressed if the decision is made to prescribe nationwide standards. Doing so would almost inevitably override at least some local practices and rules. The agenda book included some examples:

Permitting the motion to seal to be filed under seal. Several of the submissions to the Committee urge that motions to seal should be open to public inspection.

Treatment of the confidential material while the motion to seal is pending. One possibility is to provide that nothing can be filed under seal until a court has so ordered, and some urge that there be a minimum of seven days after filing of the motion publicly before the court may rule on it. But some local rules permit "temporary" or "provisional" filing under seal pending the court's ruling on the motion to seal. For litigators acting under filing deadlines, building in either a requirement that the court grant an order for filing under seal or (beyond that) that the court may not act on the motion to seal for some time, perhaps seven days, may make life very difficult as filing deadlines approach.

Requiring that the filing party also submit a redacted document that is in the open files. This measure could ensure some public access, but could also be a further burden on litigators meeting filing deadlines.

Notice to parties and nonparties with confidentiality interests. It may be that the party wanting to file the confidential materials is not the one contending that the materials are confidential, as with materials obtained under a protective order through discovery. So the showing needed to justify filing under seal may depend on a showing by another party, or even a nonparty. And providing these other persons notice of the proposed filing of the confidential materials may be important to protecting their confidentiality interests.

Consequences of denial of the motion to seal. Providing that filing under seal may occur only if the court so orders would avoid a problem that can arise if filing "provisionally" under seal is permitted before the ruling on the motion to seal. But if filing can occur before the court rules on the motion to seal, the question what happens if the motion to seal is denied arises. One possibility is that the filed document is automatically completely unsealed. Another might be that the party that sought to file under seal could retract the document and rely only on the redacted version (assuming filing a redacted version is required). But if retraction of the documents is a

remedy, another issue is that the party wanting to rely on the document may not be the one who claims confidentiality interests in the document. It would be odd to deny the moving party the chance to rely on the document after the court has ruled that the grounds for filing under seal have not been established.

Stating the date the seal ends. Another proposed requirement is that the motion to seal state when the document can (or perhaps automatically must) be unsealed. It may be that the clerk's office is to make a record of such unsealing dates and act upon them without further action by the parties. That could be a burden for the clerk. Relatedly, one proposal is that a rule direct that the document be unsealed 60 days after the "final resolution" of the action. But if there is an appeal, it may be uncertain (particularly for the court clerk) when "final resolution" has occurred.

Specialized intervention rules. There a body of caselaw recognizing that there is a right to intervene in some circumstances to seek to have materials unsealed even though they were filed under seal. One focus of that body of intervention law is the sort of interest a nonparty must demonstrate to support such focused intervention. Some submissions urge, however, that any "member of public" should have what seems to be a presumptive right in effect to intervene, whether or not that would otherwise be authorized under Rule 24.

Returning sealed documents to the filing party. Another possibility is to return the sealed documents to the filing party. That would not fit with a requirement that the documents be unsealed by a date certain or upon "final termination" of the action.

The Subcommittee invited reactions to these issues.

An initial reaction from a judge was "Why do practitioners want such a rule?" This judge is familiar with many cases involving highly confidential technical and competitive information. Impeding filing under seal would be very troublesome in such litigation.

An attorney emphasized that the extreme variety of local practices is a serious problem for the bar. Indeed, it would excellent if this Committee could regularize the practices of state courts as well, but that is beyond its remit. This member favors permitting filing of the sealed document before the court rules on the motion to seal, but also requiring simultaneous filing of a redacted document. Including time frames could be helpful. As things stand, without a uniform nationwide procedure things can get bogged down. It would be very desirable to determine what is really needed.

Another attorney member agreed. "There is a lot of uncertainty." One can have material from another party that it claims is confidential. "We should avoid micromanaging, but adopting a uniform set of procedures would be very helpful." The question what to do when the motion is denied is challenging.

Another attorney member agreed. Not only are districts presently inconsistent, but some of them have very onerous requirements. The real life difficulties for lawyers are substantial. Building

in required meet-and-confer sessions, etc., really imposes on a lawyer up against a filing deadline. But it is likely at least some courts may push back against some particulars.

Another attorney member recognized that the nature of practice in different districts could be quite significant on these topics. Some districts may have a high proportion of technology cases with great sensitivity about relevant data. Other districts may have caseloads that involve very different sorts of cases that do not present such problems.

A judge liaison brought up the issues of bankruptcy courts. At least some filings there must be kept under seal, including motions. For example, consider a motion to garnish. In addition, there may be confidentiality in a sense "inherited" from another court action. In addition, this member suggested that the draft Rule 5(d)(5) should be modified to say "Unless filing under seal is directed or permitted by a federal statute or by these rules . . . ."

A judge noted that "This is a big job." It's important to recognize that there are courts that think they know what they are doing. "Less is more with this kind of thing." And remember to focus on step 3 in Judge Dow's series of questions – will we create problems by making a change to respond to the problem called to our attention?

It was asked why the Appellate Rules are not a focus of this effort. One response is that the courts of appeals "inherit" sealing decisions made by district courts in the record on appeal. But it can happen that further matters are filed in the appellate court for which confidentiality is claimed.

An attorney member noted that "The Seventh Circuit does not credit district court seals."

Another suggestion was that Subcommittee members should consult with districts that have views on these subjects to learn more about their concerns.

A judge warned that it would be a mistake to assume that all CM/ECF systems are the same. Moreover, it is not necessarily true that anyone can really retract something filed in this manner – "Once on the server, it's hard to impossible to remove." It may be that something would be adopted at a high level of generality, but caution is needed.

Another judge noted, however, that concerns about excessive use of sealing have been floating around for years. So this is important. But it is also critical to assure that clerk's offices are involved because they are "essential players."

(3) *MIDP*

There was brief discussion of the learning of the very thorough MIDP study. No members urged that work continue on this topic, and it will be dropped from the agenda.

(4) *Cross-border Discovery*

Judge Michael Baylson (E.D. Pa.) attended the meeting during the discussion of this topic, and introduced the issues raised by his submission urging that the rules address the growing phenomenon of cross-border discovery. He noted that he dealt with these issues as a lawyer in private practice and also as U.S. Attorney before he took the bench. More recently, he has played a prominent role in a number of meetings and conferences about these issues, including a number involving the Sedona Conference, which has written to the Committee supporting Judge Baylson's proposals.

As a judge, he has found it workable to take a collaborative approach to discovery in France in a major litigation before him that involved discovery in France.

Altogether, these issues have persuaded him that we need to have rules addressing these challenges. The frequency of this activity has increased a great deal in this century, and the trend lines are pointed up in his forthcoming Judicature article, as indicated on p. 194 in the agenda book. But presently there is essentially no guidance in the rules for these problems even as they proliferate. "We are in a global universe." His suggestion is that the rules consider (1) that the judge ought to pay attention to foreign law; (2) that the judge should take account of comity; (3) that a rule should emphasize proportionality; and (4) that the challenges of ESI must be recognized in the rules. He is confident that interested lawyers can be approached for insights.

A reaction was that too often American litigators (and perhaps some judges) seem to insist on doing things their own way even though taking a cooperative approach might achieve valuable and rapid results while taking a confrontational approach can prove ineffective. In addition, it was noted that different approaches may be needed for discovery abroad for use in U.S. litigation under section 1781 and discovery in the U.S. for use in foreign courts (under section 1782).

Judge Baylson agreed that the Hague Convention is very important, but also noted that it is very unpopular with many American lawyers. It will be a challenge to explain why we need a rule, but it is worthwhile challenge.

It was noted that this is the first time this topic has been on the Committee's agenda, and the Subcommittee is presently at an early stage and seeking reactions.

A member reacted that these are important concerns, but not limited to discovery. There are closely related issues regarding service of process, the use of Rule 44.1 on proof of foreign law. In the 1950s, Congress created a process for cross-border issues.

A reaction to that comment was that it may be better to adhere to a "pure procedural" framework. Another was that when this set of discovery issues came up more than 30 years ago and resulted in a rule change approved by the Judicial Conference and forwarded to the Supreme Court, the government of the United Kingdom submitted objections and the Court returned the proposed amendments to the rulemakers, leading to eventual abandonment of the proposals. Perhaps taking a low profile approach would be prudent.

At the end of the Advisory Committee meeting, it was announced that a new subcommittee had been established to address cross-border issues. It will be chaired by Judge Manish Shah (N.D.Ill), and include Magistrate Judge Jennifer Boal (D. Mass.), Professor Clopton, Josh Gardner (DOJ), and Judge Catherine McEwen (liaison to the Bankruptcy Rules Committee).

Rule 41

Judge Bissoon introduced the report of the Rule 41 Subcommittee. A key problem is the interpretation of the word "action" in the rule. At least one court of appeals has taken a very literal approach to that word in this rule, holding that even a stipulated dismissal by court order of parts but not all of an action is not covered by the rule. Other courts have taken a more pragmatic approach to the rule, particularly when dismissal is done pursuant to a stipulation and by court order. There has been some outreach to the bar and bench about the issues raised by Rule 41(a), and that outreach is ongoing. Meanwhile, the thought is that the rule might benefit from a shift from "action" to "claims." That could mean complete dismissal of all claims against any party or dismissal of some but not all claims against a given party could be covered by the rule.

Professor Bradt added that there is a great variety of potential interpretations. At one end is the Eleventh Circuit interpretation that "action" means only that – the whole case. Another approach is that the rule should permit unilateral dismissal by plaintiff as to any defendant or any claim. In between, there are many possible positions.

A related problem is whether the current deadlines – filing of an answer or motion for summary judgment – should be moved up. Other rules cut off other things at an earlier point, so perhaps the filing of a Rule 12 motion should cut off the right to dismiss without prejudice.

Historical research does not provide much light on the current problem. It is clear that the goal in the 1930s was to put an end to the widespread problem of dismissals without prejudice at very late stages in the litigation (even after trial had begun). But that does not much inform the issues encountered nowadays, when multiparty cases abound.

Further discussion pointed up the variety of ways in which the rules might produce results like the ones Rule 41(a) authorizes. Rule 16 authorizes the judge to "narrow" the issues and claims as part of the pretrial process. Parties can in essence drop claims by forgoing a request under Rule 51 for instructions on some claims. Even the Eleventh Circuit has said that parties may "abandon" claims. And Rule 11(b) says that even as to claims properly asserted in the first place, if it becomes clear that they are unwarranted the attorney violates the rule by "later advocating" the claims.

The discussion so far was summed up as reflecting the reality that has emerged that the rule is "clunky" and that a literal interpretation resembles trying to fit "a square peg into a round hole." It is not clear how much additional outreach to the bench and bar will facilitate this work, though help is always welcome. The current thinking is that the rule should focus on "claims" rather than "actions." There seems to be less interest in revising the provisions about time frames – e.g., before an answer or Rule 56 motion is filed.

Another set of questions was raised: (1) How would the "without prejudice" feature of Rule 41(a) play out? Does that mean the claim dropped at one point in the case can be re-introduced later in the case? (2) How does that affect the consequences of eventual judgment in the case (assuming the withdrawn claim does not return) in a separate action asserting the withdrawn claim?

A first reaction to these questions was that the existing rules hardly work efficiently to deal with such situations. "Amending the complaint in the middle of a trial would be a problem." Another member agreed, and added that problems can arise if there is a settlement with some but not all defendants in a multi-defendant case. One does not want to invite a "whole satellite litigation" about how to proceed in such circumstances. And nonsettling defendants can cause mischief.

Regarding the second question, a further point was that "without prejudice" under Rule 41(a) (as under Rule 41(b)) only means that the dismissal itself is not res judicata. Assuming there is a final judgment on the remaining claims in the case, the claim preclusive effect of the judgment in a separate litigation would depend on the rules of claim preclusion. So that means the various claims initially combined in the action may have little to do with one another. If so, the rule should not provide that the withdrawn claims would have to be regarded as barred by the judgment on the remaining ones. It would depend on the specifics of the given case.

A further note was that the Supreme Court's *Semtek* case points out that the rules ought not try to control claim preclusion. That decision was about Rule 41(b), but instructive for Rule 41(a).

Yet another note was that Rule 41(b) speaks of "any claim," not the entire "action." So even within Rule 41 we have divergent attitudes toward dismissals. This set of questions is ripe for careful examination.

And the Rule 41(a) question is not limited to unilateral actions by a party; the "action" limitation (if it is one) also applies to stipulations and court orders under Rule 41(a).

The Subcommittee will continue examining these issues.

Rule 7.1

Justice Bland is Chair of the Rule 7.1 Subcommittee, which was appointed after the last meeting of the Committee and has begun work. Though the work to date is preliminary, progress has been made. One starting point is that Rule 7.1 does not map perfectly onto the main recusal statute, 28 U.S.C. § 455. But that is not necessarily a flaw in the rule. The rule does not tell judges when they must recuse. Instead, it serves to alert judges to the possible existence of statutory grounds for recusal. "Rule 7.1 does not put a thumb on the scale on whether to recuse, but only provides information for the judge."

The current rule may, however, not do that job as well as could be hoped. One submission to the Committee emphasized what has been called the "corporate grandparent" problem. The illustrative instance (but not only illustration) is Berkshire Hathaway. It may own 100% of the stock of a subsidiary that in turn owns 100% of the stock of the party before the court. The current

rule does not clearly call for disclosure of Berkshire Hathaway in such a situation, and the judge who owns Berkshire Hathaway stock (perhaps acquired before appointment to the bench) may be unaware of the possible connection.

At this point, one question is whether it makes sense to try to revise the rule. If so, there are other questions, such as:

(1) whether Rule 7.1 should be conformed to the recusal statute in some manner. For example, one district has a rule that focuses on whether the judge's interests might be "substantially affected" by the outcome of the pending case.

(2) Whether the disclosure net should be widened beyond interests in corporate parties. Today's commercial world includes many large actors who are not "nongovernmental corporations," which are the focus of the rule. Examples that come to mind include LLCs, limited partnerships, etc. Perhaps something like "entity" should be used, though that probably would introduce very uncertain boundaries. Beyond that, one might also focus on "profit-sharing agreements" or perhaps "insurance agreements."

(3) Whether the 10% figure in present Rule 7.1(a)(1)(A) should be changed. That is derived from outside the rules.

(4) The rule is limited to publicly-traded entities. But in today's world many large commercial players do not fit that description. Should it be assumed that the judge would not need notice of such interests (as compared to holding stock in publicly-traded entities) because the judge would recognize the connection without the need for a formal disclosure requirement?

Another proposal was to require the parties to examine the judge's holdings (as now required to be disclosed) and notify the judge of any possible ground for recusal within a short period.

A judge noted that one district is also looking at disclosure of third party litigation funding as a related sort of method of identifying possible grounds for recusal. A response was that TPLF remains on the Committee's agenda and is being actively monitored. Another response followed up with an observation by a judicial member of the Committee on this topic several years ago: "I don't think very many judges hold substantial interests in hedge funds." It has been asserted that hedge funds are major players in the TPLF world. The TPLF set of issues is probably separate,

Another reaction was that the rule could be expanded to call for disclosure of "any financial interest," but this would be quite broad.

A judge noted that if the goal is to assist the judge it is worth noting the Codes of Conduct Committee of the Judicial Conference is reportedly at work on revising the ethics guidance for judges to take account of the current landscape in terms of judicial ethics. One possible focus is on control (as opposed to a financial stake). Another is the "appearance issue" -- what would create an appearance of bias?

Another member agreed, but added that this could become a "huge quagmire." Using terms like "entity" or "affiliates" would be very broad.

It was stressed that the statute commands judges to recuse in situations the statute describes. The rule does not purport to replace the statute in that regard, but only to give the judge information helpful in making the decisions the statute commands the judge make.

On the 10% provision in the current rule, it was noted that it serves as a proxy for focusing on "control." Presumably there may be other connections that could contribute to "control," but defining them and excluding semantically similar arrangements that do not constitute "control" would be quite difficult. Our rule currently avoids other proxies. And it might be that statutory changes could bear on such topics. For example, Senator Warren has introduced a bill that would restrict judicial ownership of securities. No action has been taken on that bill, but if something like that were adopted it might inform what should be in Rule 7.1.

A judge suggested it would be a good idea to reach out to the Judicial Conference Committee on Codes of Conduct. The response was that the Subcommittee had already made contact with that group, and the Chair of that committee favored moving forward on the rules front as well. Another point made was that, to some extent, it seems that the Civil Rules Committee is serving as a lead on these topics, which also bear on the Bankruptcy, Criminal, and Appellate rules.

A judge noted that it appears that about half the districts do not have a local rule implementing the national rule. Maybe this is something on which districts vary a great deal in important ways. For example, a district in a financial center might have very different needs than a rural district.

Another reaction was that this is really more of a court conduct issue than a procedural rules concern. Having a disclosure rule is helpful to judges who must decide whether they should recuse under the statute. Our goal is to help judges avoid problems, not to tell them what to do.

The Subcommittee will continue with its work.

Inter-Committee Matters

Prof. Struve, Reporter of the Standing Committee, made oral reports about two sets of issues being addressed by inter-committee committees.

E-Filing by Self-Represented Litigants

Professor Struve reported on the progress of the working group that has been studying two broad topics relating to self-represented litigants – first, increasing their electronic access to court (whether by access to CM/ECF or by other means), and second, removing the current rules' requirement that paper filers effect paper service (of papers submitted subsequent to the complaint) on CM/ECF participants. One new development is that there now is a report (included in the agenda book) that deals with findings from a round of interviews that Dr. Tim Reagan and Prof. Struve conducted in Spring with employees of nine district courts.

The other new development concerns tentative decisions taken at the working group's most recent meeting. At that meeting, working group participants noted the substantial support that had emerged from the advisory committee discussion concerning a change to the rules governing service of papers subsequent to the complaint. The consensus supports repealing the current rules' apparent requirement that non-CM/ECF users serve CM/ECF users separately from the NEF generated after a filing is scanned and uploaded into CM/ECF. But a sketch of a proposed amendment is not before the advisory committees this fall because the working group concluded that it may be worthwhile to consider a broader overhaul of the service rules, to take greater account of the overall shift from paper to electronic service. Given that service by means of the NEF is the primary means of service nowadays, the idea is that the service provisions in Civil Rules 5 and the other national rules should be revised to foreground that as the primary means.

As to the question of CM/ECF access for self-represented litigants, working group participants recognized that in the advisory committee discussions there were expressions of support for expanding that access, but also expressions of skepticism and concern about expanding that access. Accordingly, the working group was now considering the possibility of proposing a rule that would merely disallow districts from adopting blanket bans entirely denying all CM/ECF access to all self-represented litigants. Such a rule could say that even if a district generally disallows CM/ECF access for all self-represented litigants, it should make reasonable exceptions to that policy. Professor Struve invited participants to share any ideas about how such a rule could be drafted so as to address any concerns held by skeptics in the room.

Midnight deadline for E-filing

Professor Struve also reported on the work of the E-Filing Joint Subcommittee. The subcommittee had been formed in response to a 2019 suggestion by then-Judge Michael Chagares that the national time-counting rules be amended to set a presumptive deadline (for electronic filing) earlier than midnight. The subcommittee asked the FJC for research on relevant issues, and the FJC produced two excellent reports – one on electronic filing in federal courts, and one on electronic filing in state courts.

The other notable development was the adoption by the Third Circuit of a local rule that moved the presumptive deadline for most electronic filings in that court of appeals to 5:00 p.m. That local rule took effect in July 2023.

The Standing Committee had asked the subcommittee to consider these developments. The subcommittee met virtually in summer 2023. They carefully considered both the Third Circuit's reasons for its new local rule and also concerns that a number of private attorneys and the DOJ had expressed about the proposed local rule. The subcommittee voted not to propose any national rule changes and also voted that it should be disbanded.

One Advisory Committee member suggested that things were working out fine in the Third Circuit. Another participant suggested that it would make sense for the rules committees to allow things to work themselves out in that circuit.

Redaction of last four digits
of Social Security number

Rules Committee Chief Counsel Thomas Byron reported on recent developments concerning the redaction of social-security numbers. Senator Wyden has asked for a re-examination of the current provisions in the privacy rules (including Civil Rule 5.2) that allow filings to include only the last four digits of the social-security number in court. An alternative would instead require redaction of the entire social-security number. The current rules allowing partial redaction reflect the judgment of the Advisory Committees that uniformity considerations warranted consistent redaction requirements across the Appellate, Bankruptcy, Civil, and Criminal Rules. Because the Bankruptcy Rules Committee previously determined that the last four digits of a social-security number could be important in some bankruptcy filings, this committee and others decided to follow the lead of the Bankruptcy Rules because practitioners would benefit from consistent requirements across the rules.

The Bankruptcy Rules Committee has discussed this issue during its last two meetings; those discussions suggest that there remains a need in bankruptcy proceedings to allow at least some filings that include a partial social-security number. Although that committee will continue to consider whether some changes to the Bankruptcy Rules might be warranted, it seems unlikely to recommend a requirement of complete redaction. That tees up the question for this committee, as well as the Appellate and Criminal Rules Committee, whether to depart from a uniform approach and adopt a rule requiring the complete redaction of social-security numbers. The reporters for the Advisory Committees and the Standing Committee met to discuss this question, and hope to have more to report to this Committee at the spring 2024 meeting.

Professor Marcus observed that the Civil Rules do not appear to require that any part of a social-security numbers be included in a filing. He also noted that Senator Wyden's suggestion did not identify any specific problem attributable to the inclusion of a partial number in a court filing. Mr. Byron responded that it might not be possible to trace an instance of identity theft to a court filing with a partial social-security number but there might nevertheless be good precautionary reasons for considering a complete redaction requirement. A practitioner member noted concerns about data breaches and the and the possibility of serious harm from identity theft using a partial social-security number and other information.

A judge explained the benefits to both debtors and creditors of allowing partial social-security numbers in bankruptcy proceedings. For example, the discharge in bankruptcy has value to the debtor only if the debtor can show that this discharge applies to that person. The last four digits are one way to do that. Another example is to give immediate effect to the automatic stay upon filing of the petition in bankruptcy court. It can be crucial to show that this "John Doe" is the one being sued in a given case.

Professor Marcus and a judge member discussed the practice of the Social Security Administration that historically included complete social-security numbers in administrative proceedings. Professor Struve pointed out that the current privacy rules exempt filings in social security review cases.

An academic member suggested that there might be technological tools available to identify partial or complete social-security numbers in court filings. Mr. Byron agreed that those kinds of tools could be useful, even if not matters for rulemaking. He also reminded the committee that the Federal Judicial Center is conducting research into the scope of any noncompliance with the redaction requirements of the privacy rules.

This issue will be carried forward.

Remote testimony in Bankruptcy Court

As an information matter, it was reported that the Bankruptcy Rules Committee has begun discussion of relaxing limits on remote testimony in some court proceedings. A focus group study is ongoing.

Civil Rule 43(a) says that remote testimony is permitted only in "compelling circumstances" and only with "appropriate safeguards." It appears that the Bankruptcy Rules committee is focused on relaxing the "compelling circumstances" requirement.

It was noted that the CARES Act Subcommittee formed at the beginning of the pandemic examined all the Civil Rules to determine whether the pandemic experience should a need for special treatment of the requirements of Rule 43(a), but found that the current rule gave courts sufficient flexibility in dealing with the problems via remote proceedings.

A judge raised a caution about too much relaxation. One illustration was noted by another participant – *Nuvasive, Inc. v. Absolute Medical, LLC*, 642 F.Supp.3d 1320 (M.D. Fla. 2022), in which a witness testifying remotely in an arbitration proceeding was receiving text messages from another party seemingly telling the witness what to say. *See id.* at 1331-32. This is a real concern, but the judge in that case was clear that this was the only such instance he had seen in his long career. Contemporary methods of communication may make this sort of thing easier than it was in the past, however. At the same time, safeguards only work if they are honored, and liars may cheat on that score as well. In this cited case, there were some safeguards in place, but they did not entirely protect against misbehavior.

Pushing in the direction of flexibility, however, is the likelihood that remote participation may enhance access to court. For example, it was reported that in the state courts in Texas (particularly family law matters) remote hearings had been used some two million times. This permitted better participation than in conventional in-person proceedings. It offered "road testing in real time" and shows great promise.

Random case assignment

The issue of "judge-shopping" has been very prominent recently with regard to a number of high-profile suits, often seeking "nationwide" injunctive relief. The Brennan Center for Justice at NYU Law School submitted 23-CV-U, urging the adoption of a rule that "would establish a minimum floor for the randomization of judicial assignment within districts in certain civil cases."

That is not the only such initiative. The American Bar Association in its Resolution 521 (adopted in August 2023) urged the federal courts to "eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge without random assignment when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation and where any party, including intervenor(s), in such a case objects to the initial, non-random assignment within a reasonable time."

In July 2023, 19 U.S. senators wrote to Judge Rosenberg raising similar concerns.

This is clearly a matter of great importance. But the introduction of this matter during the Committee's meeting also noted that it is not clear that this is best addressed in a Civil Rule. Somewhat supportive of that concern is 28 U.S.C. § 137(a), which appears to grant the district court authority to adopt a method of allocating cases. Statutory provisions also contain considerable detail about the divisions of district court, which may sometimes be a reason why a plaintiff can be confident in a given division that the case will be assigned to a particular judge. See 28 U.S.C. §§ 81-131. Since the main focus of recent concerns seems to be on divisions rather than entire districts, the detail of these statutory provisions raise issues about whether a national rule can require a reallocation of business among divisions of a district court.

This is not to say that the rules process is clearly unable to address these concerns via rule. For one thing, there is likely a good argument that a rule about allocation of judicial business is a matter of practice or procedure within the Rules Enabling Act. And the supersession clause of that Act says that rules supersede even statutes. But that authority was largely intended to respond to concerns in the 1930s and 1940s that the multitude of then-existing statutory provisions dealing with topics addressed in the new rules could hamstring the new rules in their infancy. On the other hand, § 137 was adopted more than 20 years before the Enabling Act was adopted in 1934, so it seems to be within the ambit of the supersession clause. (Contrast, for example, the procedural provisions of the Private Securities Litigation Reform Act, adopted in 1995.)

Background information on this topic appears beginning on page 301 of the agenda book.

Discussion of the issues involved several Committee members.

A judge noted that judge shopping of this sort is not a new phenomenon. Indeed, because single-judge districts were probably more common in the past than in the present, it may have been more common in the past. This judge is Chief Judge of a district that is very large, roughly 500 miles by 500 miles. Insisting that all cases be assigned randomly among all judges in the district could impose very substantial burdens on many parties, who could be required to travel long distances to attend proceedings in a distant courthouse in the district. Whether there is a single judge or many judges in a given division is largely controlled by Congress, and its allocation of divisions is governed by statute. Given changes in political ideology, this sort of concern has heightened importance today, but it is hardly something that only came into existence in the last few years. We must keep in mind that Congress not only created the districts and the divisions (and the number of judgeships in each of them), it also adopted venue statutes that determine where cases may be filed. For the most part, these things are not controlled by the Civil Rules. Importantly, "there is an interest in having local disputes decided locally."

Another judge noted that this may not be among the responsibilities of this Committee. Congress says how the districts are to be organized. Under guidance of Congress (and partly due to the difference in size of states) there are districts of very different sizes. This judge has noted bumper stickers in his state saying "I walked across the state." That is in some ways impressive, but pales in comparison to trying to walk across a state that is 1,000 miles wide. "We should be very careful about whether to wade in here." The statute leaves these matters to the Chief Judge, possibly under direction by the Circuit Judicial Council. This Committee should be very cautious in this area.

Another judge noted that this localism is not a modern phenomenon. This judge distinctly recalls being asked decades ago by a senator during his confirmation hearing whether he realized that the new seat for which he was appointed would mean he would need to reside in and become a part of the community where the new seat was located. Indeed, as of that time, Congress had created a one-judge division, and the senator wanted to be certain the candidate understood the need to be connected to that locale.

On behalf of the Department of Justice, competing considerations were emphasized. "This is a real issue." The State of Texas, for example, has sued the United States 32 times, and its forum selection has not been random. Not every case is a "local dispute." To the contrary, the matters that called forth this proposal are national in scope, but there is an appearance problem when a litigant like a state can go into any particular division and essentially choose their judge. Section 137 does not so clearly preclude rulemaking to address these issues. The general topic falls within the scope of the Enabling Act. And the statute recognizes "rules or orders" of the district. Yet local rules themselves are adopted pursuant to Rule 83, suggesting a role for the rules in overseeing these issues. It would not be so odd for a rule to superseded this century-old statute. This issue deserves further study.

A reaction to these points was that the rules have generally stayed away from this sort of issue. The operation of district courts and allocation of responsibilities among the judges in a district have traditionally been subject to local regulation. Section 137 is one of "an array of statutes regarding judicial organization." Some of them may become controversial. Consider

related cases local rules, which have attracted attention on occasion. But the point is that they are local rules. "There are dragons along this pathway."

A judge suggested that – given the importance of these issues – the Standing Committee should have a role in deciding how and whether to pursue a rules-based response. For the present, what seems to be needed is further legal analysis of the potential role for the rules process. This is not so much a task for a subcommittee as a legal research challenge.

Another judge agreed. We must satisfy ourselves on the question whether we can or cannot solve this problem or at least change the facts on the ground by a national rule. We cannot be blind to the perception that litigants -- from both ends of the political spectrum -- may attempt to exploit judicial assignment arrangements to obtain favorable results on cases of high national importance. This issue should remain on the Committee's agenda for its next meeting.

Another judge noted that such concerns are not limited to nationwide injunction cases. Patent cases, "mega bankruptcy" proceedings may fall into the same sort of category.

Another member noted that similar concerns could be voiced about Rule 4(k), regarding the personal jurisdiction reach of district courts.

Another judge cautioned that this is statute-driven. With regard to bankruptcy venue issues, there is a "perennial bill" in Congress on such concerns.

Work will continue on these issues, and in particular the scope of rulemaking authority to address them.

Rule 60(b) – Kemp v. U.S.

The issue was introduced as involving *Kemp v. United States*, 142 S.Ct. 1856 (2022), in which the Supreme Court decided that "mistake" under Rule 60(b)(1) includes a judicial mistake. During the January 2023 meeting of the Standing Committee, Judge Pratter (E.D. Pa.), a former member of this Committee, asked whether a rule change might be considered in light of this decision.

Information concerning this issue is in the agenda book beginning at page 334, and includes the *Kemp* case, beginning at page 338 of the agenda book.

In the *Kemp* case, the issue arose from a motion under § 2255 to vacate a sentence. Kemp was convicted in 2011 and sentenced to 420 months in prison. Along with several co-defendants, he appealed his conviction. The court of appeals consolidated the appeals and affirmed in November 2013. Several other defendants – but not Kemp – sought a rehearing, and the court of appeals denied that application in May 2014.

In April 2015 – less than a year after denial of the application for rehearing by Kemp's co-defendants in the court of appeals – Kemp filed a § 2255 motion. The Government moved to dismiss on the ground the motion was too late because the court of appeals affirmance of Kemp's

conviction became final 90 days after the court of appeals' affirmance in November 2013. The district court granted the Government's motion to dismiss, and Kemp did not appeal. But due to the petition for a rehearing by Kemp's co-defendants the district judge's dismissal on timeliness grounds may have been wrong.

Two years after dismissal of the § 2255 proceeding, Kemp sought to reopen the action, arguing that the judge had been wrong to grant the Government's motion to dismiss because his time to file was extended due to the application for rehearing by his co-defendant in consolidated cases, making his filing timely.

This time the district court denied the motion on the ground it was filed too late because it was beyond the one-year limit prescribed in Rule 60(b) for motions under Rules 60(b)(1), (2), or (3). Kemp contended that he was not relying on 60(b)(1) because that provision did not include legal errors, but only errors or omissions by parties. The district court dismissed, and the court of appeals rejected this argument when Kemp appealed.

Because there was a circuit split, the Supreme Court granted certiorari, and it held by an 8-1 vote that Rule 60(b)(1) includes legal mistakes by the judge. Justice Sotomayor concurred in the opinion, but reserved the question whether that interpretation would apply if the legal error was a result of a change in law after the court's original decision, a possibility the Court's opinion recognized remained undecided. Only Justice Gorsuch dissented, and he argued that the issue should be addressed through the rules process, not that the interpretation of the rule was wrong.

The Court's decision adopted the majority interpretation of the rule, holding that the one-year limitation in Rule 60(b) applies to judicial errors of law. In addition, it also noted that, beyond that one-year limitation, the rule also requires that the motion be brought "within a reasonable time." That has been held (in at least one case cited by the Court) to mean that it is not reasonable to permit the time to appeal to expire and then to challenge the ruling under Rule 60(b).

Because this decision adopts the majority rule and only applies that one-year limitation as an outside limit on the bringing of a motion within a "reasonable time," it does not seem that the Supreme Court's decision (by an 8-1 vote) calls for consideration of a rule change.

One member expressed agreement, and the consensus was to drop this matter from the Committee's agenda.

Rule 62(b)

This issue was introduced as being raised by the Appellate Rules Advisory Committee. In the wake of *City of San Antonio v. Hotels.com, L.P.*, 141 S.Ct. 1628 (2021), the Appellate Rules Committee prepared a proposed amendment to Appellate Rule 39 authorizing a motion in the court of appeals for reconsideration of the allocation of costs. This proposed amendment is out for public comment presently.

The Supreme Court's decision was that, after remand from the court of appeals the district court had no discretion about how to allocate costs. In that case, the major item on the cost bill

was the premium on a bond posted by the losing defendant to stay enforcement of the large judgment in the city's favor. The premium was more than $2 million. After reversing the district court judgment in favor of the city, as provided in the Appellate Rule the court of appeals directed that the city bear the costs on appeal, remanding to the district court to determine the amount of those costs. The proposed amendment to Appellate Rule 39 is designed to provide a vehicle for the losing party to seek a revision from the court of appeals of the cost allocation while the overall matter is still fresh in the mind of the court of appeals judges.

During the drafting of this amendment to Appellate Rule 39, one concern was whether the judgment winner might not know the magnitude of the premium for the bond at the time it would have to decide whether to seek a court of appeals ruling on the allocation of the costs on appeal if that emerged only after remand to the district court. So a provision calling for disclosure of that cost would be useful, but the Appellate Rules Committee could not devise a way to fit that into its Rule 39. It has suggested, instead, that Civil Rule 62(b) be amended to call for such disclosure.

A possible amendment approach was included in the agenda book:

> **(b) Stay by Bond or Other Security.** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. <u>The party seeking the stay must disclose the premium [to be] paid for the bond or other security.</u> The stay takes effect when the court approves the bond or other security and remain in effect for the time specified in the bond or other security.

It is not clear, however, whether such a change is needed. For one thing, it may be that, even though there is no formal requirement for disclosure, in fact the judgment winner usually knows the amount of the bond premium in connection with the district court's approval of the bond. In the *Hotels.com* case itself, the particulars of the bonding arrangement seemed to have been discussed in some detail. It is not clear that lack of disclosure explains the city's failure to seek a reallocation of costs in the court of appeals, which may have resulted from its mistaken belief that the district court would, on remand, have discretion to change the allocation ordered by the court of appeals.

It might be, as well, that incorporating disclosure into the rule could be taken to mean the district court could refuse to approve the bond on the ground that the premium was too high. Perhaps, given the requirement that the district court approve or disapprove the bond arrangements before granting a stay, this would be a good addition. But it seems that the winning party would usually not want a bond issued by a "cut rate" bonding company, so it would be a curious ground for declining to approve the bond.

The question at present is whether such a change would be a positive development, assuming that it would not have negative consequences. In other words, is there really a need for this rule change?

One reaction was that this does not seem to be a "real world problem." Instead, it is a minor problem, though a rule amendment might in some instances provide helpful notice to the judgment

winner of the need to seek re-allocation in the court of appeals under the new procedure if it is added to Appellate Rule 39. On the other hand, it is not clear that there is any significant risk of adverse consequences due to such a rule amendment.

The matter will remain on the Committee's agenda, but the need for action remains uncertain. The question can be addressed again at a later Advisory Committee meeting.

Rule 81(c)

Submission 15-CV-A has remained on hold since 2016. It focuses on a small change of verb tense made in the 2007 restyling:

(c) Removed Actions.

(1) Applicability. These rules apply to a civil action after it is removed from a state court.

* * *

(3) Demand for a Jury Trial.

(A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law ~~does~~ did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

(B) Under Rule 38. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:

(i) it files a notice of removal; or

(ii) it is served with a notice of removal filed by another party.

When this submission was reported to the Standing Committee at its meeting in June 2016, two members of that committee (then-Judge Gorsuch and Judge Graber) proposed that, instead of this change focused on removed cases, Rule 38 itself be amended to dispense with the need for a jury demand in any civil case, as is already the attitude of the Criminal Rules. Were this change made, of course, there would be no need to revise Rule 81(c) since the jury demand requirements of Rule 38 would be inapplicable. After extensive FJC research showing that failure to demand a jury trial rarely led to loss of the right to a jury trial, however, the Committee had recently decided

to drop that Rule 38 suggestion from the agenda. For that reason, this submission has returned to the agenda.

The submission is from a Nevada lawyer who found that his failure promptly to demand a jury trial after removal in an action removed from a Nevada state court deprived his client of a jury trial because he did not demand one after removal even though the time when state court rules required a jury demand had not passed as of the time of removal. He contended that the change in verb tense misled him.

The restyling change in verb tense does not appear to have been meant to affect the application of the rule; as with other rules, the Committee Note to the restyling said that the change was "intended to be stylistic only." In 1983, the Ninth Circuit interpreted Rule 81(c) to require a jury demand in removed actions whenever a jury demand is required by the rules of the state court from which removal was effected. And the district courts in the Ninth Circuit have continued to interpret the rule, in keeping with what the Committee Note said.

In the Nevada case that prompted this submission, the district court was unwilling to excuse the failure to demand a jury trial promptly after removal. And the revised rule may have reassured the attorney that no demand was needed. Using "does" (as the rule did until 2007) seems to focus on whether the state law practice never requires a jury demand. Perhaps that would be true if a state had a rule like the Gorsuch/Graber revision to Rule 38 proposed in 2016. It is not known whether there are any states which such provisions.

With the change in tense to "did," the reader might take Rule 81(c) to ask whether, at the time of removal, state law required that a jury demand already have been made. So interpreted, the change in verb tense could reassure a plaintiff whose case was removed that the federal timetable for demanding a jury trial did not apply because the due date to demand a jury trial had the case remained in state court had not yet arrived. For example, it appears that in California state courts the jury trial demand need not be made until "the time the cause is first set for trial, if it is set upon notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation." Cal. Code Civ. Proc. § 631(f)(4). So under the prior version of Rule 81(c), California is a state that "does" require an express jury demand, which was the basis for the Ninth Circuit's 1983 decision about the effect of the rule in a case removed from a California state court.

To take the change in verb tense to mean that Rule 38's deadline does not apply unless state law required that a jury trial demand be made as of the date of removal would mean, it seems, that removal before the due date in state court would, in effect, mean that in removed cases the demand requirement would resemble what the Gorsuch-Graber proposal would have produced in federal court. That would seem an odd result of a provision that seems to have been designed only to guard against loss of the right to a jury trial when practitioners accustomed getting a jury trial without having to demand one find their cases removed to federal court.

It might be added that, because removal ordinarily must be sought very early in the case, this reading of the rule would routinely exempt removed cases from the jury-demand requirement.

Since Rule 38 requires a jury demand only after the last pleading addressing an issue is served, it would seem that usually the change in verb tense would nullify the Rule 38 demand requirement.

It does not seem that the 2007 style revision has caused courts to re-interpret Rule 81(c), however. But as one Committee member noted, the matter is not clear from the restyled rule. The lawyer who sent in this submission seemingly misread the restyled rule. And another member asked how a self-represented litigant would likely read the rule.

Whether it is worthwhile to go back and undo every seeming "glitch" in the restyling process raises questions about whether serious consideration of an amendment of Rule 81(c) is wise. So an amendment that merely substituted "does" for "did" might not be worth it. But a rewriting of the rule might clarify things significantly, as noted in 2016:

> **(3) Demand for a Jury Trial.** Rule 38(b) governs a demand for jury trial unless, before removal, a party expressly demanded a jury trial in accordance with state law. If all necessary pleadings have been served at the time of removal, a party entitled to a jury trial under Rule 38 must be given one if the party serves a demand within 14 days after:
>
> (A) it files a notice of removal, or
>
> (B) it is served with a notice of removal filed by another party.

It was noted that this rule change would remove the long-existing exemption from making a jury demand upon removal from states (if there are any) that excuse parties from making a demand at any time.

The resolution was that the matter should be returned to the Committee during its Spring meeting. At least three options exist:

(1) Leave the restyled rule unchanged, as it does not seem to have caused much difficulty;

(2) Change "did" back to "does" in the rule, going back to the pre-2007 locution; or

(3) Revise the rule, perhaps along the lines above, to make it clearer.

Rule 54(d)(2)(B)(i)

Rule 54(d)(2)(B)(i) requires that a motion for an award of attorney's fees be filed "no later than 14 days after entry of judgment." Submission 23-CV-L, from Magistrate Judge Barksdale (M.D. Fla.), points out that this requirement does not work in relation to appeals to the court from denials of Social Security benefits when the result of the court review is a remand to the Commissioner to reconsider the initial Social Security decision. These remands are done pursuant to "sentence four" of 42 U.S.C. § 405(g). Such remands to the SSA can result in enhancing benefits for the claimant beyond what was originally awarded.

The Social Security legislation is extremely complicated and presents significant challenges to those unfamiliar with the practice. There appears to be a specialized bar that focuses on such cases. But the practice is surely important to the federal courts; some 18,000 actions are filed each year challenging denials of benefits. And remands to the Social Security Administration happen with considerable frequency.

The statute places clear limits on attorney's fees awards, capping them at 25% of the amount garnered for the claimant as a result of the proceeding in court (separate from the proceeding before the SSA). Further complicating the picture is the possibility of a fee award under the Equal Access to Justice Act.

The time limit specified in Rule 54(d)(2)(B) is designed to enable the court to make a fee determination while the underlying litigation is fresh in the court's mind. But with this particular sort of proceeding, the limit to a fee award would ordinarily depend on events that cannot be known when the court's remand occurs. And one could note as well that the judge might normally not be called upon to invoke much of the work done in handling the appeal to court since the cap would likely apply arithmetically, something not true of many other attorney fee awards subject to Rule 54(d)(2), whether handled under the "common fund" or "lodestar" method of determining a fee award.

To try to deal with this problem, Judge Barksdale reports in her submission that the M.D. Florida is considering a local rule with a 14-day time limit for fee applications keyed to the claimant's receipt of a "close out" letter regarding the proceedings before SSA after remand from the court.

By way of background, some description was offered regarding the development of Supplemental Rules for Social Security Actions Under 42 U.S.C. § 405(g), which went into effect on Dec. 1, 2022, less than a year ago. Those Supplemental Rules resulted from a major project involving a subcommittee of the Advisory Committee headed by Judge Lioi (N.D. Ohio). That project resulted from a recommendation by the Administrative Conference of the United States, itself based on a 200-page study of the operation of the SSA review of claims. Though that study found that the most significant problems with claim processing lay within the SSA, it also found that the handling of review proceedings in court could be improved by recognizing that they are essentially appellate and for that reason different from ordinary actions in federal court.

The relevance of this background is that Judge Lioi's subcommittee had to immerse itself in the details of this specialized area of practice to come to grips with issues not familiar to the members of the subcommittee. In large measure, that involved "education" sessions with SSA representatives and also representatives of the main Social Security claimants' organization and with the section of the American Association for Justice focused on these sorts of claims. Only after considerable effort did the subcommittee feel comfortable devising a set of Supplemental Rules that would be neutral and helpful to the courts and the litigants.

Among the issues not included in that set of Supplemental Rules was the handling of attorney fee awards. Of note is the fact that SSA early proposed a fairly elaborate rule for fee

awards under one of the pertinent statutes – 42 U.S.C. § 406(b) – though not for EAJA fee awards. That proposed rule appeared at pp. 416-17 of the agenda book for this meeting. This suggestion was not pursued, in part because the subcommittee was worried about recommending rule provisions that might unintentionally grant an advantage to one side or the other.

The present proposal may raise issues of unintentional shifting of advantage between the SSA and claimants, and could require a similar process of education about an area of practice not familiar to members of this Committee. That does not seem worthwhile for this single issue.

One reaction, however, can be offered: revising Rule 54(d)(2)(B) to alter the treatment of one category of cases would raise risks to the central principle of transsubstantivity on which the rules are based. That principle was a key consideration in deciding whether to go forward with Supplemental Rules for Social Security appeals, but the poor fit offered by the Civil Rules for those very numerous matters ultimately made the effort seem worthwhile. So if it seems worth proceeding to respond to this timing concern, it probably would be better to do so with a Supplemental Rule. The agenda book offered a sketch of what such a rule might look like:

Rule 9. Attorney fee award under § 406(b).

In its judgment remanding to the Commissioner, the court may[, without regard to Rule 62(d)(2)(B),] {notwithstanding Rule 62(d)(2)(B),} retain jurisdiction to permit plaintiff to [move] {apply} for an attorney fee award under 42 U.S.C. § 406(b) within __ days of the [final decision of the Commissioner] {final notice of the award sent to plaintiffs' counsel} after the remand.

Particularly given the very large effort involved in becoming acquainted with the particulars of this area of practice, it seems premature to consider this idea. The Supplemental Rules have been in effect for less than a year, and it may be that more experience will show that some revision of those rules would be desirable. That might be a good reason to embark on another effort to educate Committee members about this area of practice.

The resolution was that no action be taken presently on this submission. It would be desirable to notify Magistrate Judge Barksdale of this conclusion, and also invite information about how the proposed local rule in the M.D. Fla. has worked if it is adopted.

Proposals to Remove From Agenda

The last items on the agenda were five submissions for which the recommendation was that they be removed from the agenda. These five submissions were examined in the agenda book and presented together orally to the Committee during the meeting. After that presentation, the Committee unanimously voted to remove these items from the agenda. Below is a summary of the presentation during the meeting regarding these proposals:

Rule 30(b)(6) – 23-CV-I: This proposal urges that the rule be amended to require organizations that will designate a person to testify about the information they have on listed matters to identify the individual who will testify some time before the deposition occurs. This

proposal largely tracks a proposed amendment to Rule 30(b)(6) that was put out for public comment in 2018. There was intense controversy about proposed rule provisions regarding conferring about the identity of the individual selected, and eventually it was decided not to include rule provisions about that subject. This episode involved more than 1780 written comments and dozens of witnesses at hearings. Without debating the merits of the current proposal, taking up essentially the same thing again seems unwarranted.

Rule 11 – 23-CV-N: This proposal seeks addition of a statement in the rule that sanctions are required and not discretionary "when Congress has mandated by statute that sanctions be imposed." The proposal seems unnecessary, and there is at least one example of such a statute (PSLRA) in which the statute rather than the rule has governed the issue of sanctions. The change would be unnecessary and could engender issues to be litigated.

Rule 53 – 23-CV-O: This proposal seeks to add a provision to Rule 53 saying that masters "are held to a fiduciary duty type of relationship." Rule 53 was extensively reorganized 15 years ago to take account of how it is used in contemporary litigation. The proposal urges that "masters need to be reigned [sic] in." But the recent revisions to the rule do seek to channel that activity of masters, and the "fiduciary duty" standard could introduce confusion.

Rule 10 – 23-CV-Q: This submission proposes that Rule 10 be amended to require (at least in multiparty cases, and perhaps in multi-claim cases) that there be a "Document of Direction of Claims" (DoDoC) appended to the pleadings. Examples are provided on pp. 478-81 of the agenda book. Adding this requirement to the rules might in some instances assist parties in visualizing the party relationships, but could become complicated (particularly if some claims or parties were dropped, either under Rule 41 or otherwise, perhaps requiring submission of a revised DoDoC) and might also invite delaying motions. Consider, for example, a motion to strike a DoDoC as inadequate.

Contempt – 23-CV-K: The rules do not deal much with contempt. There is authority under Rule 37(b)(2)(A)(vii) to treat a party's failure to obey an order compelling discovery as contempt. Often the contempt power is regarded as inherent in the judicial office. And the topic surely presents challenges. In 1947, for example. Justice Rutledge in a dissent described contempt as "a civil-criminal hodgepodge." This submission is based on an article the submitter has recently published that proposes adoption of a new Civil Rule 42 dealing with contempt (perhaps causing all rules currently numbered above 41 to be renumbered), and also calling for statutory amendments and amendments to the Appellate, Bankruptcy, Criminal, and Evidence Rules. It is not clear whether any other advisory committee intends to pursue such amendments, but unless that occurs there seems little reason to pursue an amendment to the Civil Rules.

At the conclusion of the meeting, Judge Rosenberg reminded Committee members that the Spring meeting would occur on April 9, 2024, and that additional hearings on the proposed amendments out for public comment would occur on Jan. 16, 2024, and Feb. 6, 2024.

Respectfully submitted

Richard Marcus
Reporter