ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
November 1, 2018

AGENDA

Meeting of the Advisory Committee on Civil Rules
November 1, 2018
Washington, DC

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TAB 1

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TAB 1A

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 12, 2018 | Washington, D.C.

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee" or "Committee") held its spring meeting at the Thurgood Marshall Federal Judiciary Building in Washington, D.C., on June 12, 2018. The following members participated:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Elizabeth J. Shapiro, Esq.*
Judge Amy St. Eve
Judge Srikanth Srinivasan
Judge Jack Zouhary

The advisory committees were represented by their chairs and reporters:

Advisory Committee on Appellate Rules –
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Incoming Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, 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 Criminal Rules –
Judge Donald W. Molloy, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules –
Judge Debra Ann Livingston, Chair
Professor Daniel J. Capra, Reporter

*Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

Providing support to the Committee were:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Professor Catherine T. Struve	Associate Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Professor Bryan A. Garner	Style Consultant, Standing Committee
Professor R. Joseph Kimble	Style Consultant, Standing Committee
Bridget M. Healy	Attorney Advisor, RCS
Scott Myers	Attorney Advisor, RCS
Julie Wilson	Attorney Advisor, RCS
Frances F. Skillman	Paralegal Specialist, RCS
Shelly Cox	Administrative Specialist, RCS
Dr. Tim Reagan	Senior Research Associate, FJC
Patrick Tighe	Law Clerk, Standing Committee

OPENING BUSINESS

Judge Campbell called the meeting to order. He apologized to any Washington Capitals fans who would miss the Stanley Cup victory parade in D.C. because of the meeting.

He welcomed Judge Dennis Dow of the U.S. Bankruptcy Court for the Western District of Missouri, who will be the Chair of the Advisory Committee on Bankruptcy Rules beginning October 1, 2018. Because the current Chair, Judge Sandra Segal Ikuta, could not attend the meeting, Judge Dow is attending in her place. Judge Campbell also welcomed Professor Ed Hartnett who was recently appointed as Reporter to the Advisory Committee on Appellate Rules. He also noted that Chief Justice Roberts reappointed Judges Bates and Molloy as Chairs of their respective Advisory Committees for another year. Judge St. Eve was recently appointed to the U.S. Court of Appeals for the Seventh Circuit, and although Director Duff appointed Judge St. Eve to the Judicial Conference Committee on the Budget, Judge St. Eve graciously agreed to serve her remaining term on the Standing Committee.

Judge Campbell remarked that Judge Zouhary's tenure on the Standing Committee ends on September 30, 2018. Judge Zouhary will continue to help with the pilot projects going forward. He thanked Judge Zouhary for his service, noting that he is an innovator in district court case management.

In addition, Judge Campbell lamented the passing of Professor Geoffrey C. Hazard, Jr., a longtime member of and consultant to the Standing Committee. Professor Hazard passed shortly after the Committee's meeting in January 2018, and Judge Campbell said that he will be greatly missed.

Lastly, Judge Campbell discussed Professor Dan Coquillette's upcoming retirement from his role as Reporter to the Standing Committee in December 2018 but noted that Professor Coquillette will remain as a consultant thereafter. Chief Justice Roberts appointed Professor Catherine Struve as Associate Reporter, and we will ask the Chief Justice to appoint Professor Struve as Reporter while Dan transitions to a consulting role. Judge Campbell thanked Professor Coquillette for his service and looks forward to the celebration later this evening.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process, which is included in the Agenda Book. Also included are the proposed rules approved by the Judicial Conference in September 2017, adopted by the Supreme Court, and transmitted to Congress in April 2018. If Congress takes no action, the rule package pending before Congress will become effective December 1, 2018.

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Standing Committee approved the minutes of the January 4, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett provided the report of the Advisory Committee on Appellate Rules, which met on April 6, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of five action items and presented a few information items.

Action Items

Appellate Rules 3 and 13 – Electronic Service. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 3 and 13, both of which concern notices of appeal. The proposed amendments were published for public comment in August 2017 and received no comments.

The proposed amendments to Rules 3 and 13 reflect the increased reliance on electronic service in serving notice of filing notices of appeal. Rule 3 currently requires the district court clerk to serve notice of filing the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Similarly, Rule 13 currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail.

One Committee member remarked that use of "sends" and "sending" in Rule 3 seemed vague and inquired why more specific language was not used. Judge Chagares responded that a more general term was used to cover a variety of ways to serve notices of appeal, reflecting the various approaches courts use as they transition to electronic service.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 3 and 13.**

Appellate Rules 26.1, 28, and 32 – Disclosure Statements. The Advisory Committee sought final approval for proposed amendments to Appellate Rules 26.1, 28, and 32. The proposed amendment to Rule 26.1 changes the disclosure requirements in several respects designed to help judges decide whether they must recuse themselves. The proposed amendments to Rules 28 and 32 would change the term "corporate disclosure statement" to "disclosure statement." These proposed amendments were published in August 2017. The proposed amendments to Rules 28 and 32 received no public comments whereas Rule 26.1 received a few.

The National Association of Criminal Defense Lawyers ("NACDL") suggested that the Committee Note include additional language to help deter overuse of the government exception in 26.1(b) concerning organizational victims in criminal cases. In response, the Advisory Committee revised the Rule 26.1 Committee Note to more closely follow the Committee Note for Criminal Rule 12.4 and account for the NACDL comment. In addition, Charles Ivey suggested that Rule 26.1(c) include additional language referencing involuntary bankruptcy proceedings and requiring that petitioning creditors be identified in disclosure statements. The Advisory Committee consulted Professor Gibson, Reporter to the Bankruptcy Rules Committee, and accepted Professor Gibson's suggestion that no change was needed. Finally, two commentators argued that the meaning of 26.1(d) regarding intervenors was ambiguous. In response, the Appellate Rules Committee folded language from 26.1(d) regarding intervenors into a new last sentence in 26.1(a) and changed the title of subsection (a) to reflect that intervenors are subject to the disclosure requirement.

One member asked what constitutes a "nongovernment corporation" and whether this term includes entities such as Fannie Mae and Freddie Mac, which are government-sponsored publicly traded companies. This member also questioned why Rule 26.1 was limited to corporations, noting that limited partnerships can raise similar issues as corporations. One Committee member stated that disclosures should be broader rather than narrower and did not see the harm in deleting "nongovernmental." Another member questioned whether it is onerous to list governmental corporations. A different member reiterated that other types of entities can present similar problems as corporations.

Professor Struve noted that the goal of the proposed amendments to Rule 26.1 is to track the other disclosure provisions in the Civil, Criminal, and Bankruptcy Rules. Professor Cooper relayed the history of these disclosure statement rules, stating that the Civil Rules Committee decided to limit the disclosure statement to "nongovernment corporations" given the significant variation among local disclosure rules. Judge Chagares reiterated Professor Struve's point that the purpose underlying the proposed change to Appellate Rule 26.1 is consistency with the other federal rules regarding disclosure statements. Professors Beale and King noted a memo by Neal Katyal exploring why the disclosure statement is limited to "nongovernmental corporations" and concluding that this limitation was not causing a practical problem.

A member noted the federal rules should be consistent with each other. However, a bigger problem is whether the newly consistent rules provide judges with adequate information for recusal. Judge Campbell said that there are two distinct issues: first, whether to approve Rule 26.1 to make it consistent with the other federal rules, and second, whether to change or revisit the current policy underlying the disclosure statement rules. He argued that the second question was not ripe for the Committee's consideration.

A member asked if 26.1(b)'s disclosure obligation is broader than 26.1(a). Judge Campbell responded that subsection (b) is parallel with Criminal Rule 12.4 whereas subsection (a) is parallel with Civil Rule 7.1. He reiterated that the scope of the disclosure obligation should perhaps be reconsidered at a later time.

A member suggested deleting "and intervenors" in Rule 26.1(a)'s title, and Judge Chagares concurred. For consistency with other subsection titles, another member recommended making "victim" and "criminal case" plural in Rule 26.1(b)'s title, as well as deleting the article "a" preceding "criminal case." The Committee's style consultants recommended making a few stylistic changes in subsection (c), including adding a semicolon after "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 26.1, 28, and 32, subject to the revisions made to Rule 26.1 during the meeting.**

Appellate Rule 25(d) – Proof of Service. The Advisory Committee sought final approval for a proposed amendment to Appellate Rule 25(d), which is designed to eliminate unnecessary proofs of service in light of electronic filing. This proposed amendment had previously been approved by the Standing Committee and submitted to the Supreme Court. But after discussion at the January 2018 meeting, the previously submitted version was withdrawn for revision to address the possibility that a document might be filed electronically but still require service through means other than the court's electronic filing system on a party who does not participate in electronic filing. The Advisory Committee now seeks final approval of the revised language. Judge Campbell thanked Professor Struve for noting the potential issue. Judge Chagares also noted a few minor changes that should be made, including adding a hyphen between "electronic filing" in 25(d)(1) and deleting the words "filing and" in the Committee Note. Judge Chagares noted the Advisory Committee's view that the proposed revision to 25(d) was technical in nature, and did not require republication.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 25(d), subject to the revisions made during the meeting.**

Appellate Rules 5, 21, 26, 32, and 39 – Proof of Service. If the proposed amendment to Appellate Rule 25(d) is approved, proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee sought final approval without public comment of what it views as technical and conforming amendments to Rules 5, 21, 26, 32, and 39. Proposed

amendments to Rules 5, 21(a)(1), and 21(c) delete the phrase "proof of service" and add "and serve it," consistent with Rule 25(d)(1). Rule 26(c) eliminates the "proof of service" term and simplifies the current rule for when three days are added for certain kinds of service. Current Rule 32(f) lists the items that are excluded when computing length limits, including "the proof of service." Given the frequent occasions in which there would be no proof of service, the article "the" should be deleted. Given this change, the Advisory Committee agreed to delete all of the articles in the list of items. Rule 39(d) removes the phrase "with proof of service" and replaces it with "and serve." Judge Chagares explained that the Advisory Committee did not think public comment was necessary for these technical, conforming amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rules 5, 21, 26, 32, and 39.**

Appellate Rule 35 – En Banc Determinations. The Advisory Committee sought approval for publication of proposed amendments to Appellate Rules 35 and 40, which would establish length limits applicable to responses to petitions for rehearing en banc. Also, Rule 40 uses the term "answer" whereas Rule 35 uses the term "response." The proposed amendment would change Rule 40 to use the term "response" for consistency.

Some members noted other inconsistencies between the two rules. For instance, one member stated that Rule 35(e) just concerns the length limit whereas Rule 40 imposes additional requirements. Professor Hartnett responded that although the Advisory Committee has formed a subcommittee to examine Rules 35 and 40 more comprehensively, the committee felt it appropriate to move forward with this amendment in the interim. Judge Campbell asked if the Advisory Committee has a time table for when this review will conclude, and Judge Chagares stated they hope to finish this review in the fall. One Committee member noted that clarifying the length limits in the appellate rules is generally helpful and important.

One Committee member commented that the Committee Note to Rule 35 states "a court," instead of "the court" like the text of rule. The Committee's style consultants concurred that "a" should be changed to "the."

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rules 35 and 40, subject to the revisions made during the meeting.**

Information Items

Judge Chagares announced the formation of three subcommittees to examine: (1) Rule 3(c)(1)(B) and the merger rule; (2) Rule 42(b) regarding voluntary dismissals, and; (3) whether any amendments are appropriate in light of the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S. Ct. 13 (2017). One member asked if the Rule 42(b) subcommittee will explore whether different rules regarding voluntary dismissals should exist for class actions, and Judge Chagares stated that the subcommittee is exploring why judicial discretion over voluntary dismissals may be necessary, including in the class action context.

In addition, Judge Chagares noted that the Advisory Committee examined the problem of appendices being too long and including too much irrelevant information, as well as how much the requirements vary by circuit. However, technology is changing quickly which may transform how appendices are done. Accordingly, the Advisory Committee decided to remove this matter from the agenda and to revisit it in three years. Judge Chagares stated that the Advisory Committee also removed from its agenda an item relating to Rule 29 and blanket consents to amicus briefs, and an item relating to whether "costs on appeal" in Rule 7 includes attorney's fees. The Committee discussed the Supreme Court's recent decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), but that discussion did not give rise to an agenda item.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Incoming Chair Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which met on April 3, 2018, in San Diego, California. The Advisory Committee sought approval of eight action items and presented three information items.

Action Items

Bankruptcy Rule 4001(c) – Obtaining Credit. The Advisory Committee sought final approval for a proposed amendment to Bankruptcy Rule 4001(c), which details the process for obtaining approval of post-petition credit in a bankruptcy case. The proposed amendment would make this rule inapplicable to chapter 13 cases. The Advisory Committee received no comments on this proposed change. Some post-publication changes were made, such as adding a title and a few other stylistic changes. No Standing Committee members had any comments or questions about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 4001(c).**

Bankruptcy Rule 6007(b) – Abandonment or Disposition of Property. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 6007(b). The proposed amendments are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b), and to make the rule consistent with the procedures set forth in Rule 6007(a). The Advisory Committee received some comments on this rule, some of which they accepted but others they declined to adopt. The Committee's style consultants suggested changes to subpart (b) which would have improved the overall language. Because the purpose of the current amendment is simply to parallel the text of Rule 6007(a), the Advisory Committee declined to accept these suggestions, but will revisit the styling improvements if the restyling project goes forward.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 6007(b).**

Bankruptcy Rule 9036 – Notice and Service Generally; Deferral of Action on Rule 2002(g) and Official Form 410. These amendments are designed to expand the use of electronic noticing and service in bankruptcy courts. The proposed amendments to Rule 2002(g) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. The published amendments to Rule 9036 allow not only clerks but also parties to provide notices or to serve documents through the court's electronic-filing system. The proposed amendments to Official Form 410 add a check box for opting into email service and noticing.

The Advisory Committee received four comments, each raising concerns about the technological feasibility of the proposed changes and how conflicting email addresses supplied by creditors should be prioritized given the different mechanisms for supplying email addresses for service. The AO and technology specialists with whom the Advisory Committee consulted confirmed these concerns. Consequently, the Advisory Committee unanimously recommended deferring action on amendments to Rule 2002(g) and Official Form 410. By holding these amendments in abeyance, the Advisory Committee will have additional time to sort out these technological issues.

Nevertheless, the Advisory Committee recommends approving the amendments to Rule 9036. In Rule 9036, the word "has" in the second sentence of the Committee Note should be changed to "have." One Committee member asked if the phrase "in either of these events" should be "in either of these cases," and the Committee's style consultants noted that they try not to use "case" unless referring to a lawsuit.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9036, subject to the revision made during the meeting.**

Bankruptcy Rule 9037(h) – Motion to Redact a Previously Filed Document. The Advisory Committee sought approval for a proposed amendment to Bankruptcy Rule 9037, which adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in compliance with Rule 9037(a). The Advisory Committee received comments on the proposed changes, including one seeking to expand the amendments to address how documents placed under seal by the bankruptcy court should be handled on appeal. The Advisory Committee rejected this concern as beyond the scope of the rule amendment.

Another comment suggested an explicit waiver of the filing fee if a party bringing the motion seeks to redact protected privacy information disclosed by a different party (i.e., a debtor motion to redact his or her social security number inappropriately revealed in an attachment to a creditor's proof of claim). The Advisory Committee agreed with this sentiment but did not think that changing the rule was necessary because Judicial Conference guidelines already permit the court to waive the filing fee in this situation. A third commenter noted that nothing in the rule required filing the redacted document. In response, the Advisory Committee added language making it clear that the redacted document must be filed.

A final comment argued that restrictions on accessing the originally filed document should not go into effect until the redacted document is filed. The current rule as written imposes restrictions on the document once the motion to redact is filed. The Advisory Committee rejected this comment, finding such restrictions necessary and appropriate because other people will be made aware of this sensitive information when the motion to redact is filed.

Judge Campbell asked if the language of "promptly restrict" is sufficient to guide clerks and whether clerks know to restrict access to these documents upon the filing of a motion to redact. Judge Dow responded affirmatively and noted that the clerk member of the Advisory Committee advised that clerks already impose restrictions as a matter of course. Judge Chagares asked about the scope of the rule and whether it applies to an opinion, which is also a "document filed." Judge Dow stated that it could, and Professor Bartell noted that the rule only applies to the protected privacy information listed in Rule 9037(a).

A member stated that he is generally supportive of the rule change and asked whether the rule should apply more broadly, including in the Civil and Criminal Rules. Professor Beale noted that the Advisory Committees on Civil and Criminal Rules, respectively, have considered this question and decided against a parallel rule change because outside the bankruptcy context, where the problem is more frequent, judges routinely and quickly handle these matters when they arise.

This same member also asked why the information is limited to the information listed in Rule 9037(a). Professors Gibson and Beale explained that Rule 9037(a) is the bankruptcy version of the privacy rules adopted by the advisory committees to limit certain information in court documents as required by the E-Government Act. Professor Capra noted that the E-Government Act does not prohibit going farther than the information listed and that the Committee could decide to prohibit disclosing additional information. He added that if the issue is taken up, it should apply across the federal rules and not just in bankruptcy.

A member questioned why the rule uses the term "entity." Judge Dow explained that the term "entity" is a defined term in the Bankruptcy Code, and the broadly defined term even encompasses governmental entities.

This member also asked if the Advisory Committee considered any changes to 9037(g) regarding waiver. Professor Bartell explained that the waiver rule is still intact and that the Advisory Committee decided no change was needed. A member inquired about local court rules that address this waiver problem, and Professor Bartell noted that bankruptcy courts have such rules.

Another Committee member suggested adding language in the Committee Note stating that 9037(g) does not abrogate the "waiver" provision. Professor Gibson was reluctant to make that change absent discussion with the Advisory Committee. Judge Campbell stated that, under the current rule, a problem already exists. Parties are currently filing motions to redact, and in certain situations it is possible such a motion could conflict with the waiver provision. This rule just creates a formal procedure for filing a motion to redact. It does not affect the current case law regarding waiver.

Professor Hartnett asked what happens when the motion is granted and whether the court, not the party, is required to docket the redacted document. Professor Gibson noted that the filing party must attach the redacted document to its motion to redact and that the court has the responsibility to docket the redacted document. The Advisory Committee explored requiring the moving party to file the redacted document as a separate document, but rejected this approach.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 9037.**

Official Forms 411A and 411B – Power of Attorney. Proposed Official Forms 411A and 411B are used to execute power of attorney. As part of the Advisory Committee's Forms Modernization Project, prior versions of these forms were changed from Official Forms to Director's Forms 4011A and 4011B. However, Judge Dow explained that this created a problem because Bankruptcy Rule 9010(c) requires execution of a power of attorney on an Official Form, and these forms are no longer Official Forms. To rectify this problem, the Advisory Committee sought approval to re-designate Director's Forms 4011A and 4011B as Official Forms 411A and 411B. Because there would be no substantive changes for which comment would be helpful, the Advisory Committee sought final approval of the forms without publication.

Judge Campbell asked if the Judicial Conference can designate these forms as Official Forms, or if Supreme Court approval is required. Professor Gibson and Mr. Myers said that under the Rules Enabling Act, the Judicial Conference makes the final decision in approving Official Bankruptcy Forms, and that if it acts this September, the changes will become effective on December 1, 2018.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the designation of Director's Forms 4011A and 4011B as Official Forms 411A and 411B effective December 1, 2018.**

Bankruptcy Rule 2002(f), (h), and (k) – Notices. Bankruptcy Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee sought approval to publish amendments to three of the rule's subdivisions for public comment. These amendments 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 reflecting the relocation of the provision specifying the deadline for an objection to confirmation of a chapter 13 plan. The Standing Committee had no questions or comments about these proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendments to Rule 2002(f), (h), and (k).**

Bankruptcy Rule 2004(c) – Examinations. Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. The Advisory Committee sought approval to publish an amendment to 2004(c) adding a reference to electronically stored information to the title and first sentence of the subdivision. The Standing Committee had no questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 2004(c).**

Bankruptcy Rule 8012 – Corporate Disclosure Statement. The Advisory Committee sought approval to publish an amendment to Rule 8012 concerning corporate disclosure statements in bankruptcy appeals. The amendment adds a new subdivision (b) to Rule 8012 to require disclosing the names of any debtors in an underlying bankruptcy case that are not revealed by the caption in an appeal and, for any corporate debtors in the underlying bankruptcy case, disclosing the information required of corporations under subdivision (a) of the rule. Other amendments track Appellate Rule 26.1 by adding a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal, and make stylistic changes to what would become subdivision (c) regarding supplemental disclosure statements.

Professor Gibson noted that the reference to subdivision (c) will be dropped from the Committee Note. A Committee member asked if the term "corporation appearing" already captures corporations seeking to intervene. Professor Gibson responded that it might be better to track the language used in FRAP 26.1. The first sentence should read: "Any nongovernmental corporation that is a party to a proceeding in the district court . . . ." She also noted that Rule 8012(b) will incorporate the language changes made to FRAP 26.1(c) at the meeting today, including adding a semicolon before "and" as well as deleting "in the bankruptcy case" in item number (2).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 8012, subject to the revisions made during the meeting.**

Information Items

Judge Dow stated that a Restyling Subcommittee is exploring whether to recommend that the Advisory Committee restyle the Federal Rules of Bankruptcy Procedure. To inform this recommendation, the Committee's style consultants produced a draft of a restyled Rule 4001. In consultation with the FJC, the Subcommittee is conducting a survey of interested parties, including judges, clerks of courts, and other bankruptcy organizations, which will conclude on June 15, 2018. The survey uses a restyled example of 4001(a). The Subcommittee will analyze the survey responses and make a recommendation to the Advisory Committee at its September 2018 meeting. Although only preliminary results were available at the time of the meeting, Judge Dow said that responses from most bankruptcy judges and clerks were positive.

Professor Capra asked whether the Bankruptcy Rules could be restyled given that they track language in the Bankruptcy Code. Judge Dow noted that the parallels with the Code do not prohibit restyling; rather, they provide a reason for caution in undertaking that restyling effort. He emphasized that no decision on restyling has been made. Informed by the survey of interested parties, the Advisory Committee will consider the advantages and disadvantages of restyling and determine how, if at all, to move forward.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on April 24, 2018, in Washington, D.C. The Advisory Committee sought approval of two action items and shared two information items.

Action Items

New Criminal Rule 16.1 – Pretrial Discovery Conference. Judge Molloy reviewed the history of the proposal, which originated as a suggestion by members of the defense bar to amend Rule 16 to address disclosure and discovery in complex criminal cases, including those involving voluminous information and electronically stored information. At Judge Campbell's suggestion, a subcommittee held a mini-conference to gather information on the problem and potential solutions. Mini-conference participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. This conference significantly helped the Advisory Committee develop the proposed new Rule 16.1 by, among other things, building consensus on what sort of rule was needed and whether the rule should apply to all criminal cases. One member echoed that the mini-conference was fantastic and helped the Advisory Committee reach consensus on this rule. Judge Campbell applauded the Advisory Committee for finding consensus.

The new rule has two new sections. The first section, Rule 16.1(a), requires that no later than 14 days after arraignment the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. The second section, Rule 16.1(b), states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial."

Publication of the rule produced six comments. One comment from the DOJ expressed concern that the new rule could be read to grant new discovery authorities that could undermine important legal protections. The Advisory Committee agreed and decided to conform the language of the proposed rule to the phrasing of Criminal Rule 16(d)(2)(A). Two comments addressed whether the rule required the government to confer with pro se litigants and the Advisory Committee, in turn, changed the rule's language to "the government and the defendant's attorney" reasoning that it would not be practical for the government to confer about discovery with each pro se defendant. Two commenters recommended relocating the rule, but the Advisory Committee rejected this suggestion. One commenter suggested adding "good faith" to the meet and confer requirement but the Advisory Committee had already explored and rejected this idea. Professor Beale noted that the words "try to agree" capture this idea of conferring in good faith.

Lastly, two comments concerned whether the new rule would displace local rules or orders imposing shorter times for discovery. As published, the Committee Note stated that the rule "does not displace local rules or standing orders that supplement its requirements or limit the authority of the district court to determine the timetable and procedures for disclosure." The Advisory Committee determined that the Committee Note affirms the district courts retain authority to impose additional discovery requirements by local rule or court order, and that no further clarification was needed.

Many Committee members expressed concern that the Committee Note did not address adequately the concern about displacing local rules. One member reads the note to authorize local rules that are inconsistent with Rule 16.1. Judge Bates said that this issue has come up in his court and he shares the same concern. Professor Capra stated that whether a local rule that supplements the Federal Rules is inconsistent remains an open question. Professor Marcus discussed the history of Civil Rule 83 dealing with local rules.

Judge Campbell proposed addressing this concern by adding the language "and are consistent with." Professor Cooper suggested that it would be helpful to add a comment that the local rules must be consistent with the Federal Rules. He also proposed adding a citation to Rule 16 to ensure that Rule 16.1 is not interpreted as altering Rule 16's discovery obligations. Judge Livingston echoed Professor Cooper's concern that this last sentence is too freestanding and could benefit from a citation.

Professor Beale responded that this Committee Note language satisfied the interested parties and that she did not think that referencing other rules in the Committee Note is a good idea. Instead, she proposed adopting Judge Campbell's proposal. A Committee member expressed similar sentiments asking why the Committee Note does not use the phrase "consistent with." Judge Campbell reminded the Committee that the proposed language reflected an accord that had been carefully worked out among the interested parties.

After much discussion, consensus emerged to revise the last sentence in the third paragraph of the Committee Note as follows: "Moreover, the rule does not (1) modify statutory safeguards provided in security and privacy laws such as the Jencks Act or the Classified Information Procedures Act, (2) displace local rules or standing orders that supplement and are consistent with its requirements, or (3) limit the authority of the district court to determine the timetable and procedures for disclosure."

Other Committee members raised stylistic concerns with Rule 16.1. In an email sent prior to the meeting, a Committee member raised some grammatical and stylistic comments about Rule 16.1, which Judge Molloy and the Reporters agree require revisions. First, the word "shortly" in the first sentence in the Committee Note should be replaced with "early in the process, no later than 14 days after arraignment," to better track the language of the rule. Second, an errant underline between "it" and "displace" in the third paragraph of the Committee Note will be removed. Third, the phrase "determine or modify" will be added in the fifth paragraph of the Committee Note to more closely parallel the rule's language. Lastly, this member also noted that the commas in Rule 16.1(b) should not be bolded.

Another Committee member proposed using words like "process" or "procedure" instead of "standard" in the third paragraph of the Committee Note reasoning that such terms better reflect that Rule 16.1 is instituting a new procedure. The Committee's style consultants stated that the word "procedure" would be appropriate to use. Judge Molloy and the Reporters agreed with this change.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed new Rule 16.1, subject to the revisions made during the meeting.**

Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings – Right to File a Reply. Judge Richard Wesley, a former member of the Standing Committee, raised this issue with the Advisory Committee, noting a conflict in the cases construing Rule 5(d) of the Rules Governing Section 2255 Proceedings. This rule currently states that "[t]he moving party may submit a reply to the respondent's answer or other pleading within a time fixed by the judge." Although the Committee Note and history of the rule make clear an intent to give the inmate a right to file a reply, some courts have held that the inmate has no right to file a reply, but may do so only if permitted by the court. Other courts do recognize this as a right. After reviewing the case law, the Advisory Committee concluded that the text of the current rule contributes to a misreading of the rule by a significant number of district courts. A similar problem was found with regard to parallel language in Rule 5(e) of the Rules Governing Section 2254 Cases. The Advisory Committee agreed to correct this problem by placing the provision concerning the time for filing in a separate sentence, thereby making clear in the text of each rule that the moving party (or petitioner in § 2254 cases) has a right to file a reply.

Three comments were received during publication. The Advisory Committee determined that the issues raised by the comments were considered at length prior to publication and no changes were required. No Standing Committee members raised any questions or comments about this proposed amendment.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases and Rule 5 of the Rules Governing Section 2255 Proceedings.**

Information Items

Criminal Rule 16 – Pretrial Discovery Concerning Expert Witnesses. The Advisory Committee received two suggestions from district judges recommending that Rule 16's provisions concerning pretrial discovery of expert testimony should be amended to provide expanded discovery similar to that under Civil Rule 26. Judge Molloy noted that there are many different kinds of experts, and criminal proceedings are not parallel in all respects to civil cases. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded discovery of forensic expert testimony. While there will not be a simple solution, there is

consensus among the Advisory Committee members that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Evidence Rules) and also plans to hold a mini-conference.

Task Force on Protecting Cooperators. Judge St. Eve updated the Committee on the efforts of the Task Force on Protecting Cooperators. In April 2018, Director Duff sent 18 recommendations identified by the Task Force for implementation by the Bureau of Prisons ("BOP"). A day before the Director's scheduled meeting with the BOP, the BOP Director resigned, and that meeting did not occur. Since then, meetings have taken place with the BOP's Acting Director, who had attended the Task Force meetings. He and his staff are preparing the BOP's response, which they anticipate sending to Director Duff and the Task Force later this month. Some of the BOP Recommendations must be approved by the BOP union. Ms. Womeldorf has drafted the Task Force's second and final report, which will be submitted sometime next month to Director Duff. Some of the Task Force's recommendations may have to be considered by the Standing Committee and the Committee on Court Administration and Case Management. That said, Judge St. Eve stated that the Task Force's work is coming to a close.

Judge Campbell noted that, last January, the Standing Committee reviewed the Advisory Committee's decision not to recommend any rules implementing the CACM Interim Guidance or similar approaches to protecting cooperator information in case files and dockets based on the Task Force's recommendations. The Advisory Committee on Criminal Rules will revisit this decision after the Task Force's second and final report.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Bates and Professors Cooper and Marcus provided the report of the Advisory Committee on Civil Rules, which met on April 10, 2018, in Philadelphia, Pennsylvania. The Advisory Committee sought approval of one action item and presented four information items.

Action Item

Rule 30(b)(6) – Deposition of an Organization. The Advisory Committee sought approval for publication of proposed amendments to Rule 30(b)(6) which would impose a duty to confer. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to Rule 30(b)(6). In the summer of 2017, the subcommittee invited comment on a preliminary list of possible rule changes. Over 100 comments were received. Discussions eventually focused on imposing a duty on the noticing and responding parties to confer in good faith. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule.

As drafted, the duty to confer is iterative, and the proposed language requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each person who will testify. The first topic has not proved controversial; however, the second topic – the identity of the witnesses – has generated more discussion. Some fear the rule might be interpreted to require that organizations obtain the noticing party's approval of its

selection of witnesses. Nevertheless, the Advisory Committee decided to keep the identity of witnesses as a topic of conferring, at least for the public comment process, because the proposal carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf, and the Committee Note affirms that the choice of the designees is ultimately up to the organization.

Judge Bates noted that the Standing Committee received comments about the Advisory Committee's decision to include the identity of witnesses as a topic on which the parties must confer. Although these comments were addressed to the Standing Committee, he assured the Standing Committee that the Advisory Committee considered their substance when deciding to recommend publication. He noted that there is some force to the concerns stated in the comments, but that the Advisory Committee decided to include this topic because it is tied to the question of the matters for examination (the other question about which the parties must confer). Discussing what kind of person will have knowledge about a matter for examination may help avoid later disputes. Judge Bates also emphasized that the amendment only adds a requirement to confer; it does not require that the parties agree nor lessen the organization's ability to choose its witnesses.

Moreover, he cautioned that the comments to the Standing Committee are coming from only one segment of the bar, particularly from the defense bar and those who represent organizations who often must identify such witnesses. Interestingly, one letter from past, present, and upcoming Chairs of the ABA Section of Litigation did not raise concerns about the "identity" topic. That said, Judge Bates anticipates receiving many comments on this topic if the proposed amendment is approved for public comment, and he thinks comments from other groups will be informative. He guaranteed that these late submissions will be included as part of the Advisory Committee's broader assessment after public comment concludes.

Judge Campbell noted that the Standing Committee has received eight to ten last-minute comments about the proposed amendments to Rule 30(b)(6). This happens from time to time, but having received a number of them, he stated that the Standing Committee needs to clarify when it is appropriate to address comments directly to the Standing Committee. Clarification will help ensure that the public has fair notice of when to properly submit comments and that all commenters are treated equally. The Reporters discussed these questions at their lunch meeting today, and the Standing Committee will consider this procedural issue at its January 2019 meeting.

Many of these late comments noted by Judge Campbell expressed concern that the noticing party would have the ability to dictate the witnesses the organization must produce for deposition. In response, Judge Campbell stated that this is not the intent of the rule. Moreover, he noted that the rule also lists the matters for examination as a topic of conferring. Under the logic of the comments, it could be said that the organization now can dictate the matters for examination. Again, this is not the intent of the rule.

Lastly, Judge Bates reported that the Advisory Committee rejected adding a reference to Rule 30(b)(6)'s duty to confer in Rule 26(f) because Rule 26(f) conferences occur too early.

After this introduction, the Standing Committee engaged in a robust discussion about the Rule 30(b)(6) amendments. One member asked whether the conference must always occur and whether complex litigation concerns were driving this requirement. Professor Marcus responded that many complained about the inability to get the parties to productively engage on these matters and that the treatment here reflects repeat reports from the bar about issues with Rule 30(b)(6). This same member questioned whether the iterative nature of the confer requirement needs to be included in the rule. Judge Bates answered that it is important to signal in the rule the continuing obligation to confer because the topics of the conference may not be resolved in an initial meeting. For example, the identity of the organization's witnesses may have to be decided once the matters for examination are confirmed. The member stated this is a helpful change to a real problem and that it avoids the "gotcha" element of Rule 30(b)(6) depositions by requiring more particularity.

Another member asked whether it may be wise to require parties to identify and produce documents they will use at the deposition. By providing all such documents in advance of the deposition, parties can better focus on the issues. Moreover, Rule 30(b)(6) notices often list the matters to be discussed and providing the documents to be used will enable parties to get more specific. Another member agreed, asserting that documents ought to be identified prior to the deposition. Professor Marcus noted that such a practice could help focus the issues, but it also could lead to parties dumping a bunch of documents they may not use.

One member suggested that identifying documents is a best practice and should be highlighted in the Committee Note to Rule 30(b)(6). Professor Coquillette responded that committee notes should not be used to discuss best practices but to illustrate what the rule means. A member noted that nothing in the proposed rule would prohibit providing the document in advance; in fact, it would not change what many lawyers already do. One member recommended deleting "at least some of" from the first paragraph of the Committee Note, which discusses how it may be productive to discuss other matters at the meet and confer such as the documents that will be used at the deposition.

Other members questioned why the rule does not address timing. One member proposed adding a provision requiring the parties to make such disclosures within a certain number of days before the deposition. Another member seconded this concern. Judge Bates stated that this is a rule about conferring, not about timing, and the Advisory Committee learned that timing is often not the real issue facing the bar.

Echoing a point raised in the letter from present, past, and incoming Chairs of the ABA Section of Litigation, one Committee member expressed concern about previous committee notes – the 1993 Committee Note stating that a Rule 30(b)(6) deposition counts as a single deposition (for purposes of the presumptive limit on the number of depositions), and the 2000 Committee Note indicating that, if multiple witnesses are identified, each witness may be deposed for seven hours. The member thought this approach could carry unintended consequences. Professor Marcus discussed the history of the seven-hour rule and stated that the Advisory Committee has twice studied this issue carefully, most recently when Judge Campbell served as Chair. Getting more specific seemed to generate more problems, and although the Advisory Committee considered this, they do not think there is a cure because any solution

would lead to other problems. The Advisory Committee consequently concluded that a requirement to confer was a step in the right direction.

Committee members discussed at length the "identity" requirement. One member noted his agreement with the criticism that "identity" is unclear. He does not know if it is helpful to require conferencing about "identity." The member stated that he conducted an informal survey and said that this is not much of an issue, especially for good lawyers. Another member noted that she does not see Rule 30(b)(6) issues often unless they concern the scope of the deposition, which the "matters for examination" topic addresses. She shared her colleague's concern that "identity" is unclear.

Judge Bates noted that district court judges do not see many Rule 30(b)(6) issues, but the Advisory Committee heard from the practicing bar that problems do not always get to the judge. The proposal is responsive to the practicing bar's concerns. Judge Campbell explained that they write rules for the weakest of lawyers and that the "identity" topic responds to the concerns of practitioners who complain that they cannot get organizations to identify the witnesses. Judge Bates reminded everyone that the proposed language is not final, but rather is the proposed language for public comment. The comments received thus far are from one constituency – members of the bar that primarily represent organizations – and comments have yet to be received from the rest of the bar.

Another Committee member remarked that the "identity" topic is important because it will inform the serving party whether the organization has no responsive witness and must identify a third party to depose. This member also suggested adding something encouraging the parties to ask the court for help in resolving their Rule 30(b)(6) disputes and to remind them of this practice's efficacy. Judge Bates noted that committee notes typically do not remind parties to come to the court to resolve such disputes, and Professor Marcus noted that judicial members on the Advisory Committee objected to inclusion of this concept in an earlier draft.

Despite this conversation, a Committee member stated that he was still uncomfortable with the "identity" language. He proposed stating "and when reasonably available the identity of each person who will testify." Another Committee member noted that such language would reinforce the iterative nature of the rule because organizations could identify witnesses shortly after conferring on the matters for examination.

Professor Cooper expressed skepticism about this Committee member's proposal. After conferring with Judge Bates and Professor Marcus, Professor Cooper recommended adding "the organization will designate to" so that the topic for conferral will be "the identity of each person the organization will designate to testify." The additional language – "the organization will designate to" – will reinforce that organizations maintain the right to choose who will testify and thus better respond to the concerns raised. If they make this change, they also recommended deleting the earlier use of "then."

Another Committee member noted that the Committee Note's use of the phrase "as necessary" was confusing and could be interpreted as requiring multiple conferences. He recommended instead: "The duty to confer continues if needed to fulfill the requirement of good

faith." Judge Bates liked this proposal, in part because it used fewer words and clarified the iterative nature of the rule.

After this discussion, Judge Campbell summarized the proposed modifications: (1) deleting "then" before the word "designate"; (2) deleting "who will" and adding "the organization will designate to"; (3) deleting "at least some of" from the first paragraph of the Committee Note; and (4) changing the wording of the penultimate sentence of the third paragraph of the Committee Note to read "The duty to confer continues if needed to fulfill the requirement of good faith."

Judge Bates noted that they may need to explain the deletion of "then" in the Committee Note, and Judge Campbell said that he and Professors Cooper and Marcus can explore this after the meeting. If such language is needed, a proposal can be circulated to the Standing Committee for consideration and approval.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 30(b)(6), subject to the revisions made during the meeting.**

Information Items

Rules for Multidistrict Litigation. The subcommittee formed to consider creating rules for multidistrict litigation is still in the information gathering phase. Proposed legislation in Congress known as the Class Action Fairness Bill would affect procedures in MDL proceedings. Judge Bates noted that consideration of this subject will be a long process, and that the subcommittee is attending various conferences on MDLs. The subcommittee has identified eleven topics for consideration, including the scope of any rules and whether they would apply just to mass torts MDLs or all types of MDLs, the use of fact sheets and *Lone Pine* orders, rules regarding third-party litigation financing, appellate review, etc. He encouraged Committee members to provide the subcommittee their perspective on any of these topics. Judge Bates noted that the subcommittee has not decided if rules are necessary or whether a manual and increased education would be better alternatives.

Social Security Disability Review Cases. A subcommittee is considering a suggestion from the Administrative Conference of the United States to create rules governing Social Security disability appeals in federal courts. The subcommittee has not concluded its work, and whatever rules it may recommend, if any, still need to be considered by the Advisory Committee. The most significant issues concerning these types of proceedings are administrative delay within the Social Security Administration and the variation among districts both in local court practices and in rates of remand to the administrative process. Whatever court rules may be proposed will not address the administrative delay.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which met on April 26-27, 2018, in Washington, D.C. The Advisory Committee presented two action items and seven information items.

Action Items

Evidence Rule 807 – Residual Exception. The Advisory Committee sought final approval for proposed amendments to Evidence Rule 807. Professor Capra reviewed the history of suggestions to amend the rule, noting that the Advisory Committee found that the rule was not working as well as it could. The proposal deletes the language requiring guarantees of trustworthiness "equivalent" to those in the Rule 803 and Rule 804 hearsay exceptions and instead directs courts to determine whether a statement is supported by "sufficient" guarantees of trustworthiness in light of the totality of the circumstances of the statement's making and any corroborating evidence. Subsections (a)(2) and (a)(4) are removed because they are at best redundant in light of other provisions in the Evidence Rules. The amendments also revise Rule 807(b)'s notice requirement, including by permitting the court, for good cause, to excuse a failure to provide notice prior to the trial or hearing.

One member asked if this proposal will increase the admissibility of hearsay evidence. Professor Capra noted that any increase will be marginal, perhaps in districts that adhere to a strict interpretation of the rule regarding "near miss" hearsay.

Ms. Shapiro noted the fantastic work Professor Capra did to help improve this rule and stated that the DOJ is incredibly grateful for his work.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously decided to recommend to the Judicial Conference for approval the proposed amendments to Rule 807.**

Evidence Rule 404(b) – "Bad Acts" Evidence. The Advisory Committee sought approval to publish proposed amendments to Evidence Rule 404(b). Professor Capra explained various Rule 404(b) amendments considered and rejected by the Advisory Committee. The Advisory Committee, however, accepted a proposed amendment from the DOJ requiring the prosecutor to provide notice of the non-propensity purpose of the evidence and the reasoning that supports that purpose. The Advisory Committee liked this suggestion because articulating the reasoning supporting the purpose for which the evidence is offered will give more notice to the defendant about the type of evidence the prosecutor will offer. The Advisory Committee also determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "*other* crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Professor Bartell asked whether the Advisory Committee considered designating a specific time period for the prosecutor to provide notice. Professor Capra said the Advisory Committee considered this idea but thought it was too rigid.

One member inquired about implementing a notice requirement for civil cases. Professor Capra responded that notice was not necessary in civil cases because this information

comes out during discovery. Judge Campbell also noted that lawyers in civil cases are not bashful about filing Rule 404 motions in limine.

Another member asked whether it would be better that subsection 404(b)(3) track the language of 404(b)(1) instead of stating "non-propensity purpose." Professor Capra said the Advisory Committee will consider this idea during the public comment period.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication in August 2018 the proposed amendment to Rule 404(b).**

Information Items

Judge Livingston provided a brief update of the Advisory Committee's other work. First, the Advisory Committee decided not to proceed with rule changes to Evidence Rules 606(b) and 801(d)(1)(A).

Second, the Advisory Committee considered at its April 2018 meeting the results of the Symposium held at Boston College School of Law in October 2017 regarding forensic expert testimony, Rule 702, and *Daubert*. The Symposium proceedings are published in the Fordham Law Review. No formal amendments to Rule 702 have been considered yet but the Advisory Committee is exploring two possible changes: 1) an amendment focusing on forensic and other experts overstating their results and 2) an amendment that would address the fact that a fair number of courts have treated the reliability requirements of sufficient basis and reliable application in Rule 702 as questions of weight and not admissibility.

Lastly, Judge Grimm proposed amending Rule 106 regarding the rule of completeness to provide that: 1) a completing statement is admissible over a hearsay objection, and 2) the rule covers oral as well as written or recorded statements. The courts are not uniform in their treatment of Rule 106 issues, and the Advisory Committee decided to consider this proposal in more depth at its next meeting.

THREE DECADES OF THE RULES ENABLING ACT

To honor Professor Coquillette's thirty-four years of service to the Standing Committee and his upcoming retirement as Reporter to the Standing Committee, Judge Sutton – a former Chair of the Standing Committee – led a question and answer session with Professor Coquillette. The discussion was wide-ranging and provided current Committee members with helpful history on challenges faced by the rules committees over time. Professor Coquillette noted that the Rules Enabling Act ("REA") has been so successful in part because the Department of Justice played an integral role in the REA process. He thanked the DOJ for recognizing the value of the REA and for helping preserve its integrity. Although the Standing Committee must be sensitive to the political dynamics Congress faces, Professor Coquillette cautioned that the REA process should not become partisan football. He stated that the Committee must "check its guns at the door" and do the fair and just thing. It is so important that the Committee be seen as fair,

Professor Coquillette explained, because the manner in which the Committee is perceived when reaching its decisions is vital to preserving the REA and faith in the rules process.

JUDICIARY STRATEGIC PLANNING

Brian Lynch, the Long-Range Planning Officer for the federal judiciary, discussed the strategic planning process and how the Standing Committee can provide feedback on the *Strategic Plan for the Federal Judiciary*. He emphasized that the Committee's reporting on long-term initiatives will help foster dialogue between the Executive Committee and other judicial committees.

Following Mr. Lynch's presentation, Judge Campbell directed the Committee to a letter dated July 5, 2017, in which the Standing Committee provided an update on the rules committees' progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*. Judge Campbell proposed updating this letter to reflect its ongoing initiatives that support the judiciary's strategic plan. In 2019, the Committee will be asked to update the Executive Committee on its progress regarding these identified initiatives.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved authorizing Judge Campbell to update and forward to Chief Judge Carl Stewart correspondence reflecting the Committee's long-term initiatives supporting the *Strategic Plan for the Federal Judiciary*.**

LEGISLATIVE REPORT

Julie Wilson of the Rules Committee Staff ("RCS") briefly delivered the legislative report. She noted that two new pieces of legislation have been proposed since January 2018 – namely, H.R. 4927 regarding nationwide injunctions, and the Litigation Funding Transparency Act of 2018 (S. 2815) regarding the disclosure of third-party litigation funding in class actions and MDLs. Neither bill has advanced through Congress. Ms. Wilson indicated that the RCS will continue to monitor these bills as well as others identified in the Agenda Book and will keep the Committee updated.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Standing Committee will next meet on January 3, 2019 in Phoenix, Arizona. He reminded the Committee that at this next meeting it will confer about its policy regarding comments on proposed rules addressed directly to the Standing Committee outside the typical public comment period.

Respectfully submitted,

Rebecca A. Womeldorf

Secretary, Standing Committee

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TAB 1B

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Agenda E-19 (Summary)
Rules
September 2018

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, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 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. 2-6

2. a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 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; and

   b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date..... pp. 7-15

3. Approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C 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. 20-24

4. Approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 25-26

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

- Federal Rules of Appellate Procedure ..... pp. 6-7
- Federal Rules of Bankruptcy Procedure ..... pp. 15-17
- Federal Rules of Civil Procedure ..... pp. 17-19
- Federal Rules of Criminal Procedure ..... p. 24
- Federal Rules of Evidence ..... pp. 27-29
- Judiciary Strategic Planning ..... pp. 29-30

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure (Standing Committee or Committee) met on June 12, 2018. All members were present.

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

Also participating in the meeting were: Judge Jeffrey S. Sutton, former Chair of the Standing Committee; Professor Daniel R. Coquillette, the Standing Committee's Reporter; Professor Catherine T. Struve, the Standing Committee's Associate Reporter; Professor Joseph Kimble and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Attorneys on the Rules Committee Staff; Patrick Tighe, Law Clerk to the Standing Committee;

and Dr. Tim Reagan, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 25 (Filing and Service)

The proposed amendment to Rule 25(d)(1) eliminates unnecessary proofs of service when electronic filing is used. Because electronic filing of a document results in a copy of the document being sent to all parties who use the court's electronic filing system, separate service of the document on those parties, and accompanying proofs of service, are not necessary. A previous version of the Rule 25(d)(1) amendment was approved by the Judicial Conference and submitted to the Supreme Court but was withdrawn by the Standing Committee to allow for minor revisions. The revised amendment approved at the Committee's June 2018 meeting includes changes previously approved, but also covers the possibility that a document might be filed electronically and yet still need to be served on a party (such as a pro se litigant) who does not participate in the court's electronic-filing system.

Under the proposed amendment to Rule 25(d)(1), proofs of service will frequently be unnecessary. Accordingly, the Advisory Committee proposed technical amendments to certain rules that reference proof of service requirements, including Rules 5, 21, 25, 26, 26.1, 32, and 39, to conform those rules to the proposed amendment to Rule 25(d)(1). Rule 25(d)(1) was

originally published for comment; the Advisory Committee did not seek additional public comment on the technical and conforming amendments.

Rule 5 (Appeal by Permission)

The proposed amendments to Rule 5(a)(1) revise the rule to no longer require that a petition for permission to appeal "be filed with the circuit clerk with proof of service." Instead, it provides that "a party must file a petition with the circuit clerk and serve it on all other parties."

Rule 21 (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)

Under the proposed amendment to Rule 21, in addition to various stylistic changes, the phrase "with proof of service" in Rule 21(a) and (c) is deleted and replaced with the phrases "serve it" and "serving it."

Rule 26 (Computing and Extending Time)

The proposed amendment to Rule 26 deletes the term "proof of service" from Rule 26(c). A stylistic change was also made to simplify the rule's description for when three days are added to the time computation: "When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a)."

Rule 39 (Costs)

The proposed amendment to Rule 39(d)(1) deletes the phrase "with proof of service" and replaces it with the phrase "and serve."

Rule 3 (Appeal as of Right—How Taken) and Rule 13 (Appeals from the Tax Court)

The proposed amendments to Rules 3 and 13 – both of which deal with the notice of appeal – are also designed to reflect the move to electronic service. Rules 3(d)(1) and (d)(3)

currently require the district court clerk to serve notice of the filing of the notice of appeal by mail to counsel in all cases, and by mail or personal service on a criminal defendant. The proposed amendment changes the words "mailing" and "mails" to "sending" and "sends," and deletes language requiring certain forms of service. Rule 13(a)(2) currently requires that a notice of appeal from the Tax Court be filed at the clerk's office or mailed to the clerk. The proposed amendment allows the appellant to send a notice of appeal by means other than mail. There were no public comments on the proposed amendments to Rules 3 and 13.

Rule 26.1 (Corporate Disclosure Statement)

The proposed amendments to Rule 26.1 revise disclosure requirements designed to help judges decide if they must recuse themselves: subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal; new subdivision (b) corresponds to the amended disclosure requirement in Criminal Rule 12.4(a)(2) and requires the government to identify, except on a showing of good cause, organizational victims of the alleged criminal activity; new subdivision (c) requires disclosure of the names of all the debtors in bankruptcy cases, because the names of the debtors are not always included in the caption in appeals, and also imposes disclosure requirements concerning the ownership of corporate debtors.

There were four comments filed regarding the proposed amendments. One comment suggested that language be added to the committee note to help deter overuse of the government exception in the proposed subdivision (b) dealing with organizational victims in criminal cases. In response, the Advisory Committee revised the committee note to follow more closely the committee note for Criminal Rule 12.4.

Another comment suggested that language be added to Rule 26.1(c) to reference involuntary bankruptcy proceedings and that petitioning creditors be identified in disclosure statements. The Advisory Committee on Appellate Rules consulted with the reporter for the

Advisory Committee on Bankruptcy Rules and ultimately determined to not make any changes in response to the comment. In response to a potential gap in the operation of Rule 26.1 identified by the reporter to the Advisory Committee on Bankruptcy Rules, however, the Advisory Committee on Appellate Rules revised Rule 26.1(c) to require that certain parties "must file a statement that: (1) identifies each debtor not named in the caption; and (2) for each debtor in the bankruptcy case that is a corporation, discloses the information required by Rule 26.1(a)."

A third comment objected that the meaning of the proposed 26.1(d) was not clear from its text, and that reading the committee note was required to understand it. The final comment suggested language changes to eliminate any ambiguity about who must file a disclosure statement. In response to these comments and to clarify the proposed amendment, the Advisory Committee folded subparagraph 26.1(d) dealing with intervenors into a new last sentence of 26.1(a). In addition, the phrase "wants to intervene" was changed to "seeks to intervene" in recognition of proposed intervenors who may seek intervention because of a need to protect their interests, but who may not truly "want" to intervene. Other stylistic changes were made as well.

Rule 28 (Briefs) and Rule 32 (Form of Briefs, Appendices, and Other Papers)

The proposed amendments to Rules 28 and 32 change the term "corporate disclosure statement" to "disclosure statement" to conform with proposed amendments to Rule 26.1, as described above.

There were no public comments on the proposed amendments to Rules 28(a)(1) and 32(f). The Advisory Committee sought approval of Rule 28 as published. The Advisory Committee sought approval of Rule 32 as published, with additional technical edits to conform subsection (f) with the proposed amendment to Rule 25(d)(1) regarding references to proofs of service. Rule 32(f) lists the items that are excluded when computing length limits, and one such

item is "the proof of service." To account for the frequent occasions in which there would be no such proof of service, the article "the" should be deleted. Given this change, the Advisory Committee agreed to delete all the articles in the list of items.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Appellate Procedure and committee notes are set forth in Appendix A, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Appellate Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 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.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's request.

The proposed amendments to Rules 35 and 40 create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but not for responses to those petitions. In addition, the Advisory Committee observed that Rule 35 (which deals with en banc determinations) uses the term "response," while Rule 40 (which deals with panel rehearing) uses the term "answer." The proposed amendment changes the term in Rule 40 to "response."

Information Items

The Advisory Committee's consideration of length limits for responses to petitions for rehearing led it to consider a more comprehensive review of Rules 35 and 40, perhaps drawing

on the structure of Rule 21, and a subcommittee was formed to evaluate possible amendments. Another subcommittee will consider whether any amendments are appropriate following the Supreme Court's decision in *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13 (2017), which distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The subcommittee will also consider whether to align the rule with the statute, correcting for divergence that has occurred over time.

A subcommittee continues to work on Rule 3(c)(1)(B) and the merger rule, focusing on a line of cases in the Eighth Circuit holding that if a notice of appeal specifically mentions some interlocutory orders, in addition to the final judgment, review is limited to the specified orders. A subcommittee also continues to examine Rule 42(b), which provides that a circuit clerk "may" dismiss an appeal on the filing of a stipulation signed by all parties. Some cases, relying on the word "may," hold that the court has discretion to deny the dismissal, particularly if the court fears strategic behavior. The discretion found in Rule 42(b) can make settlement difficult, because litigants lack certainty, and it may result in a court issuing an advisory opinion.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 4001, 6007, 9036, 9037, and Official Forms 411A and 411B, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements)

The proposed amendment to Rule 4001(c), which applies to obtaining credit, makes that rule inapplicable to chapter 13 cases. Rule 4001(c) details the process for obtaining approval of postpetition credit in a bankruptcy case. The Advisory Committee proposed the amendment

after concluding that the rule's provisions are designed to address the complex postpetition financing issues particular to business debtor chapter 11 cases. Most members agreed that Rule 4001(c) did not readily address the consumer financing issues common in chapter 13 cases, such as obtaining a loan to purchase an automobile for family use.

There were no public comments on the proposed amendment. In giving final approval to the amendment at its spring meeting, the Advisory Committee added a title to the new paragraph (4), "*Inapplicability in a Chapter 13 Case*," and made stylistic changes to address suggestions from the style consultants.

Rule 6007 (Abandonment or Disposition of Property)

The amendments to Rule 6007(b) are designed to specify the parties to be served with a motion to compel the trustee to abandon property under § 554(b) of the Bankruptcy Code, and to make the rule consistent with Rule 6007(a) (dealing with abandonment by the trustee or debtor in possession).

Five public comments were submitted on the proposed amendments. Two comments addressed the last sentence of the proposed amendment, which stated that a court order granting a motion to compel abandonment "effects abandonment without further action by the court." The comments stated that this would be inconsistent with § 554(b), which provides for abandonment of property by the bankruptcy trustee, not the court. In response, the Advisory Committee inserted the words "trustee's or debtor in possession's" immediately before the word "abandonment." Two comments criticized as too burdensome the amendment language that requires both service and notice of the motion on all creditors. The Advisory Committee determined that ensuring all parties receive the notice of a motion to abandon property outweighed the concern of burdensomeness, and therefore made no change.

One comment noted that the 14-day period for parties to respond after *service* of a motion to compel abandonment under proposed Rule 6007(b) could be up to three days longer than the 14-day response period after a trustee voluntarily files *notice* of an intent to abandon property under Rule 6007(a). This is because of the extra time allowed for service of motions by mail. The comment suggested possible changes to Rule 6007(a) or Rule 9006(a) that would make the response periods under both subparts of Rule 6007 the same. The Advisory Committee declined to make any change at this time.

Rule 9036 (Notice by Electronic Transmission); Deferral of Action on Rule 2002(g) and Official Form 410.

Proposed amendments to Rules 2002(g), 9036, and Official Form 410 were published in 2017 as part of the Advisory Committee's ongoing study of noticing issues and were intended to expand the use of electronic noticing and service in the bankruptcy courts. Proposed amendments to Rule 2002(g) (Addressing Notices) allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and a corresponding amendment to Official Form 410 (Proof of Claim) added a check box for opting into email service and noticing. Current Rule 9036 provides for electronic service and notice of certain documents by permission of the receiving party and court order. As amended, the rule would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court's electronic-filing system on registered users of that system, without the need of a court order. The proposed amendments to Rule 9036 also allowed service or noticing on any person by any electronic means consented to in writing by that person.

Four sets of comments were submitted addressing the proposed amendments. Although the commenters were generally supportive of the effort to authorize greater use of electronic service and noticing, they raised implementation issues and therefore suggested a delayed

effective date of December 1, 2021 with respect to the proposed amendments to Rule 2002(g) and Official Form 410.

All four sets of comments stated that it is not currently feasible to implement the proposed email opt-in system. They said that without time-consuming software programming and testing, the Bankruptcy Noticing Center (BNC) would not be able to receive the email addresses that opting-in creditors would put on proofs of claim. Instead, this information would have to be manually retrieved and conveyed to the BNC by clerk's office personnel.

Three comments expressed concerns that conflicting addresses might be on file for a single creditor and that there needs to be clarity about how the proposed proof of claim email option fits into existing rules about which of the conflicting addresses should be used. This possibility exists because there are several provisions in the Bankruptcy Code and rules that allow a creditor to designate an address for notice and service. One comment suggested the following order of priorities: (a) CM/ECF email address for registered users; (b) BNC email address; and (c) proof of claim opt-in email address. This order of priorities was inconsistent, however, with the proposed committee note accompanying the amendments to Rule 2002(g), which stated that "[a] creditor's election on the proof of claim, or an equity security holder's election on the proof of interest, to receive notices in a particular case by electronic means supersedes a previous request to receive notices at a specified address in that particular case."

The Advisory Committee discussed the comments during its spring meeting. Members accepted the views of the commenters and AO personnel that current CM/ECF and BNC software would be unable to implement the email opt-in proposal and that considerable time would be required to do the necessary reprogramming and testing. The idea of approving the rule and form amendments now but delaying their effective date until 2021 provoked concern

that technological advances during that three-year period might result in better means of employing electronic service and noticing than is currently proposed.

Members were also persuaded that the comments about determining priorities among conflicting creditor email addresses show a need for further coordination with other groups and AO personnel who are working on overlapping electronic noticing issues. Therefore, the Advisory Committee concluded that the proposed amendments to Rule 2002(g) and Official Form 410 should be deferred for now.

The comments supported immediate implementation of the proposed amendments to Rule 9036. Those amendments (a) allow both clerks and parties to serve and give notice through CM/ECF to registered users; (b) allow other means of electronic service and noticing to be used for parties that give written consent to such service and noticing; and (c) provide that electronic service is complete upon filing or sending unless the sender receives notice that the transmission was not successful. Those changes are consistent with amended Civil Rule 5 (Serving and Filing Pleadings and Other Papers), which Rule 7005 makes applicable in bankruptcy proceedings, and the amendments to Rule 8011 (Filing and Service; Signature), which are on track to go into effect on December 1, 2018. Thus, the Advisory Committee recommended final approval of the amendments to Rule 9036, with minor non-substantive wording changes to clarify applicability and in response to suggestions from the Standing Committee's style consultants, and with the addition of the following sentences to the committee note:

> The rule does not make the court responsible for notifying a person who filed a paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who receives notice that the transmission failed is responsible for making effective service.

Rule 9037 (Privacy Protection for Filings Made with the Court)

The proposed amendment to Rule 9037 adds a new subdivision (h) to address the procedure for redacting personal identifiers in previously filed documents that are not in

compliance with Rule 9037(a). The Advisory Committee proposed the amendment in response to a suggestion submitted by the Committee on Court Administration and Case Management.

Three comments were submitted. The first suggested that the proposed amendment be expanded to allow parties to submit a redacted document as an alternative to the designation of sealed documents to be included in the record on appeal under Rule 8009(f). The Advisory Committee decided this suggestion was beyond the scope of the situation it was attempting to address with proposed Rule 9037(h), and therefore declined to make any change in response to this comment.

The second comment recommended that the amendment be revised to clarify that no fee need be collected, or replacement document filed, from a party seeking to redact his or her protected information unless it is the party who filed the previous (unredacted) document. In addition, the second comment pointed out two instances of the phrase "unless the court orders otherwise" that created ambiguity.

Judicial Conference policy already addresses the assessment of a redaction fee on a debtor or other person whose personal identifiers have been exposed. JCUS-SEP 14, pp. 9-10. Section 325.90 of the *Guide to Judiciary Policy*, Vol. 10 (Public Access and Records) provides that "[t]he court may waive the redaction fee in appropriate circumstances. For example, if a debtor files a motion to redact personal identifiers from records that were filed by a creditor in the case, the court may determine it is appropriate to waive the fee for the debtor." Because the judiciary policy already allows a waiver of the redaction fee in appropriate situations, the Advisory Committee concluded that there is no need for Rule 9037(h) to address the issue.

The Advisory Committee agreed that the rule was ambiguous concerning when a bankruptcy court may "order otherwise," and revised the proposal to clarify that any part of the rule may be modified by court order.

The final comment suggested that proposed Rule 9037(h) contained an inadvertent gap because the rule did not require the filing of a redacted version of the original document as a condition of the restrictions upon public access. Under the rule as published, the only redacted version of the original document is the one attached to the motion itself and that copy, along with the entire motion, is restricted from public view upon filing and before the court rules on the motion. The suggestion recommended that the motion to redact not be restricted from public view until the court rules on it.

When the Advisory Committee initially considered how best to provide for the redaction of already-filed documents, it strove to avoid the possibility that a publicly available motion to redact would highlight the existence in court files of an unredacted document. Accordingly, the proposed rule requires immediate restriction of public access to the motion and the unredacted original document. Access to those documents remains restricted if the court grants the motion to redact. Although not expressly stated, the intent and implication of the rule was that if the motion is granted, the redacted document, which was filed with the motion, would be placed on the record as a substitute for the original document that remained protected from public view. As explained in the committee note: "If the court grants the motion to redact, the redacted document should be placed on the docket, and public access to the motion and the unredacted document should remain restricted."

To eliminate any ambiguity, the Advisory Committee added language to the rule stating that "[i]f the court grants [the motion], the redacted document must be filed." The Advisory

Committee did not accept the suggestion that a restriction on access to the motion and unredacted document be delayed until the court grants the motion to redact.

Finally, stylistic changes were made in response to suggestions from the style consultants, and the committee note was revised to reflect the changes made to the rule.

Official Form 411A (General Power of Attorney) and Official Form 411B (Special Power of Attorney)

As part of the Forms Modernization Project, the power of attorney forms, previously designated as Official Forms 11A and 11B, were changed to Director's Forms 4011A (General Power of Attorney) and 4011B (Special Power of Attorney), the use of which is optional unless required by local rule. This change took effect on December 1, 2015. The Forms Modernization Project group recommended this change to allow greater flexibility in their use, in light of increased restrictions on making modifications to Official Forms under then pending amendments to Rule 9009 that became effective in 2017.

The Advisory Committee later realized, however, that using Director's Forms for powers of attorney, rather than Official Forms, created a conflict with Rule 9010(c). That rule provides that "[t]he authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose . . . shall be evidenced by a power of attorney *conforming substantially to the appropriate Official Form*" (emphasis added). In revisiting this matter, the Advisory Committee concluded that its earlier decision to convert the forms to Director's Forms was unnecessary. Rule 9009 allows modifications of Official Forms "as provided in these rules." The relevant rule here – Rule 9010(c) – only requires substantial, not exact, conformity with the appropriate Official Form. Other rules requiring a document that "conforms substantially" to an Official Form have been interpreted to permit modifications of those forms and are included in the chart of Alterations Permitted by Bankruptcy Rules that was approved at the Advisory Committee's fall 2017 meeting and is available on the AO website. Treating Rule 9010(c) as permitting

modifications of the power of attorney forms would be consistent with the interpretation of Rules 3001(a), 3007, 3016(d), 7010, 8003(a)(3), 8005(a)(1), and 8015(a)(7)(C)(ii). Accordingly, to bring the rule and forms into conformity, the Advisory Committee recommended designating the power of attorney forms as Official Forms 411A and 411B, in keeping with the new numbering system for forms, with an effective date of December 1, 2018.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Bankruptcy Procedure and the proposed revisions to the Official Bankruptcy Forms and committee notes are set forth in Appendix B, with an excerpt from the Advisory Committee's report.

Recommendation: That the Judicial Conference:

a. Approve the proposed amendments to Bankruptcy Rules 4001, 6007, 9036, and 9037 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.

b. Approve effective December 1, 2018 converting Director's Forms 4011A and 4011B to Bankruptcy Official Forms 411A and 411B for use in all bankruptcy proceedings commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date.

Rules Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rules 2002, 2004, and 8012 with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

Rule 2002 (Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee)

Rule 2002 specifies the timing and content of numerous notices that must be provided in a bankruptcy case. The Advisory Committee recommended publication for public comment of amendments to three of the rule's subdivisions. This package of amendments would (i) require

giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Rule 2004 (Examination)

Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (ESI). The Advisory Committee discussed the suggestion at its fall 2017 and spring 2018 meetings. By a close vote, the Advisory Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to ESI 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.

Rule 8012 (Corporate Disclosure Statement)

Rule 8012 sets forth the disclosure requirements for a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel. It is modeled on Appellate Rule 26.1. The Advisory Committee on Appellate Rules has proposed amendments to Rule 26.1 that were published for comment in August 2017, including one that is specific to bankruptcy appeals. The Advisory Committee on Bankruptcy Rules therefore proposed publication of conforming amendments to Rule 8012 this summer.

Information Item

The Advisory Committee has created a Restyling Subcommittee and charged it with recommending whether to embark upon a project to restyle the Federal Rules of Bankruptcy Procedure, similar to the restyling projects that produced comprehensive amendments to 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.

To inform its recommendation, the subcommittee is seeking input from those who would be affected by such a restyling. The subcommittee worked with the Standing Committee's style consultants to produce a draft restyled version of Rule 4001 that illustrates changes that would likely occur should the restyling project proceed.

At its spring meeting, the Advisory Committee decided to seek comment on one section of the restyled rule, Rule 4001(a), and it approved a cover memo and a set of survey questions to be distributed to interested parties, such as all bankruptcy judges and clerks and various professional bankruptcy organizations. The cover memo explains that the exemplar is not being proposed for adoption, nor is the Advisory Committee seeking substantive comments on its revisions, but rather that input is sought on the threshold issue of whether restyling should be undertaken. Additional language was added to emphasize that substance and "sacred words" will prevail over style rules. The deadline for making comments was set at June 15, 2018. The subcommittee will analyze the responses over the summer in preparation for making a recommendation to the Advisory Committee at its September meeting.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an

organization, with a request that they be published for comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The proposed amendments to Rule 30(b)(6) are the result of over two years of work by the Advisory Committee. In April 2016, a subcommittee was formed to consider a number of suggestions proposing amendments to the rule. By way of background, this is the third time in twelve years that Rule 30(b)(6) has been on the Advisory Committee's agenda. In the past, the Advisory Committee ultimately concluded that the problems reported by both plaintiffs' and defendants' counsel involve behavior that could not be effectively addressed by a court rule.

The initial task of the subcommittee formed in 2016 was to reconsider whether it is feasible (and useful) to address by rule amendment problems identified by bar groups. The subcommittee worked on initial drafts of more than a dozen possible amendments that might address the problems reported by practitioners and, in the summer of 2017, invited comment on a narrowed down list of six potential amendment ideas. More than 100 comments were received. In addition, members of the subcommittee participated in conferences around the country to receive input from the bar. The focus eventually narrowed on imposing a duty to confer in good faith between the parties. The Advisory Committee determined that such a requirement was the most promising way to improve practice under the rule. The proposed amendment requires the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.

As drafted, the duty to confer requirement is meant to be iterative and recognizes that a single interaction will often not suffice to satisfy the obligation to confer in good faith. The committee note also explicitly states that "[t]he duty to confer continues if needed to fulfill the requirement of good faith." The duty to confer is also bilateral – it applies to the responding organization as well as to the noticing party.

Information Items

The Advisory Committee met on April 10, 2018. Among the topics on the agenda were updates from two subcommittees tasked with long-term projects. As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop 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)." With input and insights from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee has developed draft rules. The three draft rules are for discussion purposes only and do not represent any decision by the subcommittee to recommend adoption of these or any other rules.

Another subcommittee has been formed to consider three suggestions that the Advisory Committee develop specific rules for multidistrict litigation proceedings. Among the many proposals are early procedures to address plainly meritless cases and broadened mandatory interlocutory appellate review for important issues. This subcommittee will also consider a suggestion that initial disclosures be expanded to include third party litigation financing agreements, which are used in multidistrict litigation proceedings as well as other contexts. With assistance from the Judicial Panel on Multidistrict Litigation, the subcommittee has begun gathering information and identifying issues on which rules changes might focus. The subcommittee's work is at a very early stage – the list of issues and topics for study is still being developed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed new Criminal Rule 16.1, and amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts, with a recommendation that they be approved and transmitted to the Judicial Conference.

New Rule 16.1 (Pretrial Discovery Conference; Request for Court Action)

The proposed new rule originated with a suggestion that Rule 16 (Discovery and Inspection) be amended to address disclosure and discovery in complex cases, including cases involving voluminous information and ESI. While the subcommittee formed to consider the suggestion determined that the original proposal was too broad, it determined that a need might exist for a narrower, targeted amendment. A mini-conference was held in Washington, D.C. on February 7, 2017. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. Consensus developed during the mini-conference regarding what sort of rule was needed. First, the rule should be simple and place the principal responsibility for implementation on the lawyers. Second, it should encourage the use of the ESI Protocol.[1] Participants did not support a rule that would attempt to specify the type of case in which this attention was required. The prosecutors and Department of Justice attorneys also felt strongly that any rule must be flexible given the variation among cases.

[1]The "ESI Protocol" is shorthand for the "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases" published in 2012 by the Department of Justice and the Administrative Office in connection with the Joint Working Group on Electronic Technology in the Criminal Justice System.

Guided by the discussion and feedback received at the mini-conference, as well as examples of existing local rules and orders addressing ESI discovery, the subcommittee drafted proposed new Rule 16.1. Because it addresses activity that is to occur well in advance of discovery, shortly after arraignment, the subcommittee concluded it warrants a separate position in the rules. A separate rule will also draw attention to the new requirement.

The proposed rule has two sections. Subsection (a) requires that, no later than 14 days after the arraignment, the attorneys for the government and defense must confer and try to agree on the timing and procedures for disclosure. Subsection (b) states that after the discovery conference the parties may "ask the court to determine or modify the timing, manner, or other aspects of disclosure to facilitate preparation for trial." The phrase "determine or modify" contemplates two possible situations. First, if there is no applicable order or rule governing the schedule or manner of discovery, the parties may ask the court to "determine" when and how disclosures should be made. Alternatively, if the parties wish to change the existing discovery schedule, they must seek a modification. In either situation, the request to "determine or modify" discovery may be made jointly if the parties have reached agreement, or by one party. The proposed rule does not require the court to accept the parties' agreement or otherwise limit the court's discretion. Courts retain the authority to establish standards for the schedule and manner of discovery both in individual cases and through local rules and standing orders.

Because technology changes rapidly, the proposed rule does not attempt to specify standards for the manner or timing of disclosure in cases involving ESI. The committee note draws attention to this point and states that counsel "should be aware of best practices" and cites the ESI Protocol.

Six public comments were submitted, and each comment supported the general approach of requiring the prosecution and defense to confer. The Advisory Committee made some

changes in response to concerns raised by the comments. First, the Advisory Committee agreed to revise proposed Rule 16.1(b)'s reference to "timing, manner, or other aspects of disclosure" to mirror Rule 16(d)(2)(A)'s reference to "time, place, or manner, or other terms and conditions of disclosure." Second, the Advisory Committee emphasized in the committee note that the proposed rule does not modify statutory safeguards. Finally, in response to two comments that addressed the applicability of the proposed rule to pro se parties, the Advisory Committee made two changes: amending the rule to make it clearer that government attorneys are not required to meet with pro se defendants; and adding to the committee note a statement about the courts' existing discretion to manage discovery and their responsibility to ensure that pro se defendants "have full access to discovery." The Advisory Committee also made several non-substantive changes recommended by the Committee's style consultants.

Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts (The Answer and Reply)

Proposed amendments to Rule 5(e) of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5(d) of the Rules Governing Section 2255 Proceedings for the United States District Courts make clear that the petitioner has an absolute right to file a reply.

As previously reported, a member of the Standing Committee drew the Advisory Committee's attention to a conflict in the case law regarding Rule 5(d) of the Rules Governing Section 2255 Proceedings. That rule – as well as Rule 5(e) of the Rules Governing Section 2254 Cases – provides that the petitioner/moving party "may submit a reply . . . within a time period fixed by the judge." Although the committee note and history of the rule make clear that this language was intended to give the petitioner a right to file a reply, the Advisory Committee determined that the text of the rule itself has contributed to a misreading of the rule by a

significant number of district courts. Some courts have interpreted the rule as affording a petitioner the absolute right to file a reply. Other courts have interpreted the reference to filing "within a time fixed by the judge" as allowing a petitioner to file a reply only if the judge determines a reply is warranted and sets a time for filing.

The proposed amendments confirm that the moving party has a right to file a reply by placing the provision concerning the time for filing in a separate sentence, providing that the moving party or petitioner "may file a reply to the respondent's answer or other pleading. The judge must set the time to file, unless the time is already set by local rule." The committee note states that the proposed amendment "retains the word 'may,' which is used throughout the federal rules to mean 'is permitted to' or 'has a right to.'" The proposal does not set a presumptive time for filing, recognizing that practice varies by court, and the time for filing is sometimes set by local rule.

Three comments were submitted, two of which addressed issues fully considered before publication: the need for an amendment, and whether to replace "may" with a phrase such as "has a right to" or "is entitled to." The Advisory Committee considered these two issues at length prior to publication and determined not to revisit the Advisory Committee's resolution.

A third comment supported the proposal but suggested additional rule amendments that would require that inmates be informed about the reply and when it should be filed at the time the court orders the respondent to file a response. Although the Advisory Committee declined to expand the scope of the proposed amendments to the rules, it did approve the addition of the following sentence to the committee notes: "Adding a reference to the time for filing of any reply to the order requiring the government to file an answer or other pleading provides notice of that deadline to both parties." In the Advisory Committee's view, this additional language will serve as a helpful reinforcement of best practices.

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee. The proposed amendments to the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Section 2255 Proceedings for the United States District Courts and committee notes are set forth in Appendix C, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve proposed new Criminal Rule 16.1 and proposed amendments to Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts and Rule 5 of the Rules Governing Section 2255 Proceedings for the United States District Courts as set forth in Appendix C 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.

Information Item

The Advisory Committee met on April 24, 2018. At that meeting, the Advisory Committee added to its agenda two suggestions from district judges recommending that pretrial disclosure of expert testimony in Rule 16 (Discovery and Inspection) be amended to parallel Civil Rule 26. While there is consensus among members of the Advisory Committee that the scope of pretrial disclosure of expert testimony is an important issue that should be addressed, members also agree that there is no simple solution. There are many different types of experts, and criminal proceedings are of course not parallel in all respects to civil proceedings. Additionally, the DOJ has adopted new internal guidelines calling for significantly expanded disclosure of forensic expert testimony; it will take some time for the effects of those guidelines to be fully realized. The Advisory Committee will gather information from a wide variety of sources (including the Advisory Committee on Rules of Evidence) and also plans to hold a mini-conference.

FEDERAL RULES OF EVIDENCE

Rule Recommended for Approval and Transmission

The Advisory Committee on Rules of Evidence submitted proposed amendments to Rule 807, with a recommendation that they be approved and transmitted to the Judicial Conference.

The project to amend Rule 807 (Residual Exception) began with exploring the possibility of expanding it to admit more hearsay and to grant trial courts somewhat more discretion in admitting hearsay on a case-by-case basis. After extensive deliberation, the Advisory Committee determined that it would not seek to expand the breadth of the exception. But in conducting its review of cases decided under the residual exception, and in discussions with experts at a conference at Pepperdine Law School, the Advisory Committee determined that there are a number of problems in the application of the exception that could be improved by rule amendment. The problems addressed by the proposed amendment to Rule 807 are as follows:

1. The requirement that the court find trustworthiness "equivalent" to the circumstantial guarantees in the Rule 803 and 804 exceptions is exceedingly difficult to apply, because there is no unitary standard of trustworthiness in the Rule 803 and 804 exceptions.

2. Courts are in dispute about whether to consider corroborating evidence in determining whether a statement is trustworthy. The Advisory Committee determined that an amendment would be useful to provide uniformity in the approach to evaluating trustworthiness under the residual exception, and substantively, that amendment should specifically allow the court to consider corroborating evidence, because corroboration provides a guarantee of trustworthiness.

3. The requirements in Rule 807 that the hearsay must be proof of a "material fact" and that admission of the hearsay be in "the interests of justice" and consistent with the "purpose

of the rules" have not served any good purpose. The Advisory Committee determined that the rule will be improved by deleting the references to "material fact" and "interest of justice" and "purpose of the rules."

4. The notice requirement in current Rule 807 is problematic because it does not contain a good cause exception, it does not require the notice to be provided in writing, and its requirements of disclosure of the "particulars" of the statement and the name and address of the declarant are difficult to implement.

Proposed amendments to Rule 807 were published for comment in August 2017. The Advisory Committee received nine public comments. It carefully considered those comments, most of which were positive, and made some changes. The Advisory Committee also implemented some of the suggestions made by members of the Standing Committee at its June 2017 meeting, including adding references to Rule 104(a) and to the Confrontation Clause to the committee note. Finally, the Advisory Committee addressed a dispute in the courts about whether the residual exception could be used when the hearsay is a "near-miss" of a standard exception. A change to the text and committee note as issued for public comment provides that a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness.

The Standing Committee voted unanimously to adopt the recommendation of the Advisory Committee. The proposed amendments to the Federal Rules of Evidence and committee note are set forth in Appendix D, with an excerpt from the Advisory Committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Evidence Rule 807 as set forth in Appendix D and transmit them to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Rule Approved for Publication and Comment

The Advisory Committee submitted proposed amendments to Rule 404(b) (Crimes, Wrongs, or Other Acts) with a request that they be published for public comment in August 2018. The Standing Committee unanimously approved the Advisory Committee's recommendation.

The Advisory Committee has monitored significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several circuits have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

1. Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2. Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3. Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Advisory Committee considered several textual changes to address these case law developments. At its April 2018 meeting the Advisory Committee decided against proposing extensive substantive amendments to Rule 404(b), based on its conclusion that such amendments would add complexity without rendering substantial improvement. The Advisory Committee did recognize that some protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the

evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, given the prosecution's expanded notice obligations under the Department of Justice proposal. The Advisory Committee also unanimously agreed that the requirement that the defendant must request notice be deleted, as that requirement simply leads to boilerplate requests.

Finally, the Advisory Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

Information Items

At its April 26-27, 2018 meeting, the Advisory Committee discussed the results of the symposium held at Boston College School of Law in October 2017 regarding Rule 702. The symposium consisted of two separate panels. The first panel included scientists, judges, academics, and practitioners, exploring whether the Advisory Committee could and should have a role in assuring that forensic expert testimony is valid, reliable, and not overstated in court. The second panel, of judges and practitioners, discussed the problems that courts and litigants have encountered in applying *Daubert* in both civil and criminal cases. The panels provided the Advisory Committee with extremely helpful insight, background, and suggestions for change.

The Advisory Committee is considering whether Rule 106, the rule of completeness, should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to be misleading, the opponent may require admission of a completing statement that would correct the misimpression. Judge Paul Grimm submitted a suggestion that Rule 106 should be amended in two respects: 1) to provide that a completing

statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Advisory Committee continues to consider the possibility of amending Rule 606(b) to reflect the Supreme Court's 2017 holding in *Pena-Rodriguez v. Colorado*. The Court in *Pena-Rodriguez* held that application of Rule 606(b) barring testimony of jurors on deliberations violated the defendant's Sixth Amendment right where the testimony concerned racist statements made about the defendant and one of the defendant's witnesses during deliberations. When it first considered the issue in April 2017, the Advisory Committee at that time declined to pursue an amendment for the time being due to concern that any amendment to Rule 606(b) to allow for juror testimony to protect constitutional rights could be read to expand the *Pena-Rodriguez* holding. The Advisory Committee revisited the question at its April 2018 meeting and came to the same conclusion but will continue to monitor the case law applying *Pena-Rodriguez.*

The Advisory Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

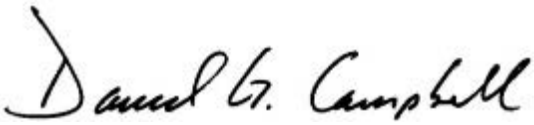
Finally, the Advisory Committee determined not to go forward with possible amendments to Rules 609(a), 611, and 801(d)(1)(A).

JUDICIARY STRATEGIC PLANNING

Chief Judge Carle E. Stewart, the judiciary's planning coordinator, asked Judicial Conference committees to provide an update on the initiatives they are pursuing to implement the strategies and goals of the *Strategic Plan for the Federal Judiciary*. The judiciary's long-range planning officer addressed the Committee on how its feedback on the *Strategic Plan* and reporting of its long-term initiatives helps foster communication between the Executive

Committee and Judicial Conference committees. The Committee will provide an update to Chief Judge Stewart on the rules committees' progress in implementing initiatives in support of the *Strategic Plan*.

Respectfully submitted,



David G. Campbell, Chair

Jesse M. Furman	William K. Kelley
Daniel C. Girard	Carolyn B. Kuhl
Robert J. Giuffra Jr.	Rod J. Rosenstein
Susan P. Graber	Amy J. St. Eve
Frank M. Hull	Srikanth Srinivasan
Peter D. Keisler	Jack Zouhary

Appendix A – Federal Rules of Appellate Procedure (proposed amendments and supporting report excerpt)
Appendix B – Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms (proposed amendments and supporting report excerpts)
Appendix C – Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings for the United States District Courts (proposed amendments and supporting report excerpt)
Appendix D – Federal Rules of Evidence (proposed amendments and supporting report excerpt)

TAB 2

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 10, 2018

The Civil Rules Advisory Committee met in Philadelphia, Pennsylvania,, on April 10, 2018. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq. (by telephone); Judge Craig B. Shaffer; Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter (by telephone), Professor Catherine T. Struve, Associate Reporter, and Peter D. Keisler, Esq., represented the Standing Committee . Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Fred B. Buck, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); Joseph Garrison, Esq. (NELA); Susan H. Steinman, Esq. (AAJ); Amy Brogioli (AAJ); Melissa Whitney, Esq., (FJC); Naomi Mendelsohn, Esq. (Social Security Admn.); Francis Massaro, Esq. (Admn. Conf. of U.S.); Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Leah Nicholls, Esq.; Robert Levy, Esq.; Brittany Schultz, Esq.; David Kerstein; Julia Sutherland; Bob Chlopak; Kristina Sesek; John Beisner, Esq.; Robert Owen, Esq.; Malini Moorthy, Esq.; Andrew Cohen, Esq.; and Andrew Strickler, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that four members -- Barkett, Folse, Matheson, and Nahmias -- were finishing six years of service, the maximum two terms in standard practice. Judge Shaffer is retiring from federal service, and a replacement must be found. And no successor has yet been appointed for former member Judge Oliver. As many as six new members may have been appointed by the time of the next meeting in November. This will be more change than usual in the Committee's membership.

Judge Bates reported that the Standing Committee meeting in January provided valuable input on the Rule 30(b)(6), MDL, and social security review projects. The subcommittees have taken this

input into account in the ongoing work that they report today. Nothing in the work of the Judicial Conference last March bears on the Committee's ongoing work. Finally, he noted that the Supreme Court continues to deliberate the Civil Rules proposals that were transmitted by the Judicial Conference last fall.

November 2017 Minutes

The draft Minutes of the November 7, 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the Legislative Report. She noted that in November the Senate Judiciary Committee held a hearing on the impact of lawsuit abuse on American small businesses and job creators. The subject is connected to the Lawsuit Abuse Reduction Act of 2017, which passed the House in March 2017 and remains pending in the Senate. Another House Bill addresses nationwide injunctions, a topic that was recently on the Committee agenda. It has a provision that would limit an injunction so that it reaches only parties to the case, and a provision that would limit injunctions to the district where issued.

Rule 30(b)(6)

Judge Bates introduced the three primary items on the agenda as the Reports of the Subcommittees on Rule 30(b)(6), MDL practices, and Social Security review. Skeptics have questioned the need for rules amendments in each of these areas. Each will provoke significant discussion, particularly Rule 30(b)(6) if it leads to a recommendation to publish a proposal for comment.

Judge Ericksen introduced the Report of the Rule 30(b)(6) Subcommittee. The November Committee meeting provided useful discussion of ways to improve the November draft. The Subcommittee conferred and made improvements following that meeting. The Subcommittee conferred again after learning of the January discussion in the Standing Committee.

The Rule 30(b)(6) amendment proposed by the Subcommittee appears at pp. 116-117 of the agenda materials. Several features deserve notice. It directs the person serving the notice or subpoena and the entity named as deponent to confer before or promptly after the notice or subpoena. "or promptly after" has been confirmed following earlier discussion. The question whether to say the parties "should" or "must" confer has been resolved in favor of "must," as a more appropriate direction for rule text. On the other

hand, the possibility of adding "or attempt to confer" has been rejected. Those words make sense in Rule 37, where they ensure that a recalcitrant party cannot thwart an attempt to compel proper discovery behavior by refusing to confer. They do not fit in Rule 30(b)(6), which should not be satisfied by a perfunctory attempt.

The Subcommittee discussed the proposed Committee Note at length. It chose a "less is more" approach. The Note does not prescribe topics to be discussed, for fear of prompting litigation about the adequacy of the conferring.

The Subcommittee also presents for consideration a possible amendment of Rule 26(f), which appears at p. 119 of the agenda materials. This proposal would add a suggestion that the parties "may consider issues regarding [contemplated] depositions under Rule 30(b)(6)" in the Rule 26(f) conference. The Subcommittee believes the Committee should consider this topic, but recommends that the amendment not be advanced for publication. Although the parties may be in a position to think about Rule 30(b)(6) depositions at the Rule 26(f) conference in some cases, in most cases the need to depose an entity and the matters to be covered will develop only as discovery progresses through other means. The possible Rule 26(f) proposal is described in a bracketed sentence in the Committee Note, p. 118 lines 237-239. The sentence that follows, also in brackets, observes that in some cases discussion at a Rule 26(f) conference may satisfy the Rule 30(b)(6) obligation to confer. This sentence makes sense whether or not the Rule 26(f) amendment is proposed, but it is not clear that it should be retained. It may be that it will simply invite disputes about the sufficiency of preliminary discussion in a Rule 26(f) conference to satisfy the Rule 30(b)(6) requirement.

Judge Bates thanked the Subcommittee for this report, and suggested that it be reviewed from the perspective of experience. From the outset, the Committee has been advised that most Rule 30(b)(6) problems are handled by the parties. If that fails, the court can resolve them without much ado. Judges, especially magistrate judges, say they seldom encounter Rule 30(b)(6) problems. So it is argued there is no need for any amendment. What is the Subcommittee view on this?

Judge Ericksen responded that anxiety about amending Rule 30(b)(6) has been substantially reduced when lawyers see the conservative amendment actually proposed. The question whether to go ahead with the proposal was the subject of back-and-forth discussion in November. The Subcommittee concluded that the proposal will bring into rule text the good practices in some courts and spread them to courts where the rule is not working so well. The need is real. "There is a disconnect between what lawyers

see -- frustration, and a wish to do something -- and what judges see."

Professor Marcus observed that about 12 years ago, the Committee went through Rule 30(b)(6) very carefully. Since then the Committee has repeatedly heard of problems with it. A lot can be learned from public comment, just as the Subcommittee learned a lot from the hundred or so comments offered in response to the Subcommittee's invitation.

A Subcommittee member added that the Subcommittee also recognizes that the 2015 amendments are working their way through the system. And reading all the Rule 1 cases shows that judges are invoking Rule 1 "to tell lawyers to behave better." Help also will be found in the new Rule 26(b)(1) definition of the scope of discovery. Not that progress is as uniform as might be hoped. References to the stricken phrase "reasonably calculated to lead to the discovery of admissible evidence," for example, have appeared in 99 cases in the weeks since this February 1, either in describing arguments of counsel or in the court's own statements. "Rule 30(b)(6) is a lightning rod." It generates disputes about the number and lack of clarity of matters for examination, what documents to prepare for, and lack of preparation. These seem to be case-management problems. If the proposed amendment encourages judges to become more involved, it will do good work.

Another Subcommittee member noted that he had been a fairly strong advocate for amending Rule 30(b)(6) based on his own experience. "Over the years, the process keeps getting reinvented case-by-case." But some proposals to solve problems directly would spawn their own problems. The Subcommittee proposal looks fairly modest. "It is what happens when good lawyers work together." Yet not all lawyers do that. Putting it into the rule can make it happen more often. And the Committee Note highlights added issues the lawyers should talk about. Some proponents of change will be upset that the proposal does not go far enough. But it is so modest that it is hard to imagine being upset with what it does.

Still another Subcommittee member echoed these thoughts. "Putting in more detailed commands will lead to more fights." Limiting the amendment to a requirement to confer is a sound approach. It is better at this point in the rule's evolution.

A different Subcommittee member observed that "The grandiose ideas gave way to a 'little nudge.'" The proposal is a good first step to prod the parties to confer and work it out.

Three Committee members turned to the draft Rule 26(f) amendment, agreeing that they would not recommend it for

publication. It is likely to stir fights in the Rule 26(f) conference.

That issue prompted a suggestion that if the Rule 26(f) draft does not go forward, thought should be given to deleting the final sentence from the proposed Committee Note, p. 118, lines 242-245: "In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16." Discussion suggested that if the Rule 26(f) proposal does not go forward, the bracketed sentence referring to it at lines 237 to 239 will be deleted. The next bracketed sentence, suggesting that discussion at a Rule 26(f) conference might at times satisfy the Rule 30(b)(6) mandate to confer, might also be deleted for fear of generating new disputes. But why not keep the suggestion that the parties might, without prompting by new rule text, find it helpful in some cases to include provisions for Rule 30(b)(6) in their discovery plan and perhaps seek to work out Rule 30(b)(6) issues at a scheduling conference? These questions will be framed more directly once the fate of the Rule 26(f) draft is decided, but the suggestion at lines 242-245 seems useful. "Let's not tinker too much with the Note."

It was noted that the Department of Justice would oppose going forward with the Rule 26(f) draft. As to Rule 30(b)(6), experience has been that it is not a concern. Still, it can be a difficult area for litigants given the breadth of the matters that may be described for examination. On the other hand, why does it matter who will be the persons designated by an entity deponent to provide testimony? Requiring discussion of who might be a witness may be difficult when the entity is not in a position to commit, and there is a risk that it will be difficult to change witnesses later. The entity may not yet know who can best testify, or how many.

The first response was that "there is a bit of reciprocity." The deposing party has to discuss the number and description of matters for examination. The deposed entity can think about the designation of witnesses only when the descriptions of the matters for examination are worked out. The party taking the deposition, on the other hand, needs to know whether the designated witness is also a fact witness. That can support discussion of ways to avoid duplicating depositions. The entity "is not required to put its feet in concrete. This is discussion, not a binding commitment."

A counterpoint was that over the last 25 years of reviewing discovery decisions, the most litigated issue arises from arguments that Rule 30(b)(6) designated witnesses are not adequately prepared.

September 5 version

The first response found a parallel. The proposal only requires that the parties confer in good faith. "They need not resolve every problem, but they can reduce the number of problems."

The doubt about discussing the identity of witnesses was repeated. It will help to confer about the matters for examination to learn whether they are needed, and how clearly they are defined. But why does the deposing party care whether the witness is John Smith or Joan Smith?

The next response was that the entity can say that the witness will be John Smith or Mary Jones. Then they can confer about whether one of them also will be a fact witness, and perhaps should be designated as the entity's witness for that reason.

A Subcommittee member said that in his cases, the deposing party always asks who the witness will be. And, at some point, the entity always says who it will be. A similar comment was that the entity can, in conferring, say that "I can't tell you now. I will tell you later."

The doubter agreed that "parties do tend to share names." But requiring discussion may lead to problems. One response was that the entity can say that it is too early to be sure who will be designated, even that the choice may depend on who can be made available on the day the deposing party wants to take the deposition.

Another response agreed that witnesses are named in advance. "There are cases where the witness is obvious." On the other hand, there are cases where it may take weeks or even months to prepare the witness to testify. If the witness is not obvious because of his role in the underlying events, what value is there in conferring about identity?

Judge Ericksen noted that the direction to confer about the identity of the witnesses could be stripped from the proposal, leaving the rest to go ahead.

Professor Marcus pointed out that the Committee Note, reflecting the present rule text that will remain unchanged, says that the entity has the right to designate its witnesses. The proposal does not compel it to identify them before the deposition. But getting the topic on the table at the conference seems like a good idea. If conferring about witness identity remains in the proposal for publication, we will get comments and learn from them.

Another Committee member suggested that discussion of witness identity should be left in the proposal to elicit comments. Perhaps

some way might be found to stimulate comments, such as placing this part in brackets, adding a question in a footnote, or specifically inviting comments in the message transmitting the proposal for publication. It was agreed that any of those tactics can be used. But even without them, there is enough interest to guarantee comments.

Judge Ericksen asked whether it would help to place brackets around "[and the identity of each person who will testify]." The Subcommittee got a lot of comments in response to its invitation. But it continues to be important to get comments about all aspects of the proposal. Emphasizing one part might be a distraction.

The opportunity to begin to confer "promptly after" the notice or subpoena was pointed out as a feature that should reduce the problem with discussing witness identity. That may justify leaving this subject in the published proposal. But it would be better to take it out. It will stir claims by deposing parties that they are entitled to know the identity of the witnesses before the deposition is taken.

This concern was echoed. Focusing on "the identity of each person who will testify" "seems definitive." A different Committee member suggested that the text might be revised to require discussion of who "might be" testifying as witnesses.

The duty to confer "in good faith" came back into the discussion. The duty is not satisfied by one phone call. There will be a continuing exchange. Perhaps the Committee Note can identify the iterative nature of the process. Agreement was expressed. One phone call is not good-faith conferring. The first step must be to identify with some clarity the matters for examination. Then the conference can move on to discuss who might be witnesses. Later discussion added further support for the view that it is important to emphasize the iterative nature of the process.

This view of the continuing duty to confer was questioned under the rule text. It might be argued that a duty to confer "before or promptly after" the notice or subpoena is satisfied by a single, one-off conference. One way to address this concern may be by elaboration in the Committee Note without changing the rule text. The Note could say that beginning no later than "promptly after" does not mean that prompt beginning should always be a prompt conclusion. In some -- perhaps many -- cases the discussion will have to continue through successive exchanges.

Judge Ericksen said that the proposal should carry forward with the duty to confer about the identity of the witnesses. But it could be useful to expand the Committee Note to say that although

the conference must be initiated promptly, it will often be an iterative process that requires more than one direct discussion.

Another participant observed that the problem is that the entity may not know the identity of its witnesses when the notice or subpoena is served. Perhaps the rule should instead direct discussion of "the manner in which the organization will respond," or "the steps the organization will take to respond." A Committee member suggested that perhaps one of these phrases, with or without some revision, might be published as a bracketed alternative. Professor Marcus expressed concern that publishing several bracketed alternatives might make the product seem less finished, less carefully considered. It is more forceful to include discussion of witness identity in rule text, without leaving it to Committee Note elaboration on "steps to respond." Another participant expressed a different concern: "manner" or "steps to" respond seem to impose a very broad obligation to discuss such things as the manner of searching electronic files, steps to learn from internal sources who may be good witnesses because of personal knowledge, the ability to learn added information, and the skill to communicate information accurately under deposition questioning.

Discussion returned to a renewed observation that a lot of people have said that it is a problem to begin a deposition without knowing before that moment who the witness will be. This was met with a question: would it be enough to resolve the problems for both sides by directing discussion of not who "will," but who "may" testify? One response was that "in good faith" properly identifies the process of conferring, but "may" seems to reduce the quality of the process.

A different suggestion was to add a few words to the rule text: "must confer in good faith about the number and description of the matters for examination, and in due course the identity of each person who will testify." Or: "the matters for examination. This discussion must include the identity of each person * * *."

Another possibility was suggested: "and begin to confer about * * *."

A still different possibility was proposed: within a reasonable time after determining the matters for examination, the entity could be required to identify the persons "who likely will testify." This met a widespread response: "likely" is not enough. It also elicited a response that it would create problems to require actual identification in rule text, but the issue could be discussed in the Committee Note.

Committee discussion of Rule 30(b)(6) was suspended at this

point to enable the Subcommittee to confer over the lunch break. The way was left open for recommendation of alternative rule texts.

After lunch, the Subcommittee returned with a proposal to revise the Rule 30(b)(6) amendment by adding two words: "Before or promptly after the notice or subpoena is served, the serving party and the organization must begin to confer about * * *." These words would give a meaningful time to work out the steps that will make the deposition as useful as possible. They will support Committee Note language elaborating the iterative nature of the process and the interdependence of defining the matters for examination with designating the witnesses.

Professor Marcus noted that adopting this change would require revising the Committee Note in ways that cannot be accomplished by drafting on the Committee floor. It will be better to draft after the meeting, and to circulate the Subcommittee's recommendation for electronic review and voting by the Committee. Enough time remains for that to be done before the Report to the Standing Committee must be submitted.

A Subcommittee member said that the Note will emphasize that the conference is an ongoing process. It should emphasize the connection between defining the matters for examination and identifying the witnesses. The time for identifying witnesses depends on this. The Note also should continue to make it clear that the entity determines who the witnesses will be, and is responsible for making sure that they are prepared.

The "begin to" words raised a new concern. Are they too soft? Can a recalcitrant party say that it has no duty beyond beginning to confer, and can quit once it has begun? One response was that the Note can emphasize that "a voice-mail message is not good faith." But another Committee member "would rather not change rule text. 'Begin to' may soften the command." The Note can discuss the iterative nature of the conferring process without adding these words.

Judge Ericksen asked about a slight variation: "Beginning before or promptly after * * *." It was agreed that this change would not soften the command as much as "begin to confer." A further change was suggested to make it firmer still: "Beginning before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer * * *." That suggestion met the continuing fear that any added rule language will provoke new fights, this time about what is "necessary." But it was responded that "necessary" is clear, and rejoined that "I can't tell you what I don't know" -- it should not be necessary to go on conferring forever to force a

designation at some indeterminate time before the deposition begins. Still, three other members expressed support for the "continuing as necessary" language.

These suggestions led to a renewed suggestion that the Subcommittee's original proposal should be recommended for publication without changing the rule text. The Committee Note can explain the ongoing, iterative nature of the conferring process. All agreed that the "begin to confer" alternative should be dropped.

An observer suggested that all of this effort could be spared by simply omitting "and the identity of each person who will testify." There is no obligation to identify the person, so why require discussion of identity? The organization needs to know the matters for examination so it can prepare its witnesses, but the conference should not go further. This view was supported by a Committee member who did not want to encounter objections to the organization's choice of witnesses, nor to require discussion of who they will be. Professor Marcus replied that ultimately the organization must choose someone to testify. The witness's identity will be made known no later than the day of the deposition.

These questions were brought to a vote. The suggestion to add "and continuing as necessary" was adopted by voice vote. The Committee recommended publication of the proposal originally advanced by the Subcommittee with this addition, adding these words to Rule 30(b)(6):

> * * * Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party.
> * * *

The Committee Note will be revised to discuss the iterative nature of the obligation to confer. The new Note language will be circulated for review and a vote by the Committee.

A vote was called on the question whether to pursue further the draft that would amend Rule 26(f) to include a reminder that the Rule 26(f) conference may consider issues regarding contemplated depositions under Rule 30(b)(6). No Committee member voted to publish. All opposed publication. The draft was dropped from further consideration.

September 5 version

MDL Practice

Judge Bates introduced the Report of the MDL Subcommittee by noting that at present the main questions go to the scope of any project that might be undertaken.

Judge Dow, the Subcommittee Chair, began by stating that "this is the alpha, not the omega" of the work. The Subcommittee has entered what will be an extensive information-gathering phase to see whether to propose any rules for conducting centralized proceedings in an MDL court.

Judge Dow also expressed thanks to Rules Committee Support Office staff Womeldorf, Wilson, and Tighe for the work they have done to gather background information on many topics. The Judicial Panel on Multidistrict Litigation also has been a treasure trove of information.

Third-party litigation funding is another big topic that has been committed to the Subcommittee, in part because it may be related to MDL practice. But the Subcommittee is not yet prepared to suggest discussion in the Committee.

The Subcommittee has launched a "road show" that will involve meetings with several groups. It has planned engagements with at least five outside groups.

Work so far has identified many topics for study. The result of the work is many things for the MDL world to think about. The current agenda includes ten topics for study.

Professor Marcus led discussion of the ten current agenda topics.

(1) Scope. The scope of inquiry might extend beyond proceedings actually centralized in an MDL court. One possibility would be to aim at all proceedings that involve a large number of claimants -- one proposal has been to establish special procedures for bellwether trials in MDL proceedings that involve more than 900 claimants. That number, or some other, might be adopted as a threshold for aggregations outside MDL consolidation and class actions. Or it might be adopted as a threshold to separate MDL proceedings to be governed by special MDL rules from smaller MDL proceedings left outside the special rules. A different possibility, closer to MDL proceedings, would be to take on actions that seem ripe for MDL consolidation before the Judicial Panel orders transfer, addressing such matters as timing. Something might also be said about whether the MDL rules lose all force when an individual action is remanded to the court where it was filed.

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(2) Master Complaints and Answers. The use of master complaints and answers seems to be increasing. Do they supersede the original individual-case pleadings? Should they? Should they be the focus of Rule 12(b) motions, motions for summary judgment, and discovery rulings? If a case is remanded to the court where it was filed, do rulings on a master pleading unravel? If master complaints tend to be generated only after the consolidated proceeding is pretty much organized, will this be a fit subject for rules?

Discussion of this topic began with a judge noting that he took on an MDL proceeding when there were 200 cases. The question was what do defendants do to answer new complaints? The parties set out a master complaint to be incorporated by individual plaintiffs by directly filing a short-form complaint in the MDL proceeding. The defendants do not even answer the short-form complaint, but can move to dismiss it.

Further discussion asked whether there is much opportunity for a rule to improve a practice that seems to be pretty well developed already.

The next question was how the master pleading practice relates to initial disclosures. In this MDL, each plaintiff files an individual fact sheet 30 days after the short-form complaint. The defendant files a fact sheet for that plaintiff thirty days after the plaintiff files, stating that the product affecting that plaintiff is Lot X, sold by Y. This is case management, not a pleading rule.

A Committee member observed that there are big differences between different case types. Antitrust cases, data breach cases, personal injury, and still others do not present the same kinds of problems. "We need to think about this." One response was that these issues involve the scope of whatever rules might one day be designed.

(3) Particularized Pleading/Fact Sheets. One proposal, focused on personal-injury tort cases, has been to require particularized fact pleading in a model similar to Rule 9(b). Fact sheets, not pleadings, may be considered instead. Attention also can be directed to "Lone Pine" orders. These and still other practices can resemble initial disclosure of what will be claimed, of how it will be supported, or even of some of the supporting evidence itself.

A Committee member suggested that "this is moderately standardized." The fact sheet "does the particularizing." There is no need to make it a Rule 9(b) pleading rule, especially if there also is a master complaint.

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Another participant suggested that it would be easy for the Subcommittee to gather a couple of dozen fact sheet forms from different MDL proceedings to give an idea of what is asked for. They are not pleadings. They are sworn to. Defendants can use them to identify who is a real plaintiff.

The question whether fact sheets have been used in anything other than personal-injury MDL proceedings found only one answer -- that may have happened in a "fax" case that settled too early for the fact-sheet approach to be tested.

(4) Rule 20 Joinder and Filing Fees. The direct joinder question is raised by those who fear a "Field of Dreams" effect: building an MDL proceeding works as an invitation to joinder by would-be claimants who in fact have no connection to the events in suit. Various forms of this proposal emphasize the value of requiring payment of an individual filing fee for each plaintiff in a multi-plaintiff complaint as a means of ensuring at least close enough attention by counsel to the question whether there is any support for the claim. One difficulty with this approach might be that it could be difficult for the clerk's office to trace through a very long pleading to determine just how many plaintiffs and fees are involved. But it could be easy to require a filing fee for each plaintiff who directly files in the MDL court. This could serve as another screening device.

Individual filing fees in the largest MDL proceedings could generate millions of dollars.

A judge with a pending MDL proceeding noted that each direct-filing plaintiff provides a short-form complaint and pays a filing fee. The parties agreed that new plaintiffs would file directly in the MDL proceeding, and identify the district the plaintiff is from and to which the case will be remanded if it is not resolved in the MDL proceeding. There have been more than 3,000 direct filings.

Others noted that direct filing has become "very prevalent." It depends on the arrangements agreed to by the parties. Another Committee member agreed that direct filing is not unusual, but that it also is not unusual to have tag-along cases filed elsewhere before they are transferred to the MDL.

This discussion concluded with the question whether anyone had experience with a case with multiple plaintiffs and only one filing fee. No one identified any such case.

(5) Sequencing Discovery. Sequencing discovery to address common core issues first is a familiar case-management tool. Would a rule specifically addressing this practice be a positive

development? What of the need for case-specific discovery addressing "bystander" or "outlier" claimants? Is it a problem to delay case-specific discovery until completion of discovery on the common core issues?

A Committee member observed that class-action lawyers see sequencing of discovery as bifurcation, and do not like it.

A judge observed that Rule 16 authorizes sequencing. What more might be accomplished by another rule? Should a rule tell a judge to do it when it seems more a case-specific issue?

Another judge agreed that the authority is already there. But perhaps there is a place for a best-practices rule, something akin to the front-loading built into Rule 23 in the proposed amendments now pending in the Supreme Court. This could be part of a broader rule, or perhaps sufficiently relevant to another new rule to warrant discussion in a Committee Note.

The first judge reported that in his MDL, the parties proposed sequencing. "It was pretty obvious what needed to be done. It's case management."

Another judge agreed. It is important to encourage the parties to be creative.

(6) Third-party Litigation Financing and "Lead Generators." Although joined in the list of agenda items, these two topics are not necessarily linked to each other. There is considerable interest in third-party financing. It is not clear whether third-party financing has special ties to mass personal-injury tort MDLs, or whether it is tied to MDLs of other sorts. The concern in the mass tort cases is that lead generators explain the large numbers of claims from "people who did not use the product."

Are there problems with third-party financing serious enough to justify a rules response? What would the rule be, and where would it fit?

A judge, seconded by Professor Coquillette, noted that the Committee should be cautious in approaching the issues of professional responsibility raised by some who view third-party financing with alarm.

Additional discussion noted that third-party financing has become involved with bankruptcy practice in New York, but it is unclear just how. This prompted the further question whether, if third-party financing is to be approached at all, any new rules should address only the MDL context.

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(7) Bellwether Trials. The broad questions about bellwether trials can be framed by asking whether they should be encouraged? Discouraged? Addressed in rules? No rule now addresses them. Indeed there may be some ambiguity about the concept — in any mass tort context, any trial provides useful information for the parties in all other actions. If indeed a rule might be useful, it will remain to decide where it should be lodged in the rules structure and what it might provide.

A judge reported finishing a bellwether trial a week earlier. It was a regular trial of an individual case. There was nothing different about it. Although tried in Arizona, it involved a Georgia plaintiff, application of Georgia law, and the same witnesses as would have testified at trial in Georgia. This is a case management technique. The parties wanted it. A total of six cases were set for trial, with the parties' consent. Case selection can be an issue. In this proceeding, each side proposed 24 cases for the process. More extensive disclosures were required for these 48 cases. Twelve of them went to full discovery: doctors were deposed, and the plaintiffs were deposed. The parties then were able to agree on one case to be a bellwether. The judge picked the remaining five, looking to get a representative mix of cases. The purpose of these trials is to facilitate settlement. "I'm drawing the line at six. If they don't settle, the cases go home."

(8) Facilitating Appellate Review. The basic concern about appeals is that interlocutory rulings that for good reason are not appealable in ordinary litigation become so important in MDL proceedings as to warrant appeal before final judgment. 28 U.S.C. § 1292(b) interlocutory appeals by permission may not suffice to meet the need. The recent study of Rule 23 showed that many people wanted to amend Rule 23(f) to establish mandatory jurisdiction of appeals from orders granting or denying class certification. That wish was not granted. But some rulings in MDL proceedings are "really, really important." Is there a way to define when appeal should be available?

Judge Bates noted that if appeal jurisdiction is taken up, it will be necessary and helpful to coordinate with the Appellate Rules Committee.

Another judge found the desire to appeal understandable. But there is a practical problem, at least in a busy circuit. In a pending class action, he had to confront two lines of conflicting circuit authority. He chose one to decide a summary-judgment motion and certified the question for appeal. The panel decision was rendered 27 months later, and the mandate has not yet issued. What would happen in a case that afforded two or three opportunities for interlocutory appeal on complicated issues? A suggestion that a

rule could require expedited appellate procedure was rewarded with doubting laughter.

(9) Coordinating between "parallel" federal- and state-court actions: Parallel actions may be centralized both in a federal court MDL proceeding and in similar state-court consolidations. Some observers suggest that the federal MDL should become the leader, even suggesting enactment of legislation to remove related state actions to the federal MDL. Is there a serious problem? What is it? Can a rule reduce any problem? Informal coordination actions do happen, at least at times.

A judge noted that she recently sat on the bench for three days with a state-court judge at a Daubert hearing. The state judge, applying state law, dismissed all the state cases. She, applying federal law, cleared the path for the federal cases to go to trial. She also observed that coordination could delay settlement, for example if a strong state case is used as an obstacle. So, perhaps, a strong individual case in a federal MDL could become an obstacle to settlement.

A Committee member suggested there is no need for a rule. "I often see some level of coordination to achieve efficiency by avoiding redundant discovery." Defense counsel can join with plaintiffs' counsel in arranging to do a deposition once, and in adjusting for the phenomenon that state rules do not have the same time limit for depositions as the federal rules. "Often we work it out." Another problem, however, is presented by a race to settle and take credit for it.

(10) PSC Formation and common-fund directives. Questions have been raised about the formation of plaintiffs' steering committees, executive committees, coordinating counsel, and similar arrangements. Common-benefit funds to compensate lead counsel for their efforts also raise many questions. And some observers suggest that "insiders" are too often appointed to leadership positions.

Related concerns are raised by court-imposed caps on fees for individual representation of individual plaintiffs, combined with the "tax" for the common benefit fund.

Some courts borrow the Rule 23(g) and (h) criteria for designation of lead counsel and their compensation. The Manual for Complex Litigation advises judges to take an active interest in these matters. Here too, the questions are whether there are problems? Do any problems have rules solutions?

A judge suggested that these questions overlap third-party financing questions. In his MDL the estimate was that plaintiffs'

counsel would have to invest $20 million to pursue the case. Third-party financing can be part of the answer to the need for heavy investment. It can enable non-insider lawyers to take the lead. A court must consider the resources the lawyers can commit to the litigation. This observation was seconded by a fervent "amen."

Another judge reported learning that expenditures on a first bellwether trial usually are astronomical, mounting into the millions. "We want more diversity, new faces. But those on the steering committee must be able to bear the cost."

Discussion of these ten agenda items concluded by asking whether there are other matters the Subcommittee should investigate, and with agreement that after learning more the Subcommittee would likely profit from arranging a miniconference. An outline of the format suggested gathering 6 MDL judges, 6 plaintiffs' lawyers, and six defense lawyers.

Judge Bates then opened an opportunity for comments by observers.

John Beisner said that this process of inquiry is important. The bar becomes accustomed to regular practices. For some time, it was accepted that cases could be transferred for trial in the MDL court by supplementing § 1407 transfer with § 1404 transfer. Then the Supreme Court said that could not be done. The bar responded by developing the "Lexecon waiver." Workarounds like this may rest on foundations that appellate courts will not accept. Developing an understanding of common practices may support new rules that incorporate and advance them. He suggested further that data should be compiled to inform MDL courts about what other MDL courts are doing. The MDL process generally works well, but not all MDLs do. When an MDL goes awry, it can come to grief after investing many years and millions of dollars. Problems include orders that cannot be reviewed until long after they are issued, and orders that are not issued until there has been a long delay. It is important to come up with best practices or common rules.

Another observer who practices on the plaintiff side asked "What is broken to need fixing"? None of the agenda items address anything that is broken. Flexibility is necessary. Courts have express or inherent authority to address most of these issues. And as for appellate review, there is always mandamus. Expanding the opportunities for appeal will not do much. "The issues can be addressed as they arise."

Susan Steinman said that a lot of the agenda ideas do not work well for AAJ members. Flexibility is needed to address the different needs of different kinds of cases. Mass disaster cases

are different from environmental disasters. The AAJ has a working group to consider these problems. The issues that raise concerns include master complaints and answers, particularized pleading-fact sheets, and sequencing discovery. She also suggested that MDL cases that "aren't quite ready to go" could be put in an inactive file for later development. Professor Marcus added that the inactive-file approach was used in Massachusetts for pleural thickening asbestos cases.

Alex Dahl noted that Lawyers for Civil Justice has filed written comments on the Subcommittee Report. He offered several specific points. (1) "The Rules are not applied in all MDL cases." Practice has evolved beyond the Rules. As a practical matter, the Rules do not work when there are too many parties. Discovery does not work to reveal false plaintiffs. (2) There must be a rule that enables the parties to find out whether each MDL plaintiff has a claim. (3) In response to a question whether new rules should address all MDL proceedings, he said the need is for rules that work. Distinctions can be drawn. For example, Rule 7 could be amended to recognize the use of a master complaint, but to apply only to cases in which a master complaint is in fact used. (4) Devising rules that expand the opportunities to appeal is worth the complication because appeals are important to the judicial system as a whole and also to the parties. (5) The repeat-player phenomenon is a real problem. Outsiders cannot learn about "real" MDL procedure. If means can be found to educate outsiders in the practices that have been honed by the repeat players, the problem can be reduced. (6) The need for disclosure of third-party financing is demonstrated by the 24 district rules and 6 circuit rules that require disclosure. There should be a uniform national rule that requires disclosure of nonparties that have a financial interest in the outcome. Protection of the opportunity for judicial recusal is a compelling reason for disclosure, but there are additional reasons as well. The present local rules were not designed to address the other reasons for disclosure, and vary one from another. (7) In conclusion, MDLs are a complicated subject. The Committee should act to make sure that the Civil Rules apply in all cases. It should begin with a handful of topics including discovery, trial, and appeals.

Judge Bates thanked the Subcommittee, Judge Dow, and Professor Marcus for their excellent work.

§ 405(g) Social Security Review

Judge Bates introduced the work of the Social Security Review Subcommittee by noting that the project has been recommended by the Administrative Conference of the United States with the enthusiastic endorsement of the Social Security Administration. It

raises interesting and somewhat novel issues about rulemaking for a specific substantive area.

Judge Lioi delivered the Subcommittee Report. The Subcommittee is in the early stages of exploring whether uniform review rules should be developed. Working from a rough and "bare bones" draft that illustrated one possible approach, it sought reactions from the groups that provided initial advice in a meeting with the Subcommittee last November 6. The draft covers such topics as initiating an action for review, electronic service of the complaint, the Commissioner's response, and briefing on the merits. Reactions were provided by the Social Security Administration, the Department of Justice, the National Organization of Social Security Claimants' Representatives, and the American Association for Justice. The initial draft was revised to reflect their reactions. That draft was discussed in a Subcommittee conference call on March 9. The draft was then revised again; that revised draft is the one included in the agenda materials.

The question for today is whether it will be useful to use this revised draft, as it might be revised still further, as a basis for eliciting further comments. The draft is not yet ready to serve as the basis for refining into a foundation for work toward actual rules.

The questions were explained further. The Subcommittee has not decided whether it will recommend that any rules be adopted. It will continue to gather information from as many as possible of the people and groups with experience in social security review actions. The outcome may be a recommendation that no rules be developed. It may be that the wide variations now found in local district practice reflect different conditions in the districts, and that little would be accomplished by forcing all into a uniform national template. Or it may be that although the variations do exact substantial costs, it will be difficult to develop national rules that effect substantial improvements. And there is some remaining uncertainty whether it is appropriate to develop rules for one specific substantive area.

If rules are to be developed, choices remain as to form. One possibility would be to amend several of the present Civil Rules -- for example, a special pleading provision could be added to Rule 8. Another possibility would be to create new rules within the body of the Civil Rules. Abrogation of Rules 74, 75, and 76 has left a hole that might be filled, in whole or in part, by social security review rules. The draft in the agenda materials takes a different approach, creating a new set of supplemental rules along the lines of the supplemental rules for admiralty or maritime claims and civil asset forfeiture. No choice has been made among these

possibilities.

The draft rules begin with a scope provision that may be refined further as the work progresses. One possibility is to limit the new rules to actions that are pure § 405(g) actions: One claimant seeks nothing more than review of fact and law questions on the administrative record, joining only the Commissioner as defendant. That category would include a large majority -- likely nearly all -- of § 405(g) actions. Any action presenting any additional claims or including any additional parties would, as at present, be governed only by the general Civil Rules. The alternative possibility is to apply the § 405(g) rules to the part of a broader action that seeks review on the administrative record, leaving all other parts to the regular Civil Rules. Whichever approach is taken, it will remain necessary to include a provision invoking the full body of the Civil Rules except to the extent that they are inconsistent with the supplemental rules.

The next step is a rule for initiating the review proceeding. Discussions of this topic often begin by noting that review on an administrative record is essentially an appeal, and can be initiated by a document that is in effect a notice of appeal. The draft rule characterizes the initial filing as a complaint, reflecting the § 405(g) provision calling for review by filing a civil action. The elements of the complaint are simple, covering identification of the parties, jurisdiction, a general statement that the Commissioner's decision is not supported by substantial evidence or rests on an error of law, and a request for relief. Successive drafts also have included an opportunity to "state any other ground for relief," reflecting the possibility that a claimant may raise issues outside the administrative record.

The next provision has met widespread approval among those who have seen it. It provides that instead of Rule 4 service of a summons and the complaint, the court makes service of process by electronic notice to the Commissioner. The current draft places the responsibility for designating the "address" for electronic service on the Commissioner. Some districts have begun to use electronic service by agreement of the Commissioner and local United States Attorney. Their experience has been satisfactory. It may be that this provision should direct service on the local United States Attorney as well as the Commissioner, but still rely on the Commissioner to determine whether service should be made directly on the Commissioner, on the social security district where the district court is located, on both, or on yet some other office.

The next step is the Commissioner's answer. Earlier drafts, picking up a suggestion by the Social Security Administration, provided that the answer would include only the complete record of

administrative proceedings. Discussion in the Subcommittee, however, broadened this provision to say only that an answer must be served and must include the record. This approach was taken from concern that closing off the answer might lead to forfeiture of affirmative defenses. Res judicata, for example, is an affirmative defense that must be pleaded under Rule 8(c) or lost. Estoppel may be another example.

Dispositive motions also are covered. Earlier drafts limited dilatory motions to exhaustion and finality, timeliness, and jurisdiction in the proper court. Summary-judgment motions were excluded on the theory that they contribute no advantage when all of the facts for decision are already in the administrative record, and may be an occasion for delay or confusion. Some districts now seize on summary-judgment procedure to frame the review, a sound practice to the extent that it calls for identifying the issues and tying them to the record. But many parts of Rule 56 are inapposite and may cause confusion. All of the advantages of Rule 56 might be gained directly by the review rules themselves. Be that as it may for cases that involve nothing more than review on the record, however, summary judgment has a role to play when other claims or issues are introduced. The present draft says nothing of Rule 56, and recognizes the full sweep of Rule 12 motions. The time to answer is governed by Rule 12(a)(4). And the special role of motions to remand is recognized by providing that a motion to remand can be made at any time.

The procedure for bringing the case on for decision relies primarily on the briefs. The current draft directs the plaintiff to file a motion for the relief requested in the complaint and a supporting brief. The Commissioner as defendant must file a response brief, again with references to the record. The draft includes bracketed provisions that the briefs must support the arguments by references to the record.

The draft rules do not include other provisions that are included in the draft rules prepared by the Social Security Administration. Little other support has been found for provisions that would specify the length of the briefs. Nor has there been much other support for adding detailed provisions for seeking attorney fees. The general feeling has been that district courts should remain free to set rules for the format and lengths of briefs that fit their local circumstances and general practices. So too it has been felt that the general procedures for seeking attorney fees are adequate. Still, there may be room to inquire whether special provision should be made for seeking fees under the Social Security Act as compared to fees under the Equal Access to Justice Act.

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Judge Lioi reminded the Committee that the question the Subcommittee presents for discussion is whether the Subcommittee should use the present draft of supplemental rules, as it might be revised in light of ongoing discussions, to prompt further responses from those who have experience on all sides of social security review cases.

Discussion began with agreement that "it seems logical to seek input from the people who do it." Another Committee member agreed -- there seems to be a strongly felt need. The draft will draw attention. Responding to a question, Judge Lioi reiterated that this is not a proposal for publication. The Subcommittee seeks only to go forward in gathering more information. The first rounds have been valuable, but the focus may have been diffused by the strong reactions to proposals to specify stingy page limits for briefs. Providing a clear target in the form of draft rules will also stimulate clearly focused responses. Efforts will be made to find and engage as many stakeholders as possible.

Judge Bates suggested that the stakeholders are not likely to address the question whether it is appropriate to develop rules that address a specific substantive subject. The Committee must continue to deliberate this question. One alternative would be to broaden any new rules to apply generally to all district-court actions for review on an administrative record.

A Committee member responded by suggesting that it is improper to have special rules for special parts of the docket, at least unless special needs are shown to justify the specific focus. Another Committee member shared this concern, but added that we can continue to explore the need for any rules. Judge Lioi pointed out that the Subcommittee Report touches on these questions, beginning at line 47 on page 243. The Report in turn points to the discussion at the November Committee meeting, as reported in the November Minutes.

Judge Bates agreed that the need for uniform national rules is part of the calculation. But he pointed out that the problem of delay in winning benefits arises in the administrative proceedings; Civil Rules will not address that, and district courts act quickly enough that there does not seem to be much room to reduce delay there. Nor can Civil Rules do anything about differences among the circuits on substantive law.

Another judge thought the draft was a great starting point, but asked why it contemplates Rule 12 motions -- he has never seen one in the many social-security review actions he has had. It was noted that earlier draft rules had limited motions to issues of exhaustion and finality, jurisdiction, and timeliness. But the

Subcommittee thought the full sweep of Rule 12 should be made available. There may not be much risk of dilatory motions to dismiss for failure to state a claim. It would be difficult for a lawyer to frame a complaint that does not meet the proposed standards; pro se litigants might actually benefit from the education provided by a Rule 12(b)(6) motion. An additional consideration is that much of the impetus for uniform national rules seems to arise from the powerful time constraints that confront the lawyers who represent the Commissioner. There is little incentive to multiply proceedings by preliminary motions that can do little more than anticipate the ways in which the merits arguments will explore the administrative record. A different judge sharpened the question: the draft rule sets out seven matters to be included in the complaint. Is there a risk of "Supplemental Rule 2(b)" motions challenging perceived inadequacies in complying with the rule?

Discussion concluded with Judge Bates's thanks to the Subcommittee for its work.

Rule 71.1(d)(3)(B)(i): Newspaper Publication

A specific question about Rule 71.1(d)(3)(B)(i) was raised by an outside observer. The question is whether the rule should continue to make "a newspaper published in the county where the property is located" the first choice for publication of notice of a condemnation proceeding. Discussion at the November meeting concluded by asking the Committee Chair, Judge Bates, and the Reporters to make a recommendation about further action.

The recommendation is to remove this item from the agenda.

The context of Rule 71.1(d) helps to explain the question. Property owners are served with a notice of condemnation proceedings. If an owner resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice must be made "in accordance with Rule 4." Rule 71.1(d)(3)(A).

Rule 71.1(d)(3)(B)(i) addresses service by publication when personal service cannot be made under subparagraph (A). Publication must be supplemented by mailing notice if the defendant's address is known. Whether or not mailed notice is possible, publication must be made "in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located."

The suggestion is to eliminate the preference for publication in a newspaper published in the county where the property is

located. Publication in any newspaper of general circulation where the property is located would suffice.

In this setting, the main concern centers on the efficacy of publication that cannot be supplemented by mail addressed to a defendant. Which publication is more likely to effect actual notice? A locally published newspaper, even one that does not enjoy general circulation, or any of what may be more than one newspapers of general circulation? Empirical information is required to address that concern usefully, or, if empirical information is as difficult to generate as seems likely, empirical intuition. Where will a property owner who anticipates possible condemnation proceedings more likely look for notice?

Several considerations prompt the recommendation to withdraw this question from further study. The present rule has been used without known questions for many years. The Department of Justice, the most common litigant in condemnation proceedings, is neutral about the proposal. The proposal itself rests on uncertain assumptions about the possible effects of state practice on publication under Rule 71.1(d)(3)(B)(i). Rule 4 service under subparagraph (A) apparently includes service under state law as incorporated in Rule 4(e)(1) and (h)(1), which may include service by publication on terms that do not give priority to a newspaper published in a particular county. But subparagraph (B)(i) seems an independent and self-contained provision that does not make any reference to state law. It governs by its own terms.

One element of the empirical question goes to the prospect that there may be two, three, or even more newspapers of general circulation in the place where the property is located. Giving priority to a newspaper published in the county narrows the search, perhaps to one unique newspaper. Free choice among competing newspapers means that a careful property owner must attempt to identify and regularly read them all.

Additional questions arise from issues that have been made familiar, but not easy, by repeated encounters. What counts as a newspaper in an era of physical publication, electronic publication, and mixed physical and electronic publication? Where is an electronic edition published? The Committee has not yet found these issues ripe for study as a general matter, and it would be awkward either to take them on or to ignore them in proposing amendment of Rule 71.1(d)(3)(B)(i).

The Committee voted without opposition to remove this item from the agenda.

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Rule 4(k)

Two proposals have been made to expand personal jurisdiction under Rule 4(k). They are presented to the Committee without any recommendation as to future action. The purpose is to identify the many complex and difficult challenges that will be faced if one or both is taken up, and to open a discussion of the practical benefits that might be gained by further extensions of personal jurisdiction. The nature and importance of the benefits should figure importantly in deciding whether to take on the challenges.

One central challenge will be whether rules defining personal jurisdiction fall within the "general rules of practice and procedure" that may be prescribed under the Rules Enabling Act. Competing views on this question will be outlined in the present discussion. A second set of challenges arises from the common element that underlies both proposals. The proposals rest on the view that the constitutional constraint on personal jurisdiction in federal courts arises from the Fifth Amendment, not the Fourteenth Amendment. What Fifth Amendment due process requires is sufficient contacts with the United States as a whole, not sufficient contacts with any specific place within the territorial limits of one or another state.

Moving beyond the challenges, the proposals rest on the belief that much good can be accomplished by extending the reach of federal court personal jurisdiction to Fifth Amendment due process limits. The need to select appropriate places to exercise the nationwide power can be satisfied by venue statutes, as they are now or as they might be amended to reflect the new jurisdiction.

The background begins with present Rule 4(k). Both paragraphs (1) and (2) explicitly establish personal jurisdiction. Rule 4(k)(1)(A) provides that serving a summons establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located. This provision turns the jurisdiction of a district court on the longarm statutes of the state where it sits, and incorporates the 14th Amendment due process limits that constrain the longarm statute when it is applied by a state court. Rule 4(k)(1)(B) extends personal jurisdiction, independent of state lines or practice, through a "100-mile bulge" to join a party under Rule 14 or Rule 19.

Rule 4(k)(2) is more adventuresome. It provides that "for a claim that arises under federal law," serving a summons establishes personal jurisdiction if "(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States

Constitution and laws."

The first proposal, advanced by Professor Borchers, is more modest. It would simply expand Rule 4(k)(2) to include not only claims that arise under federal law but also cases in which jurisdiction is based on 28 U.S.C. § 1332 diversity and alienage jurisdiction. It would retain the requirement that the defendant not be subject to jurisdiction in any state's courts of general jurisdiction. The central purpose is to reach internationally foreign defendants that have sufficient contacts with the United States as a whole to support jurisdiction but lack sufficient contacts with any individual state. The purpose is illustrated by the circumstances of the Supreme Court's decision in *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011). Nicastro, the plaintiff, was injured in New Jersey while operating a large machine that the defendant made in England. Although the machine made its way to the United States, and although the defendant clearly and deliberately sought to make as many sales as it could in the United States, the Court ruled that New Jersey could not exercise personal jurisdiction. The defendant neither sold the machine to the plaintiff's employer nor shipped it directly to the employer. The sale was made by an independent distributor in another state. At most only four, and perhaps just this one of the defendant's machines had come into New Jersey. The proposal is that the broader reach of the national sovereign authorized by the Fifth Amendment supports personal jurisdiction.

Additional goals are offered by Professor Spencer to support the measure of personal jurisdiction that he believes proper, although he has come to believe that the limits of the Enabling Act mean that only Congress can adopt his proposal. This proposal would abandon Rule 4(k)(1) and expand Rule 4(k) to provide that serving a summons establishes personal jurisdiction when exercising jurisdiction is consistent with the United States Constitution. "[A]nd laws" might be added as a further constraint, drawing from present 4(k)(2)(B). This proposal would establish uniform personal jurisdiction rules for the federal courts, freeing them from dependence on the vagaries of such state statutes as do not extend to the limits of Fourteenth Amendment due process and likewise freeing them from Fourteenth Amendment limits that derive from the territorial definitions of state sovereignty. Federal courts would be freed to locate litigation in the most desirable court, as defined by federal venue statutes. Federal courts also would be freed from much of the preliminary wrangling that now arises over personal jurisdiction, since in most cases it will be clear that the defendant has sufficient contacts with the United States to satisfy Fifth Amendment due process. For diversity cases, expanded personal jurisdiction would help to advance the purposes of providing convenient federal courts for enforcing state-created

rights. And in some ways, defendants also would be helped by expanding the narrow limits of present Rule 4(k)(1)(B) to allow broader joinder of defendants both by the plaintiff initially and by the defendant under Rules 13, 14, 19, and 20.

These potential gains from expanded personal jurisdiction should be considered carefully. They may be real and important. Or they may be largely theoretical, particularly if experience shows that in most cases there is a convenient court that can assert personal jurisdiction over all parties that should reasonably be joined. The benefits, large or small, must then be weighed against the potential costs and uncertainties.

One major uncertainty arises from Professor Spencer's conclusion that the Rules Enabling Act does not authorize the Supreme Court to prescribe rules defining personal jurisdiction. He will elaborate this view later in the meeting. The core conclusion is that personal jurisdiction lies outside the initial authority to prescribe "general rules of practice and procedure." On this view, procedure encompasses what the parties and court do once the court acquires personal jurisdiction. Jurisdiction is a distinct and separate concept. In a pinch, it also might be argued that rules that expand or limit personal jurisdiction abridge, enlarge, or modify a substantive right. A still more ambitious argument can be made that Article III judicial power necessarily entails authority to exercise personal jurisdiction to the limits permitted by Fifth Amendment due process. On this view, Rule 4(k)(1) is invalid not because it establishes personal jurisdiction but because it curtails the personal jurisdiction that inheres in any case that falls within a statute establishing subject-matter jurisdiction within Article III.

A contrary view of the Enabling Act is also possible. One approach is to resist the temptation to rely on abstract definitions of "practice and procedure" and of "jurisdiction." On this approach, what is "practice and procedure" for Enabling Act purposes may be different from what is practice and procedure for other purposes. The question should be approached more directly by asking whether the Enabling Act should be interpreted to include rules that define personal jurisdiction. That approach does not lead to an automatic answer. Defining personal jurisdiction is a matter of important and sensitive concerns. It may be particularly sensitive to rely on courts to define the extent of their own power. In many ways, particularly with respect to internationally foreign defendants, personal jurisdiction is a more fundamental component of judicial power than the lines that limit federal subject-matter jurisdiction. A defendant from Maine or France may care more that he not be subject to suit in any court in California than that the court in California be a federal court or a state

court.

The approach that attempts a purposive interpretation of the Enabling Act can be bolstered by looking to tradition. The original version of Rule 4 expanded authority to serve summons from the district to anywhere in the state embracing the district. The Supreme Court upheld this rule as one relating to the manner and means of enforcing rights. In 1963 Rule 4 was amended to confirm and expand decisions interpreting an earlier version to enable federal courts to assert jurisdiction under state longarm statutes. Then Rule 4(k)(2) was added in 1993, reacting to a Supreme Court decision that although a foreign defendant might well be subject to personal jurisdiction because of sufficient contacts with the United States, jurisdiction could not be perfected for want of a rule authorizing service. The Court hinted that this lack could be corrected by Congress or by court rule. *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987). The 1993 Committee Note says that the amendment responds to the Court's "suggestion." The Committee Note also begins with a "SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved," the Committee recommends adoption of the balance of the rule.

The Committee, in short, seems to have acted, and to have acted repeatedly, on the view that the Enabling Act authorizes adoption of rules that define personal jurisdiction. This view seems to be supported by Supreme Court decisions. The tradition and opinions may be wrong. In any event a conclusion that authority exists does not define wise exercise of the authority.

Expanding personal jurisdiction for cases governed by state law will add to the occasions for arguing choice-of-law issues. As the law now stands, a federal court must choose among competing state laws by adopting the choice-of-law rules of the state where it sits. This rule has been applied even in an interpleader action that could not have been entertained by the local state courts for want of personal jurisdiction over all claimants. Expanding personal jurisdiction could expand a plaintiff's opportunity to choose governing law by picking among the courts that have venue. It is possible to think about adding choice-of-law provisions to a rule that expands personal jurisdiction, but the task would be uncertain and contentious. And on some philosophies of choice-of-law it would abridge, enlarge, or modify substantive rights.

Reliance on present venue statutes to establish suitable constraints on the exercise of nationwide personal jurisdiction also presents problems. A simple example is provided by 28 U.S.C. § 1391(c)(3): "a defendant not resident in the United States may be

sued in any judicial district." For those defendants, there is no venue limit. A more complex example is provided by § 1391(c)(2), which provides that a defendant that is an entity with the capacity to sue and be sued "shall be deemed to reside * * * in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." This provision interacts with § 1391(b), which establishes venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." If there is only one defendant, venue again does not limit personal jurisdiction. If there are multiple defendants, venue again is no limit if all are entities subject to personal jurisdiction. Other examples may be found, but these suffice to suggest that present venue statutes are not adequate to the task. Carefully crafted legislation would be needed to establish satisfactory venue rules to locate litigation within a system of federal courts exercising general nationwide jurisdiction.

A number of other questions would be raised as well. It is enough to sketch them. Congress has enacted a number of statutes that assert some form of "nationwide" personal jurisdiction. It is not clear whether all of them would be interpreted to reach as far as a new court rule might. If the rule goes farther than the statute, there might be a supersession question. The Enabling Act authorizes rules that supersede statutes, but this power is exercised only for compelling reasons. A different approach would be to cut the rule short if the statute does not go so far -- that might be accomplished by retaining the requirement in present Rule 4(k)(2)(B) that exercising jurisdiction be consistent with the United States "laws."

Establishing personal jurisdiction for some claims and parties might also prompt further developments in the concept of pendent personal jurisdiction. The occasion would be much reduced by a general national-contacts rule, but might arise for related claims or even parties that share a common nucleus of operative fact but standing alone do not seem to have sufficient independent national contacts.

A further complication relates to the venue statutes. There is a strong strain of thought that Fifth Amendment due process is not always satisfied by contacts with the nation as a whole. There may be some inherent requirements of fairness that protect against the transactional inconveniences of litigating in a distant forum. Working through these questions would take time, imagination, and sound judgment.

Finally, it may be wondered what to make of the increasingly sharp distinctions between specific and general jurisdiction that

are emerging in Fourteenth Amendment decisions, and of the elusive tests for asserting specific jurisdiction. If a defendant is engaged in a business that pervasively involves all the states, does any real distinction remain?

Professor Spencer outlined his views as explained in two articles. The earlier article is included in the agenda materials. The more recent article remains in draft and is being revised for publication in 2019. The nubbin is that as desirable as it would be to expand federal personal jurisdiction by freeing it from ties to the lines of territorial sovereignty that confine state courts, jurisdiction is not a matter of practice or procedure. Enabling Act rules can only address the manner of adjudicating claims. Both Rule 4(k) and the property jurisdiction provisions in Rule 4(n) go too far. Even Rule 4(k)(1), invoking the bases for personal jurisdiction in state courts, needs to be enacted by Congress.

Rules of evidence are not procedure, but they are authorized by separate language in § 2072(a). It cannot be said that anything that is not substantive is procedural.

The better line begins with recognizing that it is the Fifth Amendment that limits the territorial reach of federal courts. A federal court should be able to exercise personal jurisdiction whenever that is consistent with due process and the venue statutes. "Rule 4(k)(1) is an artificial constraint." With "some tweaking," the venue statutes can do the job of localizing litigation within the federal court system, along with a more fully developed Fifth Amendment fairness test. The federal courts have not yet had occasion to develop such fairness tests, but expanding a national-contacts foundation will provide the occasion.

Present venue statutes reflect a background of Fourteenth Amendment due process thought. They will need to be revised to fit expanded personal jurisdiction.

This expansion would not change the result in the Goodyear case — the Turkish manufacturer of a tire that failed in Paris would not become subject to federal-court jurisdiction. It is not clear whether national-contacts jurisdiction would support the claims of nonresident plaintiffs in a federal court in California against the defendant in the Bristol-Meyers case.

Choice of law is not a problem. Expanding personal jurisdiction might give plaintiffs a greater choice of federal courts and thus expand the bodies of state choice rules they could shop for, but any state rule is limited to choosing a law that has a constitutionally adequate connection to the litigation. If Congress enacts expanded jurisdiction, it can give attention to

this.

Professor Spencer concluded by stating that it is worthwhile to continue Committee discussion, but that the aim should be to develop proposals for action by Congress.

A Committee member asked whether the Committee has acted on matters outside the Enabling Act by making proposals to Congress. Professor Marcus noted that Evidence Rule 502 is a recent example of the special provision in 28 U.S.C. § 2074(b): "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." But it went through the full Enabling Act process. The only difference is that other Enabling Act rules take effect after submission to Congress "unless otherwise provided by law," § 2074(a).

Apart from that, the Committee has not engaged in recommending legislation, either by developing a proposed statute or by a more open-ended suggestion that Congress should address a problem. The closest approaches have come when fully developed proposals have adopted Enabling Act rules in the ordinary course, but the rules can become effective only if existing statutes are revised. The Appellate Rules Committee has successfully won statutory revisions to support Appellate Rules amendments, and statutory revisions were also sought and won to support some of the rules changes adopted in the Time Computation Project that swept across multiple sets of rules. The Federal-State Jurisdiction Committee regularly comments on proposed legislation, and Enabling Act Committee Chairs occasionally send formal letters to Congress commenting on pending bills. But there is no known precedent for something like developing a package of proposed personal jurisdiction and venue statutes.

A judge asked about the 1963 amendments of the personal jurisdiction provisions in Rule 4. Were they seen as expanding or as limiting personal jurisdiction? The answer is that they were seen to confirm existing interpretations of earlier Rule 4 provisions, and to ensure that federal courts could reach as far as their neighboring state courts. There is no indication that they were seen as limiting inherent personal jurisdiction that otherwise would be exercised without Rule 4 provisions for service. Instead they were intended to enable a federal court to do what a state court could do, no more.

This question came back in a different form: If Rule 4(k)(1) were rewritten to free federal courts from the limits on state-court jurisdiction, and for the purpose of expanding federal-court jurisdiction, what would be the practical effect? Will most cases have venue only where a substantial part of the events or omissions

giving rise to the claims occurred, see § 1391(b)(2)? Professor Spencer answered that it would remain necessary to redefine "resides." But the outcome would not be complete chaos. The earlier discussion of the effects of the present definitions of "resides" was renewed, with an added twist. The discussion of multidistrict centralization pointed to the limits that prevent transfer for trial in an MDL court that cannot independently establish personal jurisdiction. Adopting national-contacts personal jurisdiction could dramatically change practice in this respect.

Discussion returned to the benefits of expanding federal-court jurisdiction. It would reduce wrangling about personal jurisdiction in many cases. But it is difficult to predict just how far, and when, the actual result would be to bring actions to a federal court that could not entertain them now.

The question was repeated: Is there some value in going to Congress first? A Committee remember responded that normally the Committee does not do that.

Another Committee member asked whether, if indeed the Enabling Act process cannot prescribe rules of personal jurisdiction, parts of present Rule 4 are invalid? It would be better to avoid acting in a way that would suggest that current rules are invalid. And the discussion shows that indeed these are complicated questions.

Judge Bates suggested the Committee vote on three possible approaches: (1) Close out this agenda item. (2) Undertake full exploration of rules amendments now. This will be a major undertaking, with added complexity arising from interdependence with the venue statutes. or (3) Carry this topic forward on the agenda, but not pursue it actively now. No votes were cast for closing it out. Two votes were cast for present active pursuit. Eight votes were cast for pausing work, carrying the subject forward for future consideration.

Rule 73(b): Consent to Magistrate Judge

Judge Bates guided discussion of this agenda item. Rule 73(b)(1) provides that to signify consent to conduct proceedings before a magistrate judge "the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response * * * only if all parties have consented to the referral."

This provision for anonymity implements the direction of 28 U.S.C. § 636(c)(2), which directs that rules of court for reference to a magistrate judge "shall include procedures to protect the voluntariness of the parties' consent."

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The problem arises from a collision between the provision for anonymity and the CM/ECF system. As soon as a single party files a consent form, the system automatically forwards the consent to the district judge assigned to the case. Apparently there is no way to circumvent this feature. An alternative might be to direct the parties to deliver their separate consents to the clerk without filing them. That approach, however, would impose significant burdens on the clerk's office and would lead to occasional lapses in one direction or another.

The suggestion to amend Rule 73(b)(1) made by the clerk for the Southern District of New York is for a simple change, deleting the reference to separate statements: "the parties must jointly ~~or separately~~ file a statement consenting * * *." It may be that somewhat greater revisions should be made to facilitate the process of generating a joint statement. Guidance might be found in the joint consent form used in the Southern District of Indiana.

Discussion began by suggesting that it is worthwhile to at least attempt to sort through this question.

A judge observed that the problem is that one party consents, and others do not, and the judge finds out about it. Or it may be that all but one consent, and start to behave as if all consented, forcing a nonconsenting party to protest.

Another judge observed that the rule functioned well in pre-ECF days. Now it is incumbent on the Committee to look at it. Yet another judge and a practicing Committee member agreed.

A different judge observed that in some districts magistrate judges are automatically assigned to civil actions, leaving it to the parties to consent or withhold consent. Any amended rule must be compatible with this practice.

Judge Bates concluded the discussion by stating that the question will be pursued further. Laura Briggs and a Committee member will be asked to help.

Other Agenda Items

17-CV-EEEEEE: Judge Bates described this proposal that return receipts be required for service by mail under Rule 5(b). He noted that the Committee has recently devoted close attention to Rule 5(b), focusing on electronic service and accepting service by ordinary mail without further ado. The Committee voted to remove this item from the agenda without further discussion.

18-CV-A: Rule 55(a) directs that "When a party against whom a

judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." The proposal complains that one district court refuses to let its clerk enter default, permitting action only by a judge. The solution is to add a sentence embellishing the "must enter" already in the rule. Judge Bates suggested that there may be some reason to preserve an element of judicial discretion about entering the default, in part because Rule 55(c) allows the court to set aside a default for good cause. Nor should the Committee be charged with policing potential misapplications of a Civil Rule by continually adding new language to emphasize what the rule already says. The Committee voted without further discussion to remove this item from the agenda.

18-CV-G: This proposal urges that complaints have become too long: "New Age complaints are completely out of control." It recommends a rule that would considerably shorten complaints. Judge Bates observed that most judges likely would agree that many complaints are too long. The Committee, however, has repeatedly considered Rule 8, often in depth, over the course of the last 25 years. There is little reason to again take up the subject now. The Committee voted to remove this item from the agenda without further discussion.

Pilot Projects

Judge Bates noted that the mandatory initial discovery pilot project is actively going forward in the District of Arizona and the Northern District of Illinois. Work continues to find districts to participate in the expedited procedures pilot project.

Judge Campbell said that the mandatory initial discovery pilot took effect in the District of Arizona on May 1, 2017. So far 1,800 cases are in the pilot. "It has been very smooth." The Arizona bar is used to extensive initial disclosures in state-court practice. The test will come when the cases come to summary judgment or trial and arguments are made to exclude evidence that was not disclosed. "We likely can deal with that," in part by drawing guidance from state-court practice.

Judge Dow reported that the Northern District of Illinois launched the mandatory initial discovery pilot on June 1, 2017. Great help was provided by draft standing orders and related guidance from the District of Arizona. "Our lawyers aren't used to it," unlike lawyers in Arizona. Rumors have been heard that e-discovery vendors are advising firms not to file cases with massive e-discovery in the Northern District because of the project. But the court has been reasonable about the deadlines set in the pilot rules. Parties are not required to file terabytes of information in 30 days. Emery Lee is collecting data for the Federal Judicial

Center's evaluation of the project. About 75% of the cases in the Northern District are in the project. All but one of the active judges participate. Only one senior judge participates. The project is going well.

Emery Lee described the FJC study of the mandatory initial discovery projects. He is approaching the second round of lawyer surveys of cases closed within the last six months. "We have data on 5,000-plus cases in the two districts together." A Committee member reported hearing that one effect of the project is that people settle when they find documents they do not want to disclose. Lee responded that the study is tracking that.

The FJC also is studying data on the longstanding differentiated procedure practice in the Northern District of Ohio, with help from Judge Zouhary. Experience there suggests that it is easy to assign cases to tracks.

Discussion of the mandatory initial discovery project turned to the Employment case protocol that was created in November, 2011. The FJC has collected data on cases resolved in 2016-2017. In all it has data on hundreds of cases. The more recent data include mature cases. There is a plan to collect data on a sample of comparison cases. The hope is to be able to report in November.

Some courts already have adopted the parallel protocol for individual actions under the Fair Labor Standards Act.

Next Meeting

Judge Bates confirmed that the next scheduled meeting will be on November 2 in Washington, D.C.

The meeting adjourned.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 3

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
115th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	**H.R. 720** *Sponsor:* Smith (R-TX) *Co-Sponsors:* Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	**Bill Text (as passed by the House without amendment, 3/10/17):** https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf	• 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
Lawsuit Abuse	**S. 237** *Sponsor:* Grassley (R-IA) *Co-Sponsor:* Rubio (R-FL)	CV 11	**Bill Text:** https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf **Summary (authored by CRS):** This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question. The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. Courts may impose additional sanctions, including striking the pleadings, dismissing	• 11/8/17: Senate Judiciary Committee Hearing held – "The Impact of Lawsuit Abuse on American Small Businesses and Job Creators" • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Reduction Act of 2017, cont.			the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence. **Report:** None.	
Innocent Party Protection Act	**H.R. 725** *Sponsor:* Buck (R-CO) *Co-Sponsors:* Farenthold (R-TX) Franks (R-AZ) Goodlatte (R-VA) Sessions (R-TX) Smith (R-TX)		**Bill Text:** https://www.congress.gov/115/bills/hr725/BILLS-115hr725rfs.pdf **Summary (authored by CRS):** (Sec. 2) This bill amends procedures under which federal courts determine whether a case that was removed from a state court to a federal court on the basis of a diversity of citizenship among the parties may be remanded back to state court upon a motion opposed on fraudulent joinder grounds that: (1) one or more defendants are citizens of the same state as one or more plaintiffs, or (2) one or more defendants properly joined and served are citizens of the state in which the action was brought. Joinder of such a defendant is fraudulent if the court finds: actual fraud in the pleading of jurisdictional facts with respect to that defendant, state law would not plausibly impose liability on that defendant, state or federal law bars all claims in the complaint against that defendant, or no good faith intention to prosecute the action against that defendant or to seek a joint judgment including that defendant. In determining whether to grant or deny such a motion for remand, the court: (1) may permit pleadings to be amended; and (2) must consider the pleadings, affidavits, and other evidence submitted by the parties. A federal court finding that all such defendants have been fraudulently joined must: (1) dismiss without prejudice the claims against those defendants, and (2) deny the motion for remand. **Report:** https://www.congress.gov/115/crpt/hrpt17/CRPT-115hrpt17.pdf	• 3/13/17: Received in the Senate; referred to Judiciary Committee • 3/9/17: Passed House (224-194) • 2/24/17: Reported by the Judiciary Committee • 1/30/17: Introduced in the House; referred to Judiciary Committee;

Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	**H.R. 985** *Sponsor:* Goodlatte (R-VA) *Co-Sponsors:* Sessions (R-TX) Grothman (R-WI)	CV 23	**Bill Text (as amended and passed by the House, 3/9/17):** https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf **Summary (authored by CRS):** (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless: • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief. No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members. Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons. A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites. A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.	• 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

H.R. 985, cont.			Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action. Appeals courts must permit appeals from an order granting or denying class certification. (Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs. A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements. (Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried. **Report:** https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf	

Stopping Mass Hacking Act	**S. 406** *Sponsor:* Wyden (D-OR) *Co-Sponsors:* Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf **Summary:** (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016." **Report:** None.	• 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 1110 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)	CR 41	**Bill Text:** https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf (Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016. (b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant." **Summary (authored by CRS):** This bill repeals an amendment to [R]ule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances. **Report:** None.	• 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

Back the Blue Act of 2017	**S. 1134** *Sponsor:* Cornyn (R-TX) *Co-Sponsors:* Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf **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. 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." **Report:** None.	• 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 *Sponsor:* Poe (R-TX) *Co-Sponsors:* Barletta (R-PA) Johnson (R-OH) Graves (R-LA) McCaul (R-TX) Olson (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	**Bill Text:** https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf **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. 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." **Report:** None.	• 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 5/16/17: Introduced in the House; referred to Judiciary Committee

To amend section 1332 of title 28, United States Code, to provide that the requirement for diversity of citizenship jurisdiction is met if any one party to the case is diverse in citizenship from any one adverse party in the case.	**H.R. 3487** *Sponsor:* King (R-IA) *Co-Sponsor:* Smith (R-TX)	CV	**Bill Text:** • **Substitute:** https://judiciary.house.gov/wpcontent/uploads/2018/09/HR-3487-ANS.pdf • **Original Bill Text:** https://www.congress.gov/115/bills/hr3487/BILLS-115hr3487ih.pdf **Summary (authored by CRS):** This bill amends the federal judicial code to specify that U.S. district courts have jurisdiction on the basis of diversity of citizenship if at least one adverse party does not share the same citizenship as another adverse party. [Bill would require a $700 filing fee for the defendant's removal of a civil action from a state court to a federal district court.] **Report:** None.	• 9/13/18: markup held; no final action taken • 9/11/18: "Amendment in the Nature of a Substitute" • 9/6/17: referred to Subcommittee on the Constitution and Civil Justice • 7/27/17: Introduced in the House; referred to Judiciary Committee
To amend title 28, United States Code, to limit the authority of district courts to provide injunctive relief, and for other purposes.	**H.R. 4927** *Sponsor:* Brat (R-VA)	CV	**Bill Text:** https://www.congress.gov/115/bills/hr4927/BILLS-115hr4927ih.pdf **Summary (authored by CRS):** This bill limits the authority of federal district courts to issue injunctions. Specifically, it prohibits a district court from issuing an injunction unless the injunction applies only: (1) to the parties to the case before that district court, or (2) in the federal district in which the injunction is issued. **Report:** None. *See infra* H.R. 6730.	• 2/5/18: Introduced in the House; referred to Judiciary Committee
Litigation Funding Transparency Act of 2018	**S. 2815** *Sponsor:* Grassley (R-IA) *Co-Sponsors:* Cornyn (R-TX) Tillis (R-NC)	CV	**Bill Text:** https://www.congress.gov/115/bills/s2815/BILLS-115s2815is.pdf **Summary:** **Section 2: Transparency and Oversight of Third-Party Litigation Funding in Class Actions.** Amends chapter 114 of Title 28 (Class Actions) by adding a § 1716. Section 1716 would provide that in any class action, class counsel must disclose to the court and all named parties the identities of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the	• 5/10/2018: Introduced in the Senate; referred to Judiciary Committee

Litigation Funding Transparency Act of 2018, cont.			contingent right. Also includes timing provisions. **Section 3: Transparency and Oversight of Third-Party Litigation Funding in Multi-District Litigation.** Amends 28 U.S.C. § 1407 (Multidistrict Litigation) to include similar disclosure, production, and timing provisions as those that apply to class actions above. **Section 4: Applicability.** Provides that the amendments made by the Act would apply to any case pending on or commenced after the date of enactment. **Report:** None.	
Federal Courts Access Act of 2018	**S. 3249** *Sponsor:* Lee (R-UT)		**Bill Text:** https://www.congress.gov/115/bills/s3249/BILLS-115s3249is.pdf **Summary:** (1) raises the ordinary amount in controversy requirement to $125K but lowers the Class Action Fairness Act (CAFA) amount in controversy from $5M to $125K. (But retains the CAFA provision that allowing aggregation of class members' damages for amount in controversy purposes.); (2) eliminates the complete diversity requirement; (3) eliminates § 1332(d)(3) & (4)'s discretionary and mandatory carveouts for CAFA cases (i.e., the tests under which district courts either could or must decline to exercise CAFA jurisdiction); (4) deletes § 1332(d)(11) (concerning mass actions); (5) permits removal of § 1332(a) diversity cases featuring in-state defendants so long as at least one defendant is out-of-state; (6) removes the 1-year time limit on removing diversity cases that become removable later than the initial pleading; and (7) revises the criteria for class action diversity removal (including by eliminating the § 1453(b) proviso that removal is "without regard to whether any defendant is a citizen of the State in which the action is brought") **Report:** None.	• 7/19/2018: Introduced in the Senate; referred to Judiciary Committee
Anti-Corruption and Public Integrity Act	**S. 3357** *Sponsor:* Warren (D-MA)	CV 12	**Bill Text:** https://www.congress.gov/115/bills/s3357/BILLS-115s3357is.pdf **Summary:** Section 403: makes the Code of Conduct for United States Judges applicable to the Supreme Court; requires the JCUS to establish enforcement procedures; such	• 8/21/18: Introduced in the Senate; referred to Finance Committee

Anti-Corruption and Public Integrity Act, cont.			procedures must be submitted to Congress Section 404: amends disclosure requirements with respect to financial reports, recusal decisions, and speeches; requires livestreaming of appellate proceedings (subject to exceptions); provisions publicizing case assignments; making websites user-friendly Section 405: places ALJ positions in the competitive service Section 406: provision regarding reporting on judicial diversity Section 407: amends Civil Rule 12 to add a subdivision j: (j) Pleading Standards. A court shall not dismiss a complaint under Rule 12(b)(6), (c) or (e): (1) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief; or (2) on the basis of a determination by the court that the factual contents of the complaint do not show the plaintiff's claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged. Section 408: amends the E-Government Act of 2002 regarding the public availability of judicial opinions **Report:** None.	
Injunctive Authority Clarification Act of 2018	**H.R. 6730** *Sponsor:* Goodlate (R-VA)		**Bill Text (Amendment):** https://www.congress.gov/115/bills/hr6730/BILLS-115hr6730ih.pdf **Summary:** Prohibits federal courts from issuing an order "that purports to restrain the enforcement against a non-party of any statute, regulation, order, or similar authority" unless the non-party is represented "by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure." **Report:** None. *See supra* H.R. 4927.	• 9/13/18: markup held; reported favorably out of Committee (14-6) • 9/11/18: "Amendment in the Nature of a Substitute" • 9/10/18: Introduced in the House; referred to Judiciary Committee

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Effective December 1, 2017 REA History: no contrary action by Congress; adopted by the Supreme Court and transmitted to Congress (Apr 2017); approved by the Judicial Conference and transmitted to the Supreme Court (Sept 2016)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 4	Corrective amendment to Rule 4(a)(4)(B) restoring subsection (iii) to correct an inadvertent deletion of that subsection in 2009.	
BK 1001	Rule 1001 is the Bankruptcy Rules' counterpart to Civil Rule 1; the amendment incorporates changes made to Civil Rule 1 in 1993 and 2015.	CV 1
BK 1006	Amendment to Rule 1006(b)(1) clarifies that an individual debtor's petition must be accepted for filing so long as it is submitted with a signed application to pay the filing fee in installments, even absent contemporaneous payment of an initial installment required by local rule.	
BK 1015	Amendment substitutes the word "spouses" for "husband and wife."	
BK 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009, new rule 3015.1	Implements a new official plan form, or a local plan form equivalent, for use in cases filed under chapter 13 of the bankruptcy code; changes the deadline for filing a proof of claim in chapter 7, 12 and 13; creates new restrictions on amendments or modifications to official bankruptcy forms.	
CV 4	Corrective amendment that restores Rule 71.1(d)(3)(A) to the list of exemptions in Rule 4(m), the rule that addresses the time limit for service of a summons.	
EV 803(16)	Makes the hearsay exception for "ancient documents" applicable only to documents prepared before January 1, 1998.	
EV 902	Adds two new subdivisions to the rule on self-authentifcation that would allow certain electronic evidence to be authenticated by a certifcation of a qualified person in lieu of that person's testimony at trial.	

Revised October 2018

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 8, 11, 39	The proposed amendments to Rules 8(a) and (b), 11(g), and 39(e) conform the Appellate Rules to a proposed change to Civil Rule 62(b) that eliminates the antiquated term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	The proposed amendments to Rule 25 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	"Computing and Extending Time." Technical, conforming changes.	AP 25
AP 28.1, 31	The proposed amendments to Rules 28.1(f)(4) and 31(a)(1) respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	"Brief of an Amicus Curiae." The proposed amendment adds an exception to Rule 29(a) providing “that a court of appeals may strike or prohibit the filing of an amicus brief that would result in a judge’s disqualification.”	
AP 41	"Mandate: Contents; Issuance and Effective Date; Stay"	
AP Form 4	"Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis." Deletes the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	"Declaration of Inmate Filing." Technical, conforming change.	AP 25
BK 3002.1	The proposed amendments to Rule 3002.1 would do three things: (1) create flexibility regarding a notice of payment change for home equity lines of credit; (2) create a procedure for objecting to a notice of payment change; and (3) expand the category of parties who can seek a determination of fees, expenses, and charges that are owed at the end of the case.	
BK 5005 and 8011	The proposed amendments to Rule 5005 and 8011 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	AP 25, CV 5, CR 45, 49
BK 7004	"Process; Service of Summons, Complaint." Technical, conforming amendment to update cross-reference to Civil Rule 4.	CV 4

Revised October 2018

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
BK 7062, 8007, 8010, 8021, and 9025	The amendments to Rules 7062, 8007, 8010, 8021, and 9025 conform these rules with pending amendments to Civil Rules 62 and 65.1, which lengthen the period of the automatic stay of a judgment and modernize the terminology "supersedeas bond" and "surety" by using "bond or other security."	CV 62, 65.1
BK 8002(a)(5)	The proposed amendment to 8002(a) would add a provison similar to FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	The proposed amendment to 8002(b) conforms to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	The proposed amendments to the inmate filing provisions of Rules 8002 and 8011 conform them to similar amendments made in 2016 to FRAP 4(c) and FRAP 25(a)(2)(C). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing) (Official Forms approved by Judicial Confirance as noted above, which is the final step in approval process for forms).	FRAP 4, 25
BK 8006	The amendment to Rule 8006 (Certifying a Direct Appeal to the Court of Appeals) adds a new subdivision (c)(2) that authorizes the bankruptcy judge or the court where the appeal is then pending to file a statement on the merits of a certification for direct review by the court of appeals when the certification is made jointly by all the parties to the appeal.	
BK 8013, 8015, 8016, 8022, Part VIII Appendix	The proposed amendments to Rules 8013, 8015, 8016, 8022, Part VIII Appendix conform to the new length limites, generally converting page limits to word limits, made in 2016 to FRAP 5, 21, 27, 35, and 40.	FRAP 5, 21, 27, 35, and 40
BK 8017	The proposed amendments to Rule 8017 would conform the rule to a 2016 amendment to FRAP 29 that provides guidelines for timing and length amicus briefs allowed by a court in connection with petitions for panel rehearing or rehearing in banc, and a 2018 amendment to FRAP 29 that authorizes the court of appeals to strike an amicus brief if the filing would result in the disqualification of a judge.	AP 29
BK 8018.1 (new)	The proposed rule would authorize a district court to treat a bankruptcy court's judgment as proposed findings of fact and conclusions of law if the district court determined that the bankruptcy court lacked constitutional authority to enter a final judgment.	

Revised October 2018

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
BK - Official Forms 411A and 411B	The bankruptcy general and special power of attorney forms, currently director's forms 4011A and 4011B, will be reissued as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.	
CV 5	The proposed amendments to Rule 5 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	
CV 23	"Class Actions." The proposed amendments to Rule 23: require that more information regarding a proposed class settlement be provided to the district court at the point when the court is asked to send notice of the proposed settlement to the class; clarify that a decision to send notice of a proposed settlement to the class under Rule 23(e)(1) is not appealable under Rule 23(f); clarify in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions; updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and incorporates a proposal by the Department of Justice to include in Rule 23(f) a 45-day period in which to seek permission for an interlocutory appeal when the United States is a party.	
CV 62	Proposed amendments extend the period of the automatic stay to 30 days; make clear that a party may obtain a stay by posting a bond or other security; eliminates the reference to “supersedeas bond"; rearranges subsections.	AP 8, 11, 39
CV 65.1	The proposed amendment to Rule 65.1 is intended to reflect the expansion of Rule 62 to include forms of security other than a bond and to conform the rule with the proposed amendments to Appellate Rule 8(b).	AP 8

Revised October 2018

Effective December 1, 2018 Current Step In REA Process: adopted by the Supreme Court and transmitted to Congress (Apr 2018) REA History: unless otherwise noted, transmitted to the Supreme Court (Oct 2017); approved by the Judicial Conference (Sept 2017)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
CR 12.4	The proposed amendment to Rule 12.4(a)(2) – the subdivision that governs when the government is required to identify organizational victims – makes the scope of the required disclosures under Rule 12.4 consistent with the 2009 amendments to the Code of Conduct for United States Judges. Proposed amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements: provide that disclosures must be made within 28 days after the defendant's initial appearance; revise the rule to refer to "later" rather than "supplemental" filings; and revise the text for clarity and to parallel Civil Rule 7.1(b)(2).	
CR 45, 49	Proposed amendments to Rules 45 and 49 are part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. Currently, Criminal Rule 49 incorporates Civil Rule 5; the proposed amendments would make Criminal Rule 49 a stand-alone comprehensive criminal rule addressing service and filing by parties and nonparties, notice, and signatures.	AP 25, BK 5005, 8011, CV 5

Effective (no earlier than) December 1, 2019

Current Step in REA Process: approved by the Judicial Conference (Sept 2018)

REA History: approved by the Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); unless otherwise noted, published for public comment Aug 2017-Feb 2018; approved for publication (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes 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 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	The amendment to Rule 9036 would 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. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
BK 4001	The proposed amendment would make subdivision (c) of the rule, which governs the process for obtaining post-petition credit in a bankruptcy case, inapplicable to chapter 13 cases.	
BK 6007	The proposed amendment to subsecion (b) of Rule 6007 tracks the existing language of subsection (a) and clarifies the procedure for third-party motions brought under § 554(b) of the Bankruptcy Code.	
BK 9037	The proposed amendment would add a new subdivision (h) to the rule to provide a procedure for redacting personal identifiers in documents that were previously filed without complying with the rule's redaction requirements.	
CR 16.1 (new)	Proposed new rule regarding pretrial discovery and disclosure. Subsection (a) would require 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. Proposed 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 and clarifying 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.	

Revised October 2018

Effective (no earlier than) December 1, 2020 Current Step in REA Process: published for public comment (Aug 2018-Feb 2019) REA History: unless otherwise noted, approved for publication (June 2018)		
Rules	**Summary of Proposal**	**Related or Coordinated Amendments**
AP 35, 40	Proposed amendments clarify that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) 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
CV 30	Proposed amendments to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about (1) the number and descriptions of the matters for examination and (2) the identity of each witness the organization will designate to testify.	
EV 404	Proposed amendments to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the non-propensity 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."	

Revised October 2018

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6. MDL Subcommittee Report

The MDL Subcommittee was formed after the November 2017 meeting of the Committee to review a number of issues raised by submissions from various groups. Among other topics it was assigned to consider were proposals concerning disclosure of third party litigation financing.

Since November 2017 the Subcommittee has gathered information and heard from many sources about MDL issues. Initially, for the April 2018 meeting of the full Committee, it presented a series of potential issues that was later presented also to the Standing Committee.

Since the April 2018 meeting of the full Committee, Subcommittee representatives have attended a number of events addressing these topics (including one just before the full Committee meeting and another the day after that meeting) as follows:

Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs, April 26-27, 2018, Atlanta, GA.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Finance & State/Federal Coordination Roundtable and Conference, June 4-5, 2018, Berkeley, CA.

American Association for Justice Roundtable on MDL Practice, July 10, 2018, Denver, CO.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Conference on Issues Roundtable, Aug. 8-10, 2018, Atlanta, GA.

Lawyers for Civil Justice Conference on MDL Practice, Sept. 14, 2018, Washington, D.C.

MDL Transferee Judges Conference, Oct. 29-31, 2018, Palm Beach, FL.

George Washington University Law Center Roundtable on Third Party Litigation Funding, Nov. 2, 2018, Washington, D.C.

Together, these events have provided much insight into the emergence and contours of issues presented by contemporary MDL practice. They have also assisted the Subcommittee in refocusing its approach to these issues.

Since the agenda memo for the April meeting was prepared, the Subcommittee has also received the following submissions that are included in this agenda book:

MDL Practices and the Need for FRCP Amendments: Proposals for Discussion with the MDL/TPLF Subcommittee of the Advisory Committee on Civil Rules, Lawyers for Civil Justice, Sept. 14, 2018 (18-CV-X).

MDL Affirmative Suggestions, American Association for Justice, May 25, 2018 (18-CV-T).

Comment to the Advisory Committee on Civil Rules and its MDL/TPLF Subcommittee, Ten Observations About the MDL/TPLF Subcommittee's Examination into the Function of the Federal Rules of Civil Procedure in Cases Consolidated for Pretrial Proceedings, Lawyers for Civil Justice, April 6, 2018 (18-CV-J).

The purpose of this report is to seek input from the full Committee about the issues as now perceived. The report describes the evolution of the multidistrict procedure that prompted the formation of a Subcommittee to investigate perceived problems, and the wide variety of issues and possible responses that have been suggested by the many participants in the events identified above. The Subcommittee is indebted to all the participants in these events, and to those who have submitted formal proposals for possible rule amendments. It continues to gather information and has not yet attempted to develop recommendations about whether to consider possible rule amendments, or what amendments, if any, should be given serious study. Though it is premature to hazard a forecast about what issues may warrant serious study as potential sources of rule changes, much less to try to sketch out possible rule language, it is now possible to be somewhat more precise about what issues seem to present potential opportunities for rule changes. Specifically, the Subcommittee seeks guidance from the full Committee on:

(A) Which problems seem most important?

(B) What rulemaking responses, if any, offer promise in responding to these problems?

Before describing what the Subcommittee has heard, however, it seems useful to remind Committee members of the introduction and evolution of the MDL process because evolution over time (particularly in the last decade or so) has meant that the current reality is different from the original operation.

The stimulus for the creation of MDL procedures was the outburst of antitrust litigation in the early 1960s due to price-fixing in relation to heavy electrical equipment – the Electrical Equipment Cases. The civil suits were preceded by prosecutions of officers of various companies that made these products, leading to prison sentences for some executives, a development that got quite a lot of media attention.

The successful prosecutions certainly got the attention of lawyers, and more than 2,000 treble damages antitrust suits were filed in 35 districts. Trying to handle all these cases separately presented the federal courts with a major challenge. Chief Justice Warren responded by appointing an ad hoc Coordinating Committee for Multiple Litigation composed of nine judges drawn from across the country.

The Coordinating Committee had no explicit authority to require any judge to take any specific action. But it successfully persuaded the judges presiding over the many cases to take a coordinated approach to handling them. In this way, the nightmare prospect of duplicative

discovery and incompatible rulings was largely avoided, and the litigations were resolved in relatively short order.

The success of the Coordinating Committee in managing the Electrical Equipment cases prompted requests that it shepherd other outbursts of litigation, and also prompted a proposal that Congress create a permanent body to perform this task. In 1968, Congress passed 28 U.S.C. § 1407, creating the Multidistrict Panel, and the statute has been amended only once since then (in 1976, to add § 1407(h)). After the Supreme Court's 1998 decision in the *Lexecon* case that transferee courts could not transfer cases to themselves for all purposes (including trial) under § 1404(a), there have been proposals in Congress to add such authority, but they have not been adopted.

Meanwhile, actual practice under the MDL statute has evolved considerably since 1968. In its early years, the high-profile combinations largely were antitrust or securities proceedings governed by federal law. The Panel did not frequently transfer "mass tort" cases, governed by state law and often involving disparate individual issues. A notable exception was the Panel's 1991 decision to transfer all pending federal-court asbestos claims to the E.D. Pa., but that was the sixth time the Panel had been presented with a request for such a transfer of asbestos litigation, and it had declined on each of the previous occasions.

The 1991 asbestos transfer order was followed by a proposed class-action settlement of all pending and future asbestos personal injury claims that the Supreme Court rejected in its 1997 *Amchem* decision. Thereafter, though there were some "mass tort" class action settlements, § 1407 grew in importance as a method for resolving such litigation, in part due to defendants' desire to achieve "global peace" via a settlement in court.

Perhaps as a result, MDL proceedings have achieved increased prominence. Meanwhile and separately, the federal courts' attitude toward handling civil litigation has evolved considerably. From something of a "hands off" attitude in the 1960s, and under the impact of the 1983 amendments to Rule 16 (since fortified), along with increased attention to settlement promotion, the courts have become a good deal more active in managing civil litigation in general. That orientation has become very prominent in MDL litigation.

Meanwhile, the number of cases subject to an MDL transfer order has grown in the last 15 years or so, and mass tort litigation has assumed increasing importance when measured by case numbers. At present, approximately one third of pending civil cases in the federal court system are subject to an MDL transfer order, and if one excludes prisoner petitions and Social Security appeals, that number rises to over 40%. As some put it, these cases now account for "almost half" of the federal civil docket. Perhaps due to the existence of the MDL procedure, it seems clear that these cases do not consume 50% of the federal judicial resources used for civil cases, nor even close. Whether many of these cases would not have been filed in the absence of the MDL procedure is impossible to say, but it does seem likely that they would consume more judicial resources if each were handled separately. On the other hand, it may well be that the "related cases" treatment used in many districts would often cause multiple filings in a district to proceed together, and not entirely independently.

That overall number of transferred cases derives largely from a relatively small number of mega-cases. One estimate the Subcommittee has received is that 90% of the individual cases subject to MDL transfer orders are in 24 MDLs presenting personal-injury claims. It seems that these 24 collections of cases are a prominent stimulus for the various proposals about rulemaking for MDL litigation. For example, the Fairness in Class Action Litigation Act (H.R. 985, passed by the House in March 2017) contains provisions regulating MDL proceedings in which personal injury claims are asserted. It also seems that many of these cases are of a particular type − claims based on use of pharmaceutical products or medical devices.

There continue to be MDL proceedings that have claims of a different sort from these mega MDLs. Thus, the 4th edition of the Manual for Complex Litigation has, besides sections addressed to mass torts, sections focusing on antitrust, securities, employment discrimination, intellectual property, CERCLA, and Civil RICO litigation.

This diversity in types of MDL proceedings is relevant because the most productive methods of handing one type of MDL litigation may not be suited to another type. That difference might bear on what one could call the "scope" issue − what cases should new rules apply to?

What follows describes and reacts to the various concerns that many have described to the Subcommittee in recent months. It resembles the list presented at the April meeting, but has been considerably revised in terms of emphasis and specifics. The sequence of discussion below is:

I. Winnowing unsupportable claims
II. Interlocutory appellate review
III. PSC formation and funding
IV. Trial
V. Settlement promotion/review
VI. Third Party Litigation Funding

I. Winnowing unsupportable claims

At the April meeting, a number of ideas on the list of discussion topics related to this problem. Since April, the contours of the problem have become clearer, and those contours should be useful in discussing the possible reactions. There seems to be fairly widespread agreement among experienced counsel and judges that in many MDL centralizations – perhaps particularly those involving claims about personal injuries resulting from use of pharmaceutical products or medical devices – a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit. The reported proportion of claims falling into this category varies; the figure most often used is 20 to 30%, but in some litigations it may be as high as 40% or 50%.

Whether these problems have manageable solutions remains unclear, however. Even if a rule-based solution could be devised, it might create an undue risk of intruding too much on a transferee judge's latitude to devise an appropriate treatment for a given MDL proceeding.

The source of these problems might be called the "Field of Dreams" problem, or "If you build it, they will come." The unfortunate reality that confronts experienced lawyers in MDL proceedings is that a significant number of claimants in those proceedings turn out not to have supportable claims. Were there no MDL centralization, arguably, this would not be a problem. Defendants would have an opportunity to challenge individual claims one by one. Indeed, but for the MDL centralization order, many of those claims might not have reached court at all.

The reasons offered to explain this phenomenon vary. One is the effect of "1-800" lawyers and "claims generators" who support an atmosphere of "get a name, make a claim." From the perspective of some, these lawyers are not complying with Rule 11. Instead, they are taking a flier in the expectation that there will be a settlement in the MDL transferee court in which they can get "inventory value" for their claims. It may be that this reported inflation of the number of claims results in part from the reality that most MDL cases settle before remand; were remand for individualized litigation the normal result of filing a claim, the frequency of unsupported claims might decline.

Another explanation offered is that amassing a large inventory of claims can support a lawyer's quest for appointment to a leadership position in the MDL – "I've got 3,000 cases, so I should be on the Plaintiffs' Steering Committee (PSC)."

Other reasons for submission of claims that turn out to be unsupported have also been offered. One is inability to get needed records. For example, when the question is whether a person has been implanted with a certain medical device, it is usually not difficult to determine whether the device in issue in the litigation is the same one. But in other instances, it may be difficult to make a similar determination. Determining which over-the-counter drug the client took may be a challenge. Even with prescribed medications, it may be difficult to determine whether the client was exposed to the challenged product. For example, in one litigation the problem turned out to be about a tainted batch of otherwise good medicine, but it was very difficult for plaintiff's counsel to find out which batch was the source of the medication used by a particular patient.

In some situations, it appears, the defendant may have records indicating whether given individuals got the specific medical device or got medication from a given batch that the plaintiff's attorney can obtain only with great difficulty.

Another frequently offered explanation is that the statute of limitations forces responsible lawyers to make claims before they have completed a full examination of the client's circumstances. What might be called protective filings can be a legitimate response to this sort of problem, though such filings should be followed by prompt further investigation to verify that the claimant actually used the product in question. Whether that further investigation routinely occurs is uncertain; some assert that some lawyers routinely make claims and do nothing more.

A variant of the limitations concern is that a given client has in fact used the product in question but has so far not suffered a negative outcome from use of the product. Attorneys representing the "healthy" user of the product may feel they must file promptly for fear failure to do so will defeat the client's claim later should full-fledged disease or injury emerge. In that situation, the very prominence of MDL orders might operate to trigger the statute of limitations even though no serious disease or injury has occurred with this plaintiff. Perhaps limitations

should not start running until the client actually manifests the condition, but counsel may fear the running of limitations will not be suspended.

A related reason that has been offered is that scientific or medical understanding of all the adverse and actionable consequences from use of or exposure to a certain substance or device may be revealed only over time. Thus, although the current litigation is about condition X, it is not clear that there is such a claim for condition Y or Z. Failure to make a claim now on behalf of those suffering from conditions Y and Z may, however, create a risk of being barred later if proof emerges supporting such a claim based on condition Y or Z. So the solution is to make a claim now. Perhaps the ideal solution to this problem would be a "split" cause of action, but the pertinent tort law may not offer that solution.

Confronting this range of situations, defendants complain of what they perceive to be an "MDL exception" to operation of the Civil Rules. In an individual litigation, they could challenge the plaintiff's allegations as insufficiently specific about the medication/device used, or about the resulting medical condition. Alternatively, they could rely on initial disclosure and prompt discovery to support a summary judgment motion to knock out claims that can't be supported.

But in MDL mass tort litigation, those tools may be unavailable to defendants. The transferee judge may focus at first on the common issues rather than the unique circumstances of each claimant. That orientation seems consistent with the basic goal of the statute. Detailed examination of the circumstances of each claimant might prove an enormous and potentially unmanageable distraction to the judge.

That distraction might also appear to require unnecessary work as well. For example, assume that the defendant has some sort of preemption defense that would be a "kill shot" with regard to all the claims, no matter how supportable they might be in terms of having used the drug in question and suffered the adverse consequence in issue. Would it not make sense for the court then to begin with a focus on that possibly dispositive issue rather than undertaking an individualized review of each plaintiff's circumstances?

This sort of concern underlies some resistance to any required early triage of individual cases. Insisting on early triage, no matter what, may hamstring the transferee judge, who might otherwise favor focusing early energies on issues of general causation, preemption, or other dispositive matters.

More generally, questions have been raised about how important it is to deal early, even if not first, with winnowing individual claims. Assume that it's likely 30% of the claims will prove not to be supportable. (Note that the fact a given plaintiff ultimately loses does not mean this was an "unsupportable" case, for many who have used the product involved and suffered the malady involved in the litigation may nonetheless fail to prove causation.) Is it urgent to find out which cases fall within the 30% up front?

One could say that, even if such sorting could be expeditiously done, the court and the parties would still have to deal with the remaining 70% of the claims. So in terms of efficient use of the court's and the parties' time and energy, it may be preferable to focus on viable claims from the

outset. One could even argue that such an effort is inconsistent with the thrust of MDL centralization, which is designed to deal mainly with common issues rather than individual circumstances of individual cases.

One reason advanced for treating early screening as urgent has to do with the adverse consequences of having what appear to be large numbers of claims when the numbers should be considerably smaller. For some medical products, there is a requirement of making an adverse incident report for each reportedly adverse incident, and it appears that making a claim in litigation often is treated as triggering a requirement to report.

Separately, the volume of claims may bear on what must be included in SEC filings and reports to shareholders. Beyond that, it is reported that publicity about litigation can prompt patients to stop taking their medications or to forgo needed treatment. It may also prompt doctors to stop using the most effective treatment.

At least in the really large-volume MDL proceedings, however, it is not clear that winnowing the 30% that are not supported is likely to avoid these sorts of adverse consequences. Maybe reducing the number of claims by 30% will sometimes reduce the total below some sort of reporting trigger, but it is not clear that is often true. Indeed, even if the 30% are dismissed with alacrity, the deterrent impact on patients or doctors may already have occurred.

Against this background, a number of specific responses have been suggested:

Heightened pleading requirements for mass tort plaintiffs: There have been suggestions that some sort of heightened or particularized pleading requirement (like the one in Rule 9(b) for fraud cases) should be applied to mass tort plaintiffs. This might be different from plaintiff fact sheets (discussed below). Such a pleading requirement for these tort plaintiffs that does not apply to other tort plaintiffs (much less plaintiffs with non-tort claims) may be difficult to justify unless there is a way to focus it solely on meritless or doubtful claims drawn by what one might call the magnetic pull of the MDL litigation.

At least some supporters of a pleading upgrade seem to be focused only on the claims presumed to result from the MDL centralization; thus, some submissions also emphasize the activities of "claim generators" who may provide some lawyers with large inventories of claimant names. Taken in this light, it seems that this effort is designed to counter the "MDL exception" behavior that defendants may regard as depriving them of a meaningful opportunity to challenge individual claims in MDL litigation and thereby inviting the filing of unsupported claims.

Focusing pleading changes only on post-centralization claims would presumably not provide a basis for applying any such pleading requirements to cases already on file at the time of an MDL transfer order, or perhaps any filed in a state court. Indeed, it seems that at least some plaintiff's lawyers file in state court partly to avoid the MDL transfer that would occur if their case were in federal court; it is hard to see these state-court claimants as "free riders" in the MDL proceedings. Applying different standards to different individual cases before the MDL transferee court could complicate that judge's task. Moreover, prescribing pleading standards applicable only to tag-along cases originally filed in federal court could conceivably complicate the task of the transferor court after remand, when that occurs. To the extent the "MDL exception" attitude

prevails among transferee judges, it may be that pleadings challenges by defendants would occur after remand.

Plaintiff Fact Sheets (PFS): In many medical products litigations the court directs the plaintiffs to fill out PFSs designed to determine whether each of them has actually used the product involved and/or manifested the condition on which the litigation is focused. Some of these documents are quite elaborate, requiring time-consuming efforts to complete. Presumably defendants must then spend time and effort analyzing the PFSs once they are completed.

These burdens on the parties may not impose significant burdens on the court. We have heard that some MDL transferee courts have adopted administrative processes to screen out claimants who don't complete and return the PFSs, with such claimants' claims subject to dismissal involving only a modicum of work for the court.

Carefully scrutinizing the fact sheets that are completed could create burdens of quite another dimension for both the court and the parties, however. It might lead to something like individualized 12(b)(6) motions or "mini" summary-judgment motions. That could lead to further exchanges regarding "supplemental" PFSs from those whose fact sheets are initially challenged. In a way, such motions could replicate what would happen in individual litigation, but as part of the MDL proceeding. Whether this individualized decision-making would be worthwhile in the MDL context could be debated.

Another complication from the rulemaking perspective is that there likely is no "generic" fact sheet suitable for all litigations, or even all pharmaceutical or medical product litigations. Instead, it appears that case-specific fact sheets are the usual method of proceeding. So a rule likely could not provide many specifics on what a fact sheet should address in a given case.

Defendant fact sheets: It appears that, in at least some litigations, defendants are also called upon early to provide some specified information. If the PFS rulemaking idea is seriously pursued, it might be even-handed also to consider a rule provision concerning information defendants should provide. But as with PFSs, it seems that the specifics of any such early requirements for providing information depend a great deal on the nature of a given litigation.

Expanded initial disclosure: Something along the lines of a PFS approach might be built into Rule 26(a)(1). That rule already calls for every party to disclose information about witnesses and documents it may use to support its claim or defense. A clarification could possibly make more specific disclosures mandatory in certain cases. It might also introduce uniformity on a practice now evidently subject to divergent practices of individual transferee judges. One suggestion calls for adding a requirement to the initial disclosure rule that in MDL personal injury proceedings plaintiffs specify the drug or medical implement they used (including its maker) and also specify the harm they claim to have suffered, along with documentary or electronic evidence supporting these assertions.

But at present the consequence prescribed in Rule 37(c)(1) is different from what the proponents of this amendment seem to desire – something like immediate dismissal for those plaintiffs who fail to provide the required information. So perhaps another provision could be

added to Rule 12(b) or 12(c) or perhaps Rule 56 to authorize an early motion based on what the plaintiff disclosed (or failed to disclose).

Alternatively, it might be possible to build a mechanism directly into a Rule 26(a)(1) amendment leading to dismissal. That may be somewhat out of step with the general cast of Rules 26-37; ordinarily a merits sanction or other adverse court action in regard to discovery can only occur after the court has ordered compliance and the party has failed to obey the order. Motion practice is the norm. It may be that Rules 36 or 37(d) could provide a model for such a provision, however.

Yet another possibility would resemble H.R. 985 – to impose on the court an obligation to review and determine the adequacy of each such disclosure. Such a burden might ask too much of the court, and might also be out of step with the usual "adversary system" requirement that the parties seek relief from the court rather than requiring that the court undertake the review on its own motion.

Expanding the role of Rule 11: The proponents of early screening emphasize that the unfounded claims they want winnowed out result from failures by some plaintiff's counsel to satisfy their Rule 11 obligations. Arguably, one could therefore focus on Rule 11 as a place to install a screening mechanism. There certainly have been dramatic examples of using Rule 11 to respond to unfounded claims. *See, e.g.*, *In re Engle Cases*, 288 F.Supp.3d 1174 (M.D. Fla. 2017) (sanctions of over $9 million imposed on lawyers who were found to have filed 1250 unsupportable claims, some of them on behalf of plaintiffs who did not even know the cases had been filed).

Such a provision might focus on lawyers who have filed more than a certain number of claims and impose on them a duty to show that they have complied with Rule 11(b)(3). That idea might be somewhat at odds with Rule 11(c)(2), which provides a safe harbor by requiring that a motion for sanctions be served 21 days before it is filed. (Note that the Lawsuit Abuse Reduction Act, also passed by the House of Representatives in March 2017, contains provisions that would change Rule 11 in all cases.) On the other hand, something along this line might be regarded as consistent with Rule 11(c)(3), which already authorizes the court to enter an order to show cause why "specifically described" conduct has not violated Rule 11(b). It does not seem that a court would usually be justified in concluding that all claims by plaintiffs in MDL mass tort litigation support such treatment under Rule 11(c)(3).

Rule 11 litigation has not been viewed as a positive feature of most litigation. Adopting this approach would seem inconsistent with at least some comments at conferences during this year. More than once, it has been stressed that an effective screening program should provide the affected lawyers with an "exit strategy" that is not harmful or costly to them. Shifting to a sanctions mode does not seem to move in that direction. And, as the $9 million sanction mentioned above shows, the present rule provides a basis for responding to flagrant failures to perform the investigation required by Rule 11(b)(3).

Relying on the Plaintiffs' Leadership Committee (PLC): Another theme that has emerged is that leadership on the plaintiff side might be able to facilitate this winnowing. It is clear that the

plaintiff-side lawyers the Subcommittee has talked with recognize that other lawyers file cases without adequate investigation and, sometimes, in hope of a free ride to a profitable settlement. At least on occasion, leadership counsel on the plaintiff side may be able to prompt other lawyers to remove those cases from the mix. One way that was mentioned was that leadership could say it was not intending to prepare expert causation support for claims of plaintiffs with certain experiences or certain conditions. In the California state courts, more generally, it has been said that the courts expect the PLC members to perform this service.

Selection and appointment of the PLC is addressed below (Part III). Adding such a responsibility to the others more often imposed on lead or liaison counsel could be considered. Perhaps success in handling this responsibility could be a factor in determining fee awards from common benefit funds. Perhaps it could be a factor in determining whether to reappoint originally designated leadership in MDLs in which the members of the PLC are term-limited and subject to reappointment.

Master complaints/answers: One aspect of the "MDL exception" objection is the use of master complaints. The Manual for Complex Litigation contains an exemplar case management order with such provisions. *See* Manual (4th) § 40.52 ¶ 6 at 774-75. Such documents are highly likely to be written at a level of such generality that there is no way for defendants to challenge the claims of individual plaintiffs. Some defendants urge that this generality permits claimants with unsupportable claims to evade individualized attention. It appears that, at least in some instances, MDL courts using master complaints may initially require nothing more of claimants than the pleading equivalent of "count me in," deferring individualized details until later. One could argue that such pleadings do not comply with Rule 8(a)(2), which requires a "showing that the pleader is entitled to relief." The exemplar case management order in Manual (4th) instead says (at 777): "No motion shall be filed under Rule 11, 12, or 56 without leave of court."

Nonetheless, proposals to permit master complaints and answers have been made by many, including those advocating defendants' interests. The rules presently contain no reference to "master complaints" or "master answers." One suggestion has been to add references to these documents to Rule 7(a). If Rule 7(a) were so amended, a provision in Rule 8 or Rule 12 might invite motions to require submission of individual complaints. But such a provision might seem at tension with the idea of a master complaint and answer, which might themselves be designed to deflect a preoccupation with the specifics of individual cases and variations in individual allegations. Perhaps a Rule 7(a) amendment could specify – perhaps in the Committee Note – that any plaintiff joining a "master complaint" must also provide individualized specifics of the sort sometimes required in a PFS. But that could make "master complaints" ungainly or tend to defeat a possible purpose for them – to avoid immersing the court in those individual details and flooding the clerk's office with filings. Without such a requirement, it might be said that amending Rule 7(a) puts the rules' imprimatur on exactly the sort of generalized pleading practices the proposal seems designed to change.

Filing fees: Another idea that has been proposed is to require each plaintiff to pay a full filing fee to deter unsupported claims. Rule 20 fairly flexibly permits "batching" of claims, and the federal filing fee statute presently requires that the fee be paid for each action, not for each plaintiff. *See* 28 U.S.C. § 1914(a). Reportedly, when agreements permit "direct filing" of cases in

the MDL transferee court (avoiding the step of filing in the transferor court and becoming a tag-along action), separate filings and fees are sometimes required. Perhaps a rule could somehow make a similar pay-per-plaintiff approach mandatory in tag-along cases involving Rule 20 joinder of multiple plaintiffs after MDL centralization has occurred, though that might require a statutory change. Further investigation of whether MDL transferee judges are now requiring full payment of filing fees needs to occur.

Whether this approach would produce helpful results is uncertain. So also is the proper way to handle it in removed actions. The current statute says that the court must "require the parties instituting any civil action, whether by original process, *removal* or otherwise, to pay a filing fee of $350." 28 U.S.C. § 1914(a). So it appears that the removing defendant must pay the fee. If all a plaintiff lawyer has to do to avoid the federal filing fee is to file in state court (perhaps batching dozens of plaintiffs into one suit, as allowed under state court rules), the state-court filing fee might seem modest if divided among 50 or 60 plaintiffs, and the change would seem not to achieve much. It might even mean that the removing defendant would have to pay a per-plaintiff fee to remove. But perhaps filing in state court would create risks for plaintiff's lawyers who *want* to be tag-alongs in federal court, because defendants might not remove and instead leave them to litigate their cases in state court.

Adding screening as a mandatory topic in MDL cases to the 26(f) conference and 16(b) order: A more flexible and promising approach might be to add discussion of a claim-screening method like the PFS as something required in certain litigation under Rule 26(f) and also adding it to Rule 16(b) as a matter for judicial attention in such cases.

This method could adapt to the specifics of individual cases. It would not be a requirement that any judge use such screening, but could provide the transferee judge with sufficient information to enable the judge to decide how best to address the concern with unfounded claims. Due to its flexibility it might avoid many potential drawbacks of the other ideas discussed above while introducing early consideration of these issues into the centralized proceeding.

On the other hand, it is likely that many cases enter the MDL proceeding only long after the time for the Rule 26(f) conference and Rule 16 order have occurred. Perhaps there is a way to adapt the existing 26(f)/16(b) sequence to the MDL setting. Nothing in Rule 16(b) or (c) would stand in the way of such orders, and Rule 16(c)(2)(L) seems to authorize such provisions. Perhaps the screening idea could be added to that part of Rule 16(c).

II. Immediate appellate review

Although the ordinary starting point is that interlocutory review is not allowed in individual cases, many urge that MDL proceedings should be treated differently because they involve so many claims and parties, and last much longer than individual tort cases. Putting those factors together suggests that some interlocutory rulings in MDL proceedings may be much more significant than similar rulings in stand-alone litigation.

Nonetheless, a preliminary question is whether MDL proceedings are really so distinctive that a special rule for interlocutory review would be appropriate. The model advanced is Rule 23(f), added in 1998 to permit immediate review of class certification orders. The Committee

Note accompanying that amendment noted that other possible avenues for immediate review existed, but added:

> [S]everal concerns justify expansions of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the cost of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than run the risks of possibly ruinous liability.

Whether orders in MDL proceedings regularly raise similar issues is not clear. Class certification has long been recognized as a central and critical decision in cases governed by Rule 23. It is surely not true that all orders in MDL proceedings are similarly central. Among the sorts of orders urged to justify immediate review are rulings on preemption, personal jurisdiction, and admissibility of proposed expert testimony under the *Daubert* standard.

One concern regarding Rule 23(f) was a worry that, before it provided an avenue for review of certification orders, the courts of appeals actually had insufficient opportunities to address these Rule 23 issues and provide guidance to district courts. It is not clear that there is a similar problem with the issues advanced as warranting interlocutory review in MDL proceedings. There seem already to be many appellate rulings on the issues suggested for interlocutory review in MDL proceedings, and accordingly less concern about facilitating "law-making" on these topics by the courts of appeals. And at least some of these topics (*Daubert* is an example) seem to involve such broad trial court discretion that appellate review is not likely to make new law or lead to many reversals.

One objection to current practice is that there sometimes seems to be asymmetrical access to immediate review. For example, if defendants prevail on preemption grounds or obtain an order excluding expert testimony critical to plaintiffs' cases, that may lead to entry of an appealable judgment. But if plaintiffs prevail on such motions, appeal could not follow absent special circumstances. Of course, that is generally true with motions to dismiss or for summary judgment in all litigation, not just MDL proceedings.

Special circumstances might often support certification of such rulings for immediate review under 28 U.S.C. § 1292(b). Review under that statute depends on a certification by the district judge that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Some who have spoken during events urged that § 1292(b) certification is not granted sufficiently frequently in MDL proceedings, but firm data are as yet not available, nor easy to come by. It may be that the transferee judge is best positioned to evaluate the utility of an immediate appeal (something one could view as inherent in the MDL process), so that § 1292(b) could be an effective solution to the problems identified.

The proposals advanced so far, however, are premised on the idea that § 1292(b) has not proved equal to the task, so that a rule should provide an additional avenue for at least some rulings in MDL proceedings as Rule 23(f) does to appeal class-certification decisions.

One special feature of MDL proceedings that has been mentioned is that the absence of immediate review may in some cases deter or hobble settlement efforts. For example, if the defendant is convinced that the claims should be barred by preemption, it may refuse to consider settling a multitude of claims on the basis of a district court decision without first obtaining appellate review. Whether a court of appeals decision affirming the district judge's ruling would materially affect settlement prospects would depend on the case. As noted below, if there are circuit conflicts on an issue addressed in such an appeal, and remand to a district in a different circuit is a possibility, the decision of a given court of appeals may not be regarded as dispositive.

Besides the basic question whether there is a need for expanding opportunities for immediate appellate review, several additional issues have emerged:

Mandatory v. discretionary review: During its recent review of Rule 23 issues, the Committee received a number of submissions arguing that courts of appeals have not used their discretion to grant review under Rule 23(f) sufficiently frequently. Some urged that Rule 23(f) be rewritten to require immediate review of all orders granting or denying class certification. H.R. 985 has a provision requiring courts of appeals to grant such review. To the extent immediate review is required for review of specified types of orders in MDL proceedings (as discussed below regarding types of orders subject to mandatory review), one consequence of mandatory review for certain types of orders may be to provide an incentive to those who wish to trigger review to style their motions as falling within the enabled group.

Role for the district court: Proposals have been made that a new rule, like Rule 23(f), authorize a direct petition to the court of appeals rather than (as in § 1292(b)) requiring or even inviting the district court to opine on whether immediate review would contribute to effective resolution of the pending cases. One response to these proposals is that it will be difficult for the court of appeals to determine whether to grant review, assuming that the "enabling" features of immediate review are important to the appellate court. A suggestion, then, has been that any appealability rule provide explicitly that the district court be invited to express views on the utility of immediate review, or invite the court of appeals to solicit the district court's views on the desirability of immediate review. Either way, the court of appeals would benefit from the district judge's evaluation of the legal issues and the impact of an immediate appeal on further proceedings. The court of appeals could retain discretion to accept an immediate appeal no matter what the district court's view.

Identifying orders by legal type or topic: Rule 23(f) deals only with class-certification orders, which are a relatively discrete category. MDL proceedings often include proposed class actions, so certification orders would qualify in those proceedings. But the present proposal is to create new grounds for appeal of orders by type. The types mentioned most frequently are *Daubert*, preemption, and personal jurisdiction orders. Whether these types of orders regularly involve issues of such importance in MDL proceedings that immediate review should be permitted or required is uncertain. Whether other orders (e.g., motions to remand for lack of diversity jurisdiction) should be added is also unclear.

Identifying orders by focusing on how many cases are affected by them: An alternative (or additional) way of identifying orders subject to a new rule would be to specify that they must affect (be central to?) a specific number of cases. Such a standard might, however, be difficult to apply (particularly for a court of appeals) and invite satellite litigation.

Focusing on orders that are subject to de novo review: At least some orders entered in MDL proceedings are reviewed under an abuse of discretion standard. *Daubert* decisions, for example, are normally reviewed for abuse of discretion. In the abstract, the low likelihood of reversal might make these rulings unsuitable for immediate review, while rulings on preemption and personal jurisdiction, subject ordinarily to de novo review, might be more suitable. But that does not distinguish *Daubert* rulings from orders reviewable under Rule 23(f), since class-certification decisions are also reviewed for abuse of discretion, although the measure of discretion may be different.

Possible timing tension with early screening of unsupportable claims: Part I discussed possible responses to the problem of unsupportable claims in MDL proceedings. As noted there, any requirement that such screening be the transferee court's first task may sometimes seem unwarranted because another issue such as preemption might defeat all the claims, whether the claimants used the product or not. In terms of advancing the MDL proceedings, then, a new appellate review possibility and an early screening requirement might be incompatible.

Increasing delay in MDL proceedings: The proposals made so far do not call for staying proceedings in the district court pending interlocutory review. But the more one stresses the centrality of the orders involved to justify immediate review, the greater the tendency may be to await the results of that review before investing very considerable additional time and effort in the district court proceedings. The Subcommittee has been told that in states in which frequent interlocutory review is available (e.g., New York), such review does produce considerable delay in resolution of cases. Delays in the federal MDL forum may, in turn, affect the willingness of state courts entertaining related litigation to await the results of the federal proceedings.

Coping with delay issues by directing the court of appeals to provide "expedited" review: One reaction to the delay concern has been to urge that a rule direct the court of appeals to provide "expedited" review. That seems an odd thing for a Civil Rule to do. Particularly since the courts of appeals often have heavy dockets of criminal cases, it also seems odd to try to advance civil cases in front of them.

Volume of appeals: The volume of appeals, were interlocutory review authorized by rule, would surely depend in part on whether review is mandatory or discretionary. One estimate presented to the Subcommittee is that creating this additional route for appellate review would produce only about one or two additional appeals per year for each Circuit. There is no clear basis for this estimate. But if the figure that there are 24 mega-MDLs is accurate, the estimate may imply an appeal in each of them every year, which may be high.

"Binding" effect of appellate review: Orders for which immediate review has been urged include issues (e.g., preemption, *Daubert*) on which there may be circuit conflicts, or parties may argue that there are such conflicts. Given that cases are supposed to be returned to the transferor

court (and circuit) after the pretrial proceedings are completed by the MDL court, questions may be raised about whether the appellate rulings of the court of appeals for the transferee court would be binding upon remand. Would that "binding" effect mean that the transferor district court could not apply its own circuit law after remand of a case?

The possibility that interlocutory appellate rulings would not be binding after remand might affect the impact of immediate review on settlement prospects. Even at present, at least in some instances, there can be a dispute about whether cases should be remanded following the transferee court's exclusion of the testimony of plaintiffs' expert witnesses. *Cf. In re Lipitor Marketing, Sales Practices and Liability Litigation*, 892 F.3d 624, 647-49 (4th Cir. 2018) (rejecting plaintiffs' argument in favor of returning cases to the transferor districts for resolution of the issue of specific causation and upholding summary judgment against all plaintiffs).

Need to involve Advisory Committee on Appellate Rules: Any serious consideration of providing by rule for immediate review of interlocutory orders in MDL proceedings would have to be coordinated with the Appellate Rules Committee. This is not a reason not to proceed, but is worth noting.

III. Formation and compensation of PSC

In 2003, Rule 23(g) was added to provide guidance to courts in making the important choice of class counsel. In part, that amendment drew on experience in appointing lead and liaison counsel in MDL proceedings. But there is no rule saying Rule 23(g) criteria apply to selection of leadership counsel in MDL proceedings.

In MDL litigation, the Manual for Complex Litigation (4th) (§§ 10.22-10.225) provides guidance on appointment of lead and liaison counsel. Sections 14.221-216 of the Manual, meanwhile, provide guidance specifically about handling attorney fees for counsel involved in such common benefit activities. That guidance includes recommendations that early and clear guidelines be established for reporting to the court on the level of attorney activity, and for cost reimbursement.

The Subcommittee has been informed that many experienced MDL transferee judges have developed sophisticated methods of guiding and monitoring counsel appointed to such positions. One method is appointment of leadership counsel for a one-year term, with renewed appointment frequent but not assured. Another technique is appointment of a Special Master delegated responsibilities for monitoring both the amount of attorney time and the amount of attorney expenditures on a regular basis.

Rule 23(g)(4) provides that class counsel have a duty to represent the best interests of the class members (not only the class representative). It does not appear that in MDL proceedings a similar Civil Rule applies; leadership counsel likely have their own clients and also may effectively act on behalf of other plaintiffs who have their own lawyers (known sometimes as IRPAs – individually represented plaintiffs' attorneys). Whether there is something like a fiduciary obligation of leadership counsel to these other plaintiffs has been debated. For a recent discussion of these issues, *see* Herman, Duties Owed by Appointed Counsel to MDL Litigants

Whom They Do Not Formally Represent, 64 Loyola Law Review 1 (2018). It is not clear that civil rules could usefully contribute to resolving such questions.

Rule 23(h) provides guidance for attorney fee awards in class actions. Somewhat similar issues arise in MDL proceedings, with the added complication that attorney fee payments can come from numerous individual settlements (with the individual clients of IRPAs). "Common benefit funds" address this issue, and have become commonplace. The Subcommittee has been told that judges employ percentages from 2% to 12% of each settlement to fund the common benefit fund. It seems that the contribution ordinarily comes from the IRPA's "share" of the settlement. The allocation of the common benefit funds, in turn, appears to be handled in a variety of ways, and may also involve a Special Master's assistance.

Going forward, a key question is whether there is any reason to consider rules or even guidelines of some sort about these issues. If there are serious problems, it is not clear to the Subcommittee how they might be solved by a rule.

One recurrent concern, however, is that there is something of an "inside baseball" aspect to existing practices. *See* Burch & Williams, Repeat Players in Multidistrict Litigation: The Social Network, 102 Cornell L. Rev. 1445 (2017) (describing and explaining the reappearance of a small number of lawyers in a large number of MDL proceedings). The Subcommittee has been told that transferee judges are aware of this concern, and are attempting to respond to it. Again, a rules-based solution to this problem is not apparent.

A related concern is that members of a PSC are often expected to contribute considerable sums to pay out-of-pocket costs of the litigation. That fiscal need may hamper efforts for diversity in leadership roles. (One possible method for "new entrants" into leadership is to rely in part on third party legal funding, addressed in topic VI below.)

IV. Trial issues

It may seem odd that trial issues are included in a discussion of MDL practice, since the statute limits transfer to "pretrial" management and requires remand once that process is complete. For some time, transferee judges relied on 28 U.S.C. § 1404(a) to enable them to transfer cases for all purposes (including trial), but the Supreme Court rejected that practice in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

Despite *Lexecon*, trials in MDL transferee districts have continued to occur, often by consent when trial would not otherwise be possible. Consent can address such issues as personal jurisdiction and venue. H.R. 985 includes a provision that would forbid trial in transferred cases unless all parties consent. And there have been academic calls that early remand should become the norm. *See* Burch, Remanding Multidistrict Litigation, 75 La. L. Rev. 399 (2014).

Bellwether trials: A recurrent effort in some MDL centralizations is to arrange bellwether trials as a means of informing the parties about the strengths of cases, perhaps thereby to further settlement negotiations. The Subcommittee has heard numerous expressions of skepticism about the value of bellwether trials. One concern is that the process of selection may not yield "representative" cases for trial. Another is that it may happen that cases selected for trial disappear

(perhaps due to voluntary dismissal of claims that turn out to be unsupported), thereby skewing those ultimately tried despite a satisfactory initial selection process.

Such trials in MDL proceedings have become expensive propositions. The Subcommittee has been informed that – at least in pharmaceutical and medical device MDL litigation – it is unusual to be able to try such cases for less than $1 million in out-of-pocket costs (not including attorney fees). Given the potential stakes, the attorney fees may be larger.

There have been few proposals for rule changes addressing such trials, however. One early proposal was that transferee judges enlist other judges (perhaps in the same district) to preside over such trials so that the entire burden of trial does not fall onto one judicial officer. In some instances, transferee judges have assembled "trial packets" that other judges can use to become "trial ready" for purposes of presiding at such trials. Though this practice may be salutary, particularly in large districts, it does not seem suitable for inclusion in a rule.

Limiting joint trials to cases involving injuries to the same person or property: LCJ has proposed an amendment to Rule 20(a) that would permit joinder of claims for injury to person or property only when the parties' claims are all based on an injury to the same person or property. If applied rigorously in MDL cases, that joinder limitation would seem consistent with the idea of requiring separate filing fees from each plaintiff.

But this proposal does not appear to be limited to MDL proceedings. Applied to the general docket, this joinder limitation could affect many cases. Consider a bus accident in which many passengers are injured and want to sue the bus company. Under Rule 20(a) as now written, they could sue as co-plaintiffs because their claims all arise out of the same occurrence. As written, the proposal seems to require that each file a separate suit. If that were required, it is likely the court would nevertheless treat them as "related cases."

It may be that a proposal could be directed to combined trials, not initial joinder. Something along these lines might be added to Rule 20(b), which already addresses "an order for separate trials." The rule could perhaps be amended to require separate trials as proposed by LCJ, at least in MDL proceedings, although it is not clear just what the benefit would be. But absolutely prohibiting multi-plaintiff trials could hamstring the MDL transferee court.

Forbidding trial unless all parties consent: Another proposal is a rule forbidding an MDL transferee court to hold a trial unless all parties consent. A similar provision appears in H.R. 985. If that requirement required consent from all parties in any action before the MDL transferee court – perhaps thousands – it would likely be unworkable; the focus seems to be on the parties to the individual cases to be set for trial.

Before *Lexecon* was decided in 1998, MDL transferee judges frequently used § 1404(a) to transfer cases in the MDL proceeding to themselves for all purposes, but the Supreme Court held that such self-transfer was not authorized under the statute. More recently, a practice of "direct filing" arose, under which cases that might have been filed in "home" districts around the country and transferred as tag-along actions would instead be directly filed in the MDL transferee district. Owing to jurisdictional and venue limitations, such direct filing is often possible only with the consent of the defendants. As noted above (*see* Part I), the consent sometimes requires payment of

a filing fee by each plaintiff. It also often requires that these cases be transferred to the "home" district once pretrial activities are completed unless the cases are settled. More recently, *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017), may have raised further jurisdictional obstacles to filing in the MDL transfer district by plaintiffs who are citizens of other states.

Together, these developments make it likely that many of the cases pending before the MDL transferee judge can be set for trial – whether "bellwether" or not – only on party consent. The all-party consent proposal thus might not change the current situation significantly.

But the proposal says that the transferee judge may not conduct a trial in any action in the consolidated or coordinated proceedings without consent of all parties to that action. If that means that the transferee judge could not, after a Panel centralization order, even try the cases she already had before the order, or others properly filed in her "home" district, that would seem a curious result, meaning that the Panel's order would deprive the transferee judge of authority to try cases she already had before the Panel acted.

On the other hand, if the proposed rule does not apply to cases directly filed in the MDL transferee district, that would further limit its impact, though not likely in an important way if consent to direct filing usually includes a requirement of transfer to the "home" district before trial. Nonetheless, the seeming requirement of consent in direct filed cases is also curious.

It may be that a feature of the problem is that sometimes the parties consent to trial of a tranche of "bellwether" cases that includes some that plaintiffs have selected as strong for the plaintiffs and some that defendants have selected as strong for the defendants. Commentary suggests that on occasion, as trial approaches, several of the cases that are strong for the defendants are dismissed voluntarily by plaintiffs, thereby skewing the remaining cases in plaintiffs' favor. Unless the defendants' consent is revocable in these circumstances, it is not clear how a consent requirement would solve the problem. It is not clear whether, at present, consents to trial in the MDL transferee court include some sort of "opt out" provision to deal with the skewing concern described above. Perhaps a rule could require trial to occur in all the selected cases, but that might be unduly rigid, wasteful, and unworkable.

Permitting MDL transferee judges to order live trial testimony by party witnesses: AAJ has proposed that rule changes would improve trials in MDL litigation by enabling judges to order that party witnesses (including employees of a party) appear at trial to testify live. That proposal re-raises issues partly addressed during the Committee's review of proposed changes to Rule 45 during 2011-12.

Among the amendments to Rule 45 that the Committee proposed in mid-2011 was what is now Rule 45(c) regarding the distance a subpoena can compel a witness to travel to testify at a deposition, hearing, or trial. A conflict had emerged about interpretation of Rule 45 as then written. Some courts had treated it as authorizing a subpoena for party witnesses to testify at trial even though they would have to travel more than 100 miles from another state to do so. The most prominent example of such an order was in an MDL proceeding – the *Vioxx* litigation. But it is

worth noting that the activity in 2011-12 was not limited to MDL litigation, or particularly focused on it. It was much more general.

The preliminary draft of amended Rule 45 published for public comment in August 2011 included a new Rule 45(c) that rejected the *Vioxx* interpretation that a subpoena could compel a party witness to attend trial more than 100 miles from the place of his or her residence or employment. But it also included an Appendix inviting comment on whether a new Rule 45(c)(3) should be added to the amendment package:

> (3) **Order to a party to testify at trial or to produce officer to testify at trial.** Notwithstanding the limitations of Rule 45(c)(1)(A), for good cause the court may order a party to appear and testify at trial, or to produce an officer to appear and testify at trial. In determining whether to enter such an order, the court must consider the alterative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a), and may order that the party or officer be reasonably compensated for expenses incurred in attending the trial. The court may impose the sanctions authorized by Rule 37(b) on the party subject to the order if the order is not obeyed.

After the public comment period, the Committee decided not to include this amendment in the package recommended for adoption.

This proposal could be revisited. It might be that such a provision could be expanded beyond party officers to include others associated with a party. (Note that Rule 37(d)(1)(A)(i) authorizes sanctions against a party when a party's "officer, director, or managing agent" – or a person designated under Rule 30(b)(6) – fails to appear for a properly noticed deposition.)

As a contrast, it might be noted that courts do have authority to order party attendance at other events. For example, courts may order parties to appear for depositions in the forum district, and may order a party to attend a settlement conference in the forum. But the question whether the justification for such orders also applies to attendance to testify live at trial would have to be evaluated.

V. Settlement promotion/review/approval

The Committee has just completed a thorough review of Rule 23(e)'s procedures for judicial review of class-action settlements; those rule changes are presently scheduled to go into effect on Dec. 1. By rule, such settlements are binding on class members unless they opt out, a feature that substantially explains the requirement of judicial review of the merits of proposed settlements.

There is no similar rule authorizing or requiring judicial review of settlements in MDL proceedings for fairness, or authorizing the court to bind parties to MDL proceedings to the terms of a collective settlement, as Rule 23(e)(3) authorizes in class actions. But settlement in MDL proceedings might be said to be the de facto equivalent of class action settlements governed by Rule 23(e). Transferee judges have invested considerable efforts in achieving settlements –

sometimes "global" – and some appear to regard achieving resolution without the need for remand as an important goal. On occasion, courts have invoked the idea of a "quasi class action" to support some orders in MDL proceedings (often regarding attorney fee common fund arrangements and "caps" on contingent fees). Certainly, traditionally at least, the experience has been that remands are the exception rather than the rule. Probably settlements after centralization are an important explanation for the low rate of remands. Perhaps the analogy to class actions is strong enough to support rulemaking about some settlements in MDL litigation.

As noted in § 13.14 of the Manual for Complex Litigation (4th), there are other situations in which court approval of proposed settlements is required (e.g., shareholder derivative actions, actions in which a receiver has been appointed, consent judgments involving antitrust actions initiated by the U.S., other specialized representative actions). The sort of mass tort actions that have been the focus of discussions with the Subcommittee about MDL procedures do not require such approval, and it is unclear whether the Enabling Act would permit rules to mandate judicial approval. On the other hand, some MDL proceedings include class actions, and therefore presumably involve judicial review of at least some part of a settlement under Rule 23(e).

A beginning might be to focus on judicial involvement in efforts to negotiate settlement terms to be offered to all claimants in an MDL proceeding. At least in some such proceedings, a common set of settlement terms has been so offered, sometimes with a proviso that settlement depends on participation by virtually all claimants. Such a situation might be analogized to development of a proposed settlement of a Rule 23(b)(3) class action, with settlement premised on certification of a class and individual class members permitted to opt out, and the defendants having the option to back out of the settlement if the opt-outs reach a certain level. Even though an analogous situation in an MDL proceeding would not involve a rule-based binding effect, as in a class action, there might be a basis for a rule in light of the court's role in development of the settlement. Defining when that rule would apply could, however, present a considerable challenge; it likely could not apply with regard to individual settlements or settlements by individual plaintiff lawyers with "inventories" of claims.

Presently, Manual (4th) §§ 22.92-22.927 provide considerable advice for judicial review of proposed settlements in mass tort class actions that might also guide MDL transferee judges. Though settlement looms large in MDL proceedings, the Subcommittee has not heard many proposals for rulemaking attention specifically keyed to settlement. One focus (mentioned in Part III above) has been on common funds and awards to leadership counsel, usually following settlement. Another suggestion is that the proposed terms for settlement in MDL proceedings should be made public in the same way that Rule 23(e) requires that the terms of proposed class-action settlements be made public.

No specific proposals for rules in MDL proceedings have focused on settlement, but the general topic remains on the list of possible topics due to its importance.

VI. Third Party Litigation Funding (TPLF)

The Subcommittee has heard a great deal about this topic, and expects to learn more about it during the George Washington University event the day after the full Committee's November 1

meeting. In terms of the overall portfolio of the Subcommittee, it is important to note that TPLF is not distinctly, much less uniquely, a feature of MDL litigation.

There seems little doubt that there has been very considerable growth in litigation funding. A recent article referred to "a flood of money moving into litigation financing." Cadman, For the World's Super Rich, Litigation Funding is the New Black, Bloomberg Law Class Action Reporter, Aug. 28, 2018.

These developments have prompted interest in many quarters. A number of courts of appeals have local rules requiring disclosure of the interests of such investors in the outcome of pending cases, as have several district courts. These rules seem designed to identify situations that might call for recusal. In addition, one state (Wisconsin) has by statute adopted a requirement of disclosure, and one district (N.D. Cal.) has a local rule requiring disclosure in class actions. *See also* Litigation Funding Transparency Act of 2018, S. 2815, introduced on May 10, 2018.

There seem to be two prominent categories of litigation funding arrangements that have been involved in MDL proceedings. One involves financing provided to lawyers and law firms. The range of forms of financing of law firms is rather wide. At one end may be conventional bank lines of credit to law firms, perhaps secured by the firm's receivables. At another end are loans to lawyers or law firms keyed to one specific case, and non-recourse – keyed to success in that specific case. In between are arrangements that may give a lender an interest in an "inventory" of cases being handled by a law firm. This description focuses on funding for the prosecution of cases, but it may be that somewhat similar arrangements have been made with regard to defense of litigation.

But third-party litigation funding is a fast-growing field that is also evolving rapidly. Leading funders emphasize that major corporations and major law firms use their services as methods of dealing with litigation risk, on both the plaintiff and defendant sides. The variety of forms of such funding could pose definitional challenges for a rulemaking effort.

Regarding funding provided to lawyers, concerns have been raised about professional responsibility rules concerning sharing of attorney fees with non-lawyers. New York, for example, has recently adopted the position that lawyers in that state may not enter into agreements with funders that provide that payment to the funder is contingent on the lawyer's receipt of legal fees. *See* Formal Opinion 2018-5 (Litigation Funders' Contingent Interests in Legal Fees).

A distinct form of litigation-related financing might be called "consumer" oriented. These arrangements ordinarily arise between plaintiffs and lenders and do not directly involve lawyers or involve issues of sharing of legal fees. These loans may resemble payday loans, and have high rates of interest. Plaintiff counsel who have discussed this form of financing with the Subcommittee unanimously say that they urge their clients not to enter into such arrangements because the terms are often onerous. Some states have adopted legislation to regulate such lending, focusing on such things as interest rates and required disclosures.

Neither the professional responsibility nor the consumer protection aspects of TPLF seem suited to attention within the civil rules. Two decades ago, the Standing Committee spent considerable time studying the possibility of Federal Rules of Attorney Conduct, but eventually decided not to pursue this possibility. Though TPLF is a much narrower topic than was under study then, possible professional responsibility questions do not seem to be central to the rulemaking effort. Neither do the "consumer protection" features of some state legislation seem attuned to an Enabling Act effort.

Even if such efforts were in general suitable objectives for Enabling Act attention, it must be remembered that TPLF is not uniquely focused on MDL proceedings. In terms of the financing agreements some lenders reach with lawyers, it seems that most of the plaintiff-side lawyers the Subcommittee has heard from do not enter into such agreements. But "consumer" agreements may occur in MDL proceedings, just as they occur in other litigation. Indeed, on occasion, when an MDL proceeding has reached the settlement phase the financial commitments made by individual plaintiffs can leave them "upside down," unable to cover the indebtedness with the payout afforded by the proposed settlement.

Initial disclosure possibility: In 2014, the Committee was presented with a proposal to add certain TPLF arrangements to Rule 26(a)(1)(A)(iv). The proposal was advanced as consistent with the existing requirement that defendants disclose insurance agreements that might cover a judgment in the action. Essentially the same disclosure proposal was renewed in 2017.

The existing disclosure provision in Rule 26(a)(1)(A)(iv) is limited to an agreement by "an insurance business" to indemnify the defendant. Drafting issues would likely be presented to adapt to the TPLF situation. It does not seem that the disclosure possibility is designed to reach so far as, for example, applying to the willingness of a relative to loan a plaintiff money for living expenses or even filing fees, with the explicit or implicit expectation that the loan would be repaid only if the litigation were successful.

Need for disclosure: The proposal to require disclosure of TPLF is justified in part as enabling defendants to know what and whom they are up against in the litigation. Some proponents of disclosure have told the Subcommittee that they are not interested in the amount or terms of the funding, but only the fact of funding and the identity of the funder.

Recusal concerns: As noted above, there are local rules in many courts of appeals and district courts that seem designed to enable judges to determine whether a funder's interest might provide a ground for recusal. Although some are skeptical about the frequency with which federal judges have invested in funders (supposedly often hedge funds), disclosure for this purpose would seem satisfied with disclosure of the fact of funding and the identity of the funder.

Disclosure of the terms of the funding agreement: A current amendment proposal would require that the entire funding agreement be disclosed to the opposing party. This disclosure has been justified in part on the ground that the agreement may either give the funder some say in the decision whether to settle, or provide that the funder can withhold further funds in a way that might make settlement likely or unavoidable. At least for funding provided to lawyers, such arrangements might run afoul of professional responsibility prohibitions on lawyers consigning

control of litigation to non-lawyers. Whether a procedural rule is a suitable way of addressing that concern can be debated.

Discovery about funding arrangements: A major concern of those resisting disclosure is that disclosure will lead to time-consuming and expensive discovery efforts. These efforts, in turn, might intrude into work product because litigation counsel might sometimes provide candid reports about litigation prospects to the funder.

Particular aspects of MDL proceedings bearing on TPLF disclosure: As already noted, one particular feature of TPLF that may bear on TPLF disclosure is the possibility that some plaintiffs might find themselves "upside down" when settlement crystallizes, particularly if the originally favorable prospects of the litigation have been scaled back. Another is that some "new entrants" to leadership positions (*see* Part III) may need funding in order to participate even though it seems that well-established leadership presently do not.

A different concern that might be important in MDL litigation but not significant in ordinary litigation is the burden and difficulty of providing disclosure for "consumer" type funding obtained by individual plaintiffs. As noted above, the plaintiff-side counsel the Subcommittee has talked to uniformly say they urge their clients not to enter into such transactions, but they recognize that clients sometimes do so nevertheless. For larger MDL proceedings, the burden of monitoring and disclosing as to hundreds or thousands of individual plaintiffs could be considerable. And the question whether that burden falls on the PSC or only on the IRPAs might be difficult to answer.

Concerns about control of litigation and settlement: As suggested above, one prime concern is whether funders might inappropriately control litigation decision-making. That concern is a reason for rules against fee-sharing by lawyers. Litigation funders who have addressed the Subcommittee emphasize that they do not have or want any control over the litigation. Indeed, some say they could not come close to having the personnel to review and monitor the day-to-day progress of litigation even if they wanted to and had authority under their agreements to do so.

Proponents of disclosure counter that neither they nor the courts should have to take such assurances at face value. They also point to examples they contend raise concerns that some funders may be exercising or able to exercise substantial control over settlement decisions.

Disclosure to the court in camera: One way to address some of the concerns that have emerged but avoid some of the problems that have been identified would be a rule calling for disclosure of litigation funding (properly described) to the court in camera. That need not lead to a discovery battle, but would enable the court to be fully apprised of the various forces bearing on potential settlement and continued litigation as well as recusal information. In the ongoing MDL litigation about opioids the court has ordered such disclosure.

One objection to this approach is that it permits a form of ex parte communication between the court and plaintiff's counsel that excludes the defendants. Whether the information involved bears sufficiently on the conduct of the litigation to give force to this objection may be debated.

* * * * *

The foregoing may be unduly discursive but it attempts to capture the various ideas the Subcommittee has encountered since the April meeting of the full Committee. For the present, the objective is to use the November meeting to explore two basic questions:

(A) Which problems seem most important?

(B) What rulemaking responses, if any, offer promise in responding to those problems?

TAB 6B

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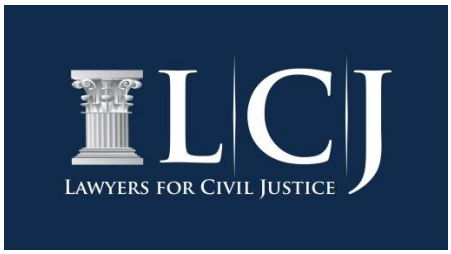

MDL PRACTICES AND THE NEED FOR FRCP AMEMDMENTS: PROPOSALS FOR DISCUSSION WITH THE MDL/TPLF SUBCOMMITTEE OF THE ADVISORY COMMITTEE ON CIVIL RULES

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Washington, D.C.

I. Early Vetting: Rule 26

a. Background

One of the greatest problems identified with the MDL process is its tendency to attract meritless claims.[1] In some cases, meritless claims take up thirty to forty percent of the total case inventory.[2] As Judge Clay Land of the Middle District of Georgia put it: "the evolution of the MDL process toward providing an alternative dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[3]

In theory, since defendants have the same rights to discovery as they do in individual litigation, it should be easy to debunk meritless claims when they appear. In practice, however, the sheer number of cases filed in MDLs means that defendants often cannot exercise their discovery rights until the litigation is well underway, at which point defendants (and courts) must expend significant resources to identify and combat these claims. Rules 8, 9, 11, 12(b) and 56 are failing to meet the need for a mechanism to test and remove meritless cases from the dockets.

Under current MDL practice, defense lawyers—and judges—often do not have basic information available at the beginning of the litigation.[4] Plaintiff fact sheets are not the answer.[5] They shift

[1] *See In re Mentor Corp. Obtape Transobturator Sling Prods.*, MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sep. 7, 2016) (Land, J.) ("based on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise").
[2] Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, available at http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase.
[3] *In re Mentor Corp.*, 2016 U.S. Dist. LEXIS 121608, *5.
[4] *See, e.g., In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1234 (9th Cir. 2006) (finding "unreasonable delay in completing Fact Sheets prejudiced the defendants' ability to proceed with the cases

the cost of basic vetting of claims to the defendants, who pay through negotiating the information in fact sheets, reviewing fact sheets for lack of basic information, and then pointing out the errors to the plaintiffs. It also shifts costs to the courts, who must "waste judicial resources deciding motions in cases that should have been dismissed by plaintiff's counsel earlier."[6] In addition, *duplicate* claims—filed on behalf of the same plaintiff by different counsel—are also a serious issue in MDLs, since they require the same attention to weed out as meritless claims.[7]

The asymmetric nature of MDLs encourages plaintiffs to file low- or no-merit cases against defendants, because the marginal costs of adding a new case are close to zero, while the costs of uncovering information about a claim's lack of merit can be significant.[8] At times it also encourages plaintiffs to stay with meritless claims through motion practice.[9]

Baseless claims are harmful to the judicial system, corporate defendants and the public. For the judiciary, ignoring dockets that are overloaded with meritless complaints undermines public confidence in courts and imposes administrative burdens—matters that the drafters of Rules 8, 9, 11, 12(b) and 56 considered highly important to if not existential for the judiciary. For publicly traded corporations, baseless claims can confuse the nature of SEC reporting requirements because it can be impossible to sort out the materiality of cases when there is no information about their merit. And for the public, baseless claims subject to FDA reporting can mislead patients about the benefits and risks of the drugs and devices prescribed by their doctors, complicating important health decisions.

Fortunately, a simple rule solution exists within the present FRCP structure: a Rule 26 amendment requiring disclosure of evidence showing the cause and nature of the injury alleged. The practical effect will be that fewer meritless claims will be filed. Even if they are still filed, defendants (and the courts) will not have to expend the same resources to identify and dismiss them. Such an amendment would not create an undue burden because plaintiffs' counsel should already possess this level of evidence to satisfy the basic Rule 11 requirements. Absent such a rule, plaintiffs will continue to "park" meritless cases in an MDL, even if the Plaintiffs' Steering Committee is making an effort at due diligence.

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effectively"); *In re Lipitor (Atorvastatin Calcium) Marketing, Sales Pracs., & Prods Liab. Litig.,* 227 F. Supp. 3d 452, 460 (D.S.C. 2017) (after months of litigation and multiple notices, plaintiffs "inexplicably" argued that no one had had the opportunity to develop the facts in their case).

[5] *See, e.g., In re PPA Prods. Liab. Litig.,* 460 F.3d at1224 (9th Cir. 2006) (noting that, despite efforts of defendants and Plaintiffs' Steering Committee, "many plaintiffs had failed to comply with [the court's] requirement to complete a Plaintiff's Fact Sheet"); *In re Mentor Corp.,* 2016 U.S. Dist. LEXIS 121608 at *7-8.

[6] *In re Mentor Corp.,* 2016 U.S. Dist. LEXIS 121608, *4 (M.D. Ga. Sep. 7, 2016) (Land, J.).

[7] Jeff Lingwall, et al., *The Imitation Game: Structural Asymmetry in Multidistrict Litigation,* 87 MISS. L. REV. 131, 162-63 (2018).

[8] *See* Lingwal, *Imitation Game,* 87 Miss. L.J. at 182; *In re Mentor Corp. Obtape Transobturator Sling Prods.,* MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *7-8 (M.D. Ga. Sep. 7, 2016) (Land, J.) ("based on fifteen years on the federal bench and a front row seat as an MDL transferee judge on two separate occasions, the undersigned is convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise").

[9] *See, e.g., In re Lipitor (Atorvastatin Calcium) Marketing, Sales Pracs., & Prods Liab. Litig.,* 227 F. Supp. 3d 452, 466 (D.S.C. 2017) (noting plaintiffs opposed summary judgment on specific causation despite lacking any expert evidence).

The AAJ's proposed "inactive docket"[10] for claims about which counsel has not conducted reasonable inquiry would not change or improve the status quo. Primarily, this is because a significant volume of such claims originate not as injured individuals contacting lawyers, but rather as the result of massive advertising campaigns that generate huge numbers of potential claims that counsel have not invested the proper resources to screen,[11] or even direct calls to potential plaintiffs warning them their lives are in danger.[12] Lawyers spend money to generate claims in this fashion because MDL practice rewards it—via lead counsel selection and settlement amounts—and because they are confident (with good reason) that courts will enable the practice. To take just a few examples, an inactive docket would not prevent the filings of specious claims that dogged both the Silica and Fen-Phen litigations.[13] Nor would it absolve a Judge Land of resolving summary judgment motions on claims where plaintiffs had no credible causation evidence, or had already passed the statute of limitations.[14] An "inactive docket" would not spare defendants from reporting such claims as required by regulation, which impose significant costs in terms of time and resources for many claims that have no basis in fact or law. In short, the AAJ's proposal should be viewed more as an acknowledgement that there is a problem with baseless claims than as a solution that would allow *more* parking of specious claims, without mitigating against any of the injurious consequences for courts, corporate defendants and the public. AAJ's proposal is also problematic since it essentially would use the federal rules to toll applicable statutes of limitations in the absence of the parties' agreement. The filing of a lawsuit normally tolls the statute of limitations but it does so when a claim is actively being litigated and is subject to dismissal with an early motion – not when a potentially meritless claim is essentially parked in federal court. Moreover, an "inactive docket" represents a radical departure from the fundamental need to support claims, with no accountability to plaintiffs' counsel for filing cases without the requisite due diligence generally required.

b. Specific problems:
    i. Rules 8, 9, 11, 12(b) and 56 are failing to provide sufficient procedures for early vetting, and the *ad hoc* use of mechanisms such as fact sheets and *Lone Pine* orders varies wildly and is inherently inconsistent with the fundamental idea of the FRCP that procedures should be uniform, clear and accessible;
    ii. Dockets overloaded with meritless claims harm the judiciary because they decrease public confidence in the courts and consume judicial resources;
    iii. Meritless claims distort perceptions of the value and complexity of MDL cases;
    iv. A process that denies defendants the ability to understand the claims made against them is incompatible with the American concept of justice;

[10] Memo from AAJ's MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee, (May 25, 2018) (available at http://www.uscourts.gov/sites/default/files/18-cv-t-suggestion_aaj_re_mdl_rulemaking_0.pdf).
[11] *See, e.g.,* S. Todd Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 411 & n. 92 (2013) (describing mass-tort recruitment practices).
[12] Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, NEW YORK TIMES, April 14, 2018.
[13] *See* S. Todd Brown, *Specious Claims & Global Settlements*, 42 U. MEM. L. REV. 559, 580-86 (2012).
[14] *In re Mentor Corp. Obtape Transobturator Sling Prods.,* MDL Docket No. 2004, 2016 U.S. Dist. LEXIS 121608, *4 (M.D. Ga. Sep. 7, 2016) (Land, J.).

v. It is unjust to apply procedural rules, including discovery rules, to one side of a case while suspending those rules as to the other party; and
vi. Overloading dockets with "inactive" cases, which may lack a basis in fact or law, increases the cost of settlement because as a practical matter, plaintiffs' counsel will likely insist that such cases be included in a global settlement, if any, and defendants will have no mechanism to eliminate such cases through motion practice because they are not on an "active docket."

c. Solution: Amend Rule 26 to provide for mandatory disclosures by plaintiffs in consolidated cases, including sufficient evidence to show plaintiff had exposure to the alleged cause and suffered a harm within the scope of the case.

d. Proposed language:

Rule 26(a)(1)

(F) Multidistrict Litigation Disclosure. Within sixty (60) days of the filing of a civil action in, or the removal or transfer of any civil action to, a multidistrict proceeding under 28 U.S.C. § 1407 in which a plaintiff alleges personal injury, plaintiff in each such action shall make an initial disclosure which:

(i) identifies with particularity any product, service, or exposure at issue in the action, and provides documents or electronically stored information evidencing same; and

(ii) identifies with particularity the specific injury at issue in the action, including the date of the injury, and provides documents or electronically stored information evidencing same.

For civil actions filed in the transferee district prior to the establishment of a multidistrict proceeding under 28 U.S.C. § 1407, the initial disclosure shall be made within sixty (60) days of the Order of the Judicial Panel on Multidistrict Litigation establishing such proceeding.

II. Appellate Review

a. Background

Certain issues—such as pre-emption, jurisdiction and Daubert on general causation—are key legal questions that affect large number of cases in an MDL proceeding.[15] However, appellate review of critical motions in MDL cases is very rare, occurring only when a trial results in judgment for the plaintiff. As a result, a large number of cases that should not have been brought are allowed to proceed through a costly litigation process without appellate review. In many

[15] See, e.g., *In re Mirena IUS Levonorgestrel-Related Prods. Liab. Litig.*, MDL No. 2767, Oral Argument Transcript Mar. 30, 2017, at 26:3-4 (Judge Vance: "You would agree that a favorable Daubert ruling is pretty much the game in these cases?").

MDL cases, the overall litigation is settled without ever receiving the benefit of a definitive ruling as to the legal validity of critical issues.

Discretionary appeals are failing to provide sufficient certainty and guidance. Some parties are reluctant to seek certification for interlocutory review even when there are good reasons for it, and some judges are reluctant to grant such review because they view it as needless delay of cases that might otherwise get resolved. Although mandamus is occasionally employed to get an appellate court's attention in certain situations, it is an imperfect mechanism for the purpose of seeking review of a key decision.

For example, in the *Actos* MDL, defendant Eli Lilly filed a motion to dismiss on pre-emption issues, arguing that it could not be held liable for the content of labels that federal law forbade it to change. The motion was denied. After one trial resulted in a $9 billion judgment, Eli Lilly filed an appeal. It withdrew the appeal in light of a pending settlement. However, it had to wait until after a lengthy and expensive pretrial and trial phase and a potentially ruinous verdict before it was able to seek review of this fundamental legal issue.[16]

b. Specific problems:
    i. Rulings on a handful of critical motions that are essentially case-dispositive (similar to class certifications) have very little possibility of appellate review;
    ii. The lack of appellate review deprives courts and parties of clear guidance;
    iii. Discretionary appeals are too seldom sought and granted to provide the certainty and case law development that MDL cases need and warrant;
    iv. Parties are increasingly turning to mandamus, which is an imperfect substitute for the right to appellate review on the merits; and
    v. The lack of appellate review adds to a sense of skepticism about MDL proceedings, specifically that settlement pressure has undue influence on some decisions.

c. Solution: Create a straightforward pathway for interlocutory appellate review as of right for a tightly defined category of motions that are critical in MDL cases. The rule should affect only those issues that could be dispositive of a significant number of cases in the MDL.

d. Proposed language:

<u>Rule 23.3 Multidistrict Litigation Proceedings</u>

<u>(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).</u>

[16] *See In re Actos (Pioglitazone) Prods. Liab. Litig.*, 274 F. Supp. 3d 485, 495-502 (W.D. La. 2017) (describing litigation from pretrial preemption motion through appeal) (Doherty, J.).

(1) Appeals. A court of appeals shall permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based.

III. Bellwether Trials

a. Background

Although the purpose of an MDL is "coordinated or consolidated pretrial proceedings," bellwether trials are commonly conducted by the judge to whom the proceedings are transferred, and parties often feel unduly pressured to participate in trials of cases that are not appropriately representative of the case as a whole. Instead of generating useful information for the parties, bellwether trials often appear to be used for both the expense and the *in terrorem* effect of large jury verdicts to spur global settlement discussions.[17]

Having only one judge handle all trials in a large consolidated proceeding does not give an accurate picture of what different judges in different courts applying different laws would do for cases. As the Seventh Circuit observed in denying certification of a nationwide products-liability class action:

> [T]he benefits [from a representative trial] are elusive. The central planning model — one case, one court, one set of rules, one settlement price for all involved — suppresses information that is vital to accurate resolution. … One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident.[18]

Similarly, relying on a few ordered trials to produce useful settlement information in a complex, multi-state MDL would be similarly fruitless.

Several other factors also confound useful information coming from bellwether trials. First, plaintiffs will often voluntarily dismiss proposed bellwethers that might prove adverse to them, thus skewing any sample towards greater recoveries than average. Second, to the extent that courts have begun to select bellwether trials only from those cases originally filed in the jurisdiction (since those cases will not require *Lexecon* waivers), they do not represent the potential theories and liabilities available across the fifty states.

If bellwether cases are not viewed as representative, they lose their utility in the settlement process. Defendants do not often lower their expectations due to losses or adverse verdicts in

[17] *See, e.g.*, S. Todd Brown, *Plaintiff Control & Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 401 & n. 50 (2013) (noting settlements in World Trade Center Disaster Site Litigation and the Deepwater Horizon litigation both occurred shortly before bellwether trials were to begin).
[18] *In re Bridgestone/Firestone, Inc.*, 288 F. 3d 1012, 1020 (7th Cir. 2002).

bellwether trials; in fact, the plaintiffs' use of voluntary dismissal as a tactic may in fact strengthen defendants' resolve to litigate.

Requiring explicit consent for bellwether trials returns some measure of legitimacy to the bellwether process, and it would reduce the potential *in terrorem* effects of bellwether trials ordered over one or both parties' objections. If trials do in fact reflect a range of potential outcomes, parties will be more likely to incorporate that information when settling.

In problems of national scope that involve claims under multiple states' laws, defaulting to trying cases in their original jurisdictions would help with the information-generating function of the MDL process.

b. Specific problems:
    i. Parties feel unduly pressured parties to participate in non-representative trials;
    ii. Selection of cases for trial is made by an unfair/unclear process;
    iii. To avoid *Lexecon*/jurisdictional waiver issues, MDL courts are trying cases filed in the court's jurisdiction, exacerbating the non-representativeness problem;
    iv. Multiple plaintiffs' claims are tried together;
    v. Delays in entering judgment after trial can thwart access to appellate review; and
    vi. A verdict in favor a plaintiff is more likely to be interpreted as proof of the merits, while a defense verdict is seen as a reason that more trials are needed.

c. Solution: Establish a consent procedure in Rule 23.3 to ensure parties' consent to each bellwether trial.

d. Proposed language:

Rule 23.3 Multidistrict Litigation Proceedings

(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).

(1) Appeals. ***

(2) Trials. In any coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S. Code § 1407, the judge or judges to whom actions are assigned by the Judicial Panel on Multidistrict Litigation shall not conduct a trial in any action in those consolidated or coordinated proceedings unless all parties to that action consent.

IV. Third-Party Funding Disclosure

a. Background

The potential risks posed by third-party litigation funding arrangements are well-documented.[19] There is a growing consensus among MDL judges in particular that review of third-party funding agreements is essential to ensuring the integrity of the judicial process. *In camera* review, however, cannot suffice as a prophylactic measure. Disclosure of the agreements to the parties is critical.

In camera review puts courts in an untenable position: vouching for one side to its opponents in an adversary process. The practical result of handling these agreements as an *ex parte* matter is not simply that the court knows about the agreements, it's that everyone in the court knows except the defendant. Defendants must know of the existence of third-party funders for a number of reasons tied to the effectiveness of MDL proceedings.

One of the most important reasons is that the existence of third-party litigation funding correlates strongly with inventories of junk cases, because funds are used for mass media recruitment of plaintiffs without sufficient due diligence into the merit of the claims. There are strong incentives (and no punishment) for filing a high volume of cases regardless of merit. Third-party funding has been tied to mistreatment of individual plaintiffs including unnecessary medical procedures.[20]

Parties also need to understand third-party litigation funding agreements because they can affect the efficient administration of mass settlements. Just recently in *In re NFL Players Concussion Injury Litigation,* Judge Anita Brody had to shut down an attempt by a third-party funder to subject the settlement agreement to a third-party arbitration.[21] The idea that such issues are a matter for the judge to deal with on an *ex parte* basis is absurd.

Disclosure of third-party litigation funding agreements is essential. First, it allows parties in the litigation to identify the real parties in interest, which is important in developing both litigation and settlement strategies. Second, it allows both the courts and the parties to focus their efforts on those parties who actually require compensation by the court, as opposed to those who bought the right to sue, possibly without doing adequate research into the merits of the claims at issue. These are the same reasons that the Advisory Committee originally required that defendants disclose the existence of any insurance coverage.

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[19] *See* Letter from Lisa Rickard, et al., to Rebecca Womeldorf (June 1, 2017) (available at: http://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf).

[20] For a recent example, see Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, NEW YORK TIMES, April 14, 2018.

[21] *See* Emma Cueto, *Ex-NFLer Dodges Arbitration Over $500K Settlement Advance,* Law360, May 23, 2018, available at TK.

b. Specific problems:
    i. Courts and parties are unaware of the people and entities with a stake in the outcome of the litigation, preventing compliance with ethical obligations;
    ii. Courts cannot apply the Rule 26(b)(1) mandate to consider "the parties' resources" as a factor in proportionality without knowing whether a third-party has agreed to fund some or all litigation expenses;
    iii. Not knowing the real parties in interest can prevent parties from determining litigation and/or settlement strategy because a party's obligation to pay a percentage of proceeds to a TPLF entity could influence that party's willingness and ability to resolve a litigation matter and will shape settlement negotiations;
    iv. Courts cannot effectively determine whether to impose sanctions or other costs absent the disclosure of TPLF arrangements;
    v. Disclosure of TPLF agreements *in camera*, and handling any issues they cause on an *ex parte* basis, puts the court in an untenable position;
    vi. Failure to disclose TPLF agreements to defendants deprives them of the right to know who is bringing the action against them, and denies them the ability to understand the dynamics of the case including the source and therefore the nature of the plaintiffs' claims;
    vii. The 24 district and six circuit local rules that require disclosure of TPLF are inconsistently written and poorly enforced; and
    viii. The few courts that are addressing TPLF are doing so in an *ad hoc* way, which is inconsistent with the FRCP's promise of clarity and uniformity.

c. Solution: Amend Rule 26 to require disclosure of third-party financing agreements to the court and parties.

d. Proposed language:

Rule 26

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. ***

<u>(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.</u>

V. Joinder

a. Background

The standard of commonality for consolidation into an MDL is intentionally not difficult to meet, and it therefore facilitates consolidation for pretrial management. This is one reason why MDLs have become such a popular tool for widespread personal-injury issues. But the leniency toward consolidation also means that cases are often consolidated that would not meet the "same transaction or occurrence" test required for joining individual cases. Indeed, as at least one appellate court has noted, in MDLs, cases are filed in which "unrelated claims of numerous plaintiffs [are] joined without specifying which products they allegedly [encountered] or the manufacturers of products that allegedly caused their injuries."[22] These are not cases that can or should be tried together in front of the same jury.

Rule 20 should make clear that cases requiring individualized proof of causation (such as two separate cases involving adverse effects of the same drug) should be tried separately, regardless of whether they properly had been consolidated for pretrial proceedings pursuant to an MDL process.

b. Specific problems:
    i. Rule 20 provides a loophole for pleading standards, effectively allowing the filing of large volumes of meritless complaints; and
    ii. The Rule 20 loophole is depriving the courts of important fee revenue

c. Solution: Amend Rule 20 to provide a common standard for determining whether plaintiffs in an MDL proceeding should be joined or if, instead, a separate complaint should be submitted for each one

d. Proposed language:

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

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(3) Plaintiffs Asserting Injury to Person or Property. Nothing in this subsection (a) shall permit persons to join as plaintiffs in an action that seeks recovery for injuries to a person or property unless each plaintiff's claims arise from injuries to the same person or property.

[22] *In re PPA*, 460 F.3d at 1225.

VI. Pleadings

a. Background

It is common practice in MDL cases for a "master complaint" to function as the pleading that guides the proceedings (particularly discovery), but numerous courts have refused to decide motions to dismiss consolidated or "master" complaints. In addition, plaintiffs' counsel in MDLs have often used master complaints as parking lots for claims, saving a space for a named individual without providing even the minimal information—such as product bought or harm encountered—required by Rule 8.

Exempting claims in an MDL from the FRCP pleading requirements further contributes to the acknowledged problem of large-scale filing of meritless claims.[23] These "generic, omnidirectional complaints" waste both defendants' and judicial resources when they become mere listing documents for large numbers of claims that are likely to be dismissed after some basic discovery is conducted.[24] Courts should not be required to monitor MDL plaintiffs to ensure they have met the bare minimum requirements of the FRCP.

Rule 7 should expressly define the documents used as pleadings in MDL cases, ensuring that they are subject to the same rules and motions as individual complaints, including the pleading requirements of Rules 8, 9, 11 and 12.

b. Specific problem: The use of master complaints leads to one-sided litigation because they are used like pleadings but not treated as pleadings under the FRCP, including when it comes to motions under Rules 8, 9, 11 or 12.

c. Solution: Amend Rule 7 to include master complaints and individual complaints in consolidated cases

d. Proposed language:

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

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(8) a master complaint in a consolidated proceeding;

(9) a master answer in a consolidated proceeding;

(10) an individual complaint, including, a short-form complaint referencing a master complaint, in a consolidated proceeding; and

(11) an individual answer, including a short-form answer responding to a short-form complaint, in a consolidated proceeding.

[23] *See generally In re Mentor Corp.*, 2016 U.S. Dist. LEXIS 121608 at *5.
[24] *See, e.g., In re Prempro Prods. Liab. Litig.,* MDL Docket No. 1507, Dkt. 6 (E.D. Ark. Jan. 14, 2009) (Wilson, J.) (slip op.).

I. Early Vetting: Rule 26 disclosures

Rule 26(a)(1)(F)

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(F) Multidistrict Litigation Disclosure. Within sixty (60) days of the filing of a civil action in, or the removal or transfer of any civil action to, a multidistrict proceeding under 28 U.S.C. § 1407 in which a plaintiff alleges personal injury, plaintiff in each such action shall make an initial disclosure which:

> (i) identifies with particularity any product, service, or exposure at issue in the action, and provides documents or electronically stored information evidencing same; and
>
> (ii) identifies with particularity the specific injury at issue in the action, including the date of the injury, and provides documents or electronically stored information evidencing same.

For civil actions filed in the transferee district prior to the establishment of a multidistrict proceeding under 28 U.S.C. § 1407, the initial disclosure shall be made within sixty (60) days of the Order of the Judicial Panel on Multidistrict Litigation establishing such proceeding.

II. Appellate Review and Bellwether Trials

Rule 23.3 Multidistrict Litigation Proceedings

(a) Prerequisites. This rule applies to actions transferred to or initially filed in any coordinated or consolidated pretrial proceeding conducted pursuant to 28 U.S.C. § 1407(b).

(1) Appeals. A court of appeals shall permit an appeal from an order granting or denying a motion under Rule 12(b)(2) or Rule 56 in the course of coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S.C. § 1407(b), provided that the outcome of such appeal may be dispositive of claims in [50] or more actions in the coordinated or consolidated pretrial proceedings. An appeal of an order granting or denying a motion under Rule 56 shall encompass any rulings on expert evidentiary challenges on which the Rule 56 motion was based.

(2) Trials. In any coordinated or consolidated pretrial proceedings conducted pursuant to 28 U.S. Code § 1407, the judge or judges to whom actions are assigned by the Judicial Panel on Multidistrict Litigation shall not conduct a trial in any action in those consolidated or coordinated proceedings unless all parties to that action consent.

III. Third-Party Litigation Funding Disclosure

Rule 26

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment~~.~~; and

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

IV. Joinder

Rule 20. Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) *Plaintiffs*. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) *Defendants*. Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) *Plaintiffs Asserting Injury to Person or Property*. Nothing in this subsection (a) shall permit persons to join as plaintiffs in an action that seeks recovery for injuries to a person or property unless each plaintiff's claims arise from injuries to the same person or property.

(4~~3~~) *Extent of Relief*. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

(b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.

V. Pleadings

Rule 7. Pleadings Allowed; Form of Motions and Other Papers

(a) Pleadings. Only these pleadings are allowed:

(1) a complaint;

(2) an answer to a complaint;

(3) an answer to a counterclaim designated as a counterclaim;

(4) an answer to a crossclaim;

(5) a third-party complaint;

(6) an answer to a third-party complaint; ~~and~~

(7) if the court orders one, a reply to an answer~~.~~;

(8) a master complaint in a consolidated proceeding;

(9) a master answer in a consolidated proceeding;

(10) an individual complaint, including, a short-form complaint referencing a master complaint, in a consolidated proceeding; and

(11) an individual answer, including a short-form answer responding to a short-form complaint, in a consolidated proceeding.

(b) Motions and Other Papers.

(1) *In General.* A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) *Form.* The rules governing captions and other matters of form in pleadings apply to motions and other papers.

18-CV-T

Memorandum

To: Judge Robert Dow and Members of the MDL Subcommittee

From: AAJ's MDL Working Group

Re: MDL Affirmative Suggestions

Date: May 25, 2018

AAJ previously submitted a memorandum to this subcommittee stating that plaintiff lawyers have concerns about amending the civil rules to improve the operation of MDLs. We suggested that it would be more practical to focus on a specific set of topics that could improve the operation of MDLs. After further discussion, we suggest two additional areas of exploration.

1. Inactive dockets

AAJ suggests the creation of an "inactive docket" within MDLs.

Currently, cases are sometimes filed prematurely and transferred to an MDL. The early filing by plaintiffs is frequently done to ensure that the client's rights are preserved in the face of a conservative analysis of a potentially applicable statute of limitations. This occurs not only in cases involving products with long latency periods such as asbestos, but also in cases where the plaintiffs need additional time to obtain medical records or other documentation to confirm the plaintiffs' use of the product, diagnosis, date of injury, etc.

An effective way to address these issues is the creation of an inactive docket. A fact sheet or other court-designated pleading would be filed into the record, and thereby toll any applicable statute of limitations. The case, however, would be inactive and would remain so until it was verified to properly fit within the MDL. The case, at some point, would either be placed on the active docket, transferred or remanded to another court as beyond the scope of the MDL transfer order, or voluntarily dismissed altogether, based on the relevant documentation.

AAJ believes that many issues facing MDLs would be solved by the implementation of an inactive docket. These early-filed claims not only slow down the litigation and result in delays for case resolution, but create a false impression that all claims in the MDL have certain weaknesses or are underdeveloped. They distract the transferee court from its primary focus and attention on the common discovery issues, generally relating to the defendant's conduct, which advance the litigation as a whole. An inactive docket would separate unverified or immature claims from cases which might be appropriate for bellwether trials. This would also allow the court, and the defendants, to focus on plaintiffs with confirmed impairments and injuries, permitting these claims to be resolved first. Making the determination that a case is not yet ripe

at the beginning of the MDL process, rather than at the end, would likely be much less expensive and more time efficient for all parties and the court. (Presumably, the defendants would have little interest in resolving claims on the inactive docket.) At the same time, an inactive docket ensures that the rights of those with viable claims are preserved.

An inactive docket would benefit the courts and parties involved in MDLs, while maintaining the rights of parties to bring their cases. AAJ believes that the creation of an inactive docket would promote the efficiency, cost, and strength of MDLs.

2. <u>Subpoena Power for Witness Testimony</u>

AAJ suggests expanding MDL courts' subpoena power to allow live witnesses to be brought to MDL trials. Some MDL courts have held that their subpoena power already allows for this, however this view varies, with many courts holding the opposite. The use of prior videotaped testimony is frequently stale by the time a case goes to the trial and is seldom specific enough to provide relevant and informed testimony to the jury.

Currently, litigants are bound by FRCP 45 in obtaining live testimony from witnesses at trial. FRCP 45 provides that "[a] subpoena may command a person to attend a trial . . . only "if the court is "within 100 miles of where the person resides, is employed, or regularly transacts business in person." FRCP 45(c)(1)(A). Instead, litigants are constrained to using the deposition of a witness who is outside of the court's subpoena power. FRCP 32(a)(4)(b). (Note that 28 U.S.C. § 1407(b) allows an MDL court to "exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions," thereby avoiding this same issue with relation to depositions.)

Plaintiffs have attempted to use FRCP 43(a) to persuade the court to require live testimony in MDLs. Rule 43(a) states that, although a witness' testimony must generally be taken in open court, however "[f]or good cause shown in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." At least two MDL courts in Louisiana have interpreted FRCP 43 and 45 to mean that they have the authority to order MDL witnesses to appear before the court via video transmission. *See In re Actos (Pioglitazone) Products Liability Litigation*, 2014 WL 107153 (W.D. La. 2014); *In re Xarelto (Rivaroxaban) Products Liability Litigation*, 2017 WL 2311719 (E.D. La. 2017). *See also In re Vioxx Products Liability Litigation*, 439 F. Supp. 2d 640 (E.D. La. 2006).

Permitting live witness testimony, versus previously-videotaped depositions, would provide many benefits in MDLs. Live testimony is vital toward a jury's assessment of a witness and his or her truthfulness and trustworthiness, and parties that are stuck with only live testimony from witnesses who are within the court's subpoena power are severely disadvantaged in relation to a party that may not be constrained in this way. Moreover, expanding the court's power would help to avoid motions to quash subpoenas in the courts of the state where the compliance is required. *See* FRCP 45(d)(3). Finally, in product liability MDLs, a great deal of emphasis is placed of late on "Test Cases" or "Bellwether Trials." The goal of this exercise, of course, is to produce a sufficient number of representative verdicts and settlements to enable the parties and

the court to, *inter alia*, determine the nature and strength of the claims. *See* Manual for Complex Litigation, Fourth, § 22.315. It makes little sense to place so much emphasis on what could be a representative verdict, but then ask the jury to consider the most important evidence by videotape testimony, merely because of a rule that currently limits the MDL court's ability

To create uniformity among courts and to help ensure that plaintiffs and defendants in MDLs are on more of an even playing field, AAJ suggests a rule or amendment that expands the courts' subpoena power in MDLs. Specifically, MDL courts should be authorized to compel live testimony, including by live video transmission.

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COMMENT
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
MDL/TPLF SUBCOMMITTEE

TEN OBSERVATIONS ABOUT THE MDL/TPLF SUBCOMMITTEE'S EXAMINATION INTO THE FUNCTION OF THE FEDERAL RULES OF CIVIL PROCEDURE IN CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS

April 6, 2018

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") and its MDL/TPLF Subcommittee ("Subcommittee") regarding the examination of how the Federal Rules of Civil Procedure ("FRCP") function in cases that are consolidated pursuant to 28 U.S.C. § 1407 for "coordinated or consolidated pretrial proceedings" ("MDL cases").

INTRODUCTION

The examination of how the FRCP are applied—or not—in MDL cases is one of the Committee's most important undertakings since 1938. MDL cases constitute 45 percent of the federal civil docket[2] and the FRCP are not providing the same utility in MDLs as in other cases, despite the responsibility to facilitate the effective administration of justice "in all civil actions and proceedings."[3] Every thoughtful observer agrees there are problems. As Judge Sarah Vance told the Duke Conference in 2015, "[t]he MDL process is not perfect, and there is always room for improvement."[4] Fortunately, the Committee need not shoulder an overwhelming burden to

[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 29 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] Excluding prisoner and social security cases. Duke Law Center for Judicial Studies, *MDL Standards and Best Practices*, xi (2014).

[3] FED. R. CIV. P. 1.

[4] Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, [hereinafter, Agenda Materials] Judge Sarah Vance, Speech at the Duke Law Conference (Oct. 8, 2015), at 204, available at http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

make meaningful improvements to the FRCP. Rather, the Committee need only adapt well-established FRCP principles to a few areas of MDL practice, including discovery disclosures, interlocutory appeals and trials. As the Committee meets to discuss the Subcommittee's initial thoughts on the task before it, we offer the following ten observations about the Subcommittee's important work.

OBSERVATION NO. 1

The scope of the Subcommittee's work should be narrowly tailored to ensuring the integrity and utility of the FRCP.

The Subcommittee's effort should not be driven by the question, "what's wrong with MDLs?" or burdened with a mission of wholesale reinvention including matters outside the Committee's purview. Rather, the Subcommittee's examination should be anchored by the Committee's responsibility to the FRCP, and therefore focused on this question: "How can we adapt the procedures and principles in the FRCP to the practical realities of MDL practice, so the FRCP can provide similar clarity and protections in MDL cases as it does for the other 55 percent of federal civil cases?" This narrow formulation comports with the Committee's ongoing duty to ensure that the FRCP facilitate the effective administration of justice "in all civil actions and proceedings."[5]

OBSERVATION NO. 2

Adapting the FRCP to MDL cases would not violate the principle of "trans-substantivity."

Since 1938, the Committee has honored the foundational principle of "trans-substantive" rules by rejecting periodic calls to create special procedures for cases relating to certain subject matters. Now the Committee is hearing an extreme version of that argument: There's a certain class of cases (MDL cases) to which *no* rules can apply.[6] But rule amendments affecting MDL cases would not offend the principle of trans-substantivity because they would apply regardless of the subject matter.

Subject matter is not what distinguishes MDLs from the other 55 percent of cases on the federal civil docket. Numerosity of parties is. The large number of parties poses real, pragmatic challenges to the administration of justice. For example, the FRCP's discovery rules that contemplate requests, motions and protective orders may be unworkable in a proceeding with 10,000 plaintiffs—and perhaps full discovery isn't even necessary in such cases. But the failure of current discovery rules does not mean there should be *no* rules or that new practices should be developed in each case. To the contrary, the FRCP's failures need to be remedied so participants in MDL cases enjoy the same clarity, principles and protections that the FRCP provide in all other cases. In the discovery example, the existing mechanism of Rule 26 could be adapted to the practical needs of MDL cases.

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[5] FED. R. CIV. P. 1.

[6] Memorandum from the AAJ MDL Working Group to Judge Robert Dow and Members of the MDL Subcommittee, *Preliminary Provisional MDL Suggestions* (Feb. 22, 2018) ("MDLs are so case-specific that 'one size fits all' rules do not make sense"), Agenda Materials at 205.

OBSERVATION NO. 3

Disclosure and discovery rules are needed in MDL cases because devices such as "plaintiff fact sheets" and *Lone Pine* orders are inconsistently applied and are inherently insufficient substitutes for the FRCP.

Procedures for disclosure and discovery should have numbers, not names. Clear rules requiring disclosure of essential information and/or enabling streamlined discovery into plaintiffs' claims would remedy the FRCP's most vivid failure: the well-known fact that many MDL cases are replete with meritless claims (30 to 40 percent of claims in some MDL cases[7]). The lack of information about plaintiffs' claims undermines the ability of MDL cases to achieve the statutory goals of "the just and efficient conduct"[8] of "coordinated or consolidated pretrial proceedings,"[9] particularly when it comes to the mandate that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[10] What's needed is an FRCP amendment that supersedes plaintiff fact sheets and *Lone Pine* orders by outlining basic disclosure requirements that apply early in the proceedings, along with procedures for enforcing them, that do not rely upon individual discovery requests, motions and protective orders where such procedures are unworkable due to the numerosity of parties.

OBSERVATION NO. 4

A mechanism for identifying and removing meritless claims from MDL dockets is critical even when there is general awareness of their existence.

Ignoring meritless claims on the courts' docket is not only unfair to the defendants facing unsupportable litigation but also is incompatible with the fundamental integrity of the judicial system. The idea that meritless claims don't matter is used to justify one-sided discovery in a way that is incompatible with the FRCP. Protecting the judicial system from non-meritorious claims serves several purposes, and "[c]hief among these is avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement."[11]

Additionally, it is common if not universal for everyone involved in an MDL case to refer to the number of plaintiffs ostensibly involved—a practice that almost certainly has a harmful "anchoring" effect. Anchoring is a powerful cognitive bias that has been proven to exert strong effects on people's judgment even when they know the number is wrong and understand the psychological phenomenon of anchoring.[12] Referring to a 5,000-plaintiff case causes people (including judges and lawyers) to make judgments about the merits of the claims even if they

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[7] Malini Moorthy, *Gumming Up the Works: Multi-Plaintiff Mass Torts*, U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, *The Litigation Machine*, *available at* http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase.

[8] 28 U.S.C. § 1407.

[9] *Id*.

[10] *Id.*

[11] *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (The Hon. J. Skelly Wright).

[12] David Kahneman, *Thinking, Fast and Slow*, (2011).

know the number 5,000 has no statistically relevant relationship to the true number of legitimate claims. It also affects customer decisions regarding the product, media interest, public reaction, advertising, financial analysis about companies and very likely the interest of third-party litigation funding (TPLF) firms in supporting continued litigation.

OBSERVATION NO. 5

Bellwether trials cannot provide information useful to the resolution of an MDL in the absence of sufficient discovery to establish that the particular trial is a reasonable representation of other plaintiffs' claims.

Bellwether trials, when selected carefully and handled appropriately, can provide courts and parties important information about the claims at issue and the overall inventory of cases. The main reason that bellwethers often fail to be useful, however, is that the selection of cases is not based upon good information or genuine consent of the parties. The utility of a bellwether is contingent upon the plaintiff's representativeness to the other cases, or at least a definable subset of them. So there's no way to know if a bellwether will provide useful information without understanding all the other plaintiffs' cases. The only way to ensure meaningful bellwethers is to require sufficient disclosures about all individual plaintiffs' cases and ensure genuine consent to each individual trial.

OBSERVATION NO. 6

Providing interlocutory review of a few key decisions in MDL cases is more important than avoiding the short-term delays it might cause.

Appellate review is fundamental to the American judicial system because it ensures three essential judicial goals: "(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants' sense that their dispute has been fully and fairly heard."[13] These goals are just as critical in MDL proceedings as in other cases—perhaps even more so given that one ruling by one judge can have great significance to the large the number of people whose rights are at stake, and also because appellate review can drive resolution. An FRCP amendment listing a few discrete issues appropriate for interlocutory review including pre-emption and *Daubert* motions would have a profound effect on the development of case law without causing a significant increase in workload at the Circuit Courts (the Rule 23(f) experience could be instructive here because the fears of a crushing burden of appeals proved unfounded). Appellate review could take time, but that should not be the reason to deny it. If timing becomes a stumbling block to drafting a potential FRCP amendment, then perhaps the Committee should explore the possibility of expedited review with the Advisory Committee on Appellate Rules.

[13] Andrew Pollis, *The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1644, 1646 (2011) (citing Professor Cassandra Burke Robertson of Case Western Reserve University School of Law, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006)).

OBSERVATION NO. 7

The "repeat player" problem in MDL cases is related to the FRCP's shortcomings.

The well-described fact that the same handful of lawyers is involved in many MDL proceedings[14] is rooted in the FRCP's failure to prescribe transparent and generally accessible procedures. The "repeat player" problem—which has led to a call for greater inclusion in MDL cases by women, minorities and other new entrants—exists because only a small, exclusive group of people is allowed to learn how the game is played. As one scholar puts it: "Because hard-and-fast formal rules are scarce when multidistrict litigation is not certified as a class action, transferee judges tend to seek guidance from predecessors, peers, and lawyers who have litigated other multidistrict proceedings."[15] The FRCP can help solve the repeat-player problem by providing clear and accessible procedures that judges and lawyers can look up, read and learn for themselves.

OBSERVATION NO. 8

The Subcommittee should protect against undue deference to repeat players when deciding whether FRCP amendments could improve the administration of justice in MDL cases.

The Subcommittee should, of course, consult with the small group of judges, practitioners and academics with inside knowledge about today's variety of MDL practices. But the Subcommittee's investigation would also benefit from "jootsing," an acronym for "jumping out of the system,"[16] which is a powerful problem-solving technique. Jootsing is useful when the people who are most knowledgeable about a particular matter realize there's a problem but cannot see the solution. Successful jootsing often reveals a "shared false assumption"[17] that everyone within the system agrees with so strongly they consider it obvious. Perhaps, with respect to MDLs, the shared, unchallenged assumption among repeat players is that clear rules governing discovery, bellwethers and appellate review would harm rather than improve MDL case management. Perhaps one of the reasons that "the difficulty and work involved in managing mass tort MDLs cannot be overstated"[18] is that judges and lawyers are burdened with re-inventing discovery procedures anew for each case rather than benefitted by looking to the FRCP and appellate decisions for guidance, as occurs in the other 55 percent of federal civil cases.

[14] Elizabeth Chamblee Burch, *Repeat Players in Multidistrict Litigation*, 102 Cornell L. Rev. 1445 (2017) (with Margaret S. Williams).
[15] *Id*. at 1447.
[16] Daniel C. Dennett, *Intuition Pumps and Other Tools for Thinking* 45 (2013).
[17] *Id*. at 46.
[18] Judge Sarah Vance, Speech at the Duke Law Conference, Agenda Materials at 204.

OBSERVATION NO. 9

The landscape of local rules requiring disclosure of third-party litigation funding (TPLF) presents a compelling case for the Committee to undertake a rulemaking effort.

The fact that "[s]ix U.S. Courts of Appeals have local rules which require identifying litigation funders," [19] and "24—or roughly 25% of all U.S. District Courts—require disclosure of the identity of litigation funders in a civil case"[20] presents a compelling reason for the Committee to undertake a rulemaking effort on this topic. Even though those rules were not motivated by TPLF per se, they nevertheless demonstrate a widespread consensus that non-parties who have a financial interest in the outcome of litigation should be disclosed. Moreover, the landscape of rules reveals many of the red flags that the Committee looks for to determine whether a rulemaking effort is needed: numerous jurisdictions addressing the topic;[21] a lack of uniformity in approach among federal circuits and districts;[22] a lack of clarity about compliance and enforcement;[23] and disagreement about the scope and meaning of the rules.[24] All but one of the District Court local rules are related to FRCP 7.1.[25]

The arguments presented by opponents of TPLF disclosure are incongruous with those facts:

- "No Federal Court Requires Blanket Disclosure of Litigation Finance."[26]
- "[I]t has become increasingly apparent that a rule requiring automatic disclosure of litigation finance in every civil action is not appropriate."[27]
- "The Chamber's radical proposal to invade parties' financial privacy and their attorneys' work product is inconsistent with the underlying purpose of the federal rules…."[28]
- "[O]ne district court's experimentation with disclosure…does not justify a rulemaking either. On the other hand, it incentivizes a wait-and-see approach as courts (and state ethics commissions) experiment with different approaches."[29]

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[19] Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, Cathie Struve, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding* (Feb. 7, 2018), Agenda Materials at 209.
[20] *Id*. at 210.
[21] *Id*. at 209.
[22] *Id*. at 210-14.
[23] *Id*. at 213.
[24] *Id*.
[25] *Id*. at 212.
[26] Letter from Christopher P. Bogart, Chief Executive Officer, Burford Capital LLC, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Sept. 17, 2017) [hereinafter, Burford letter], at 6, *available at* http://www.uscourts.gov/rules-policies/archives/suggestions/burford-capital-llc-17-cv-xxxxx.
[27] Letter from Allison K. Chock, Chief Investment Officer, Bentham IMF, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Sept. 6, 2017) [hereinafter, Bentham IMF letter], at 1, *available at* http://www.uscourts.gov/sites/default/files/17-cv-yyyyy-suggestion_bentham_imf_0.pdf.
[28] *Id*.

- "The Proposed Rule Is Not Warranted as an Extension of Rule 7.1."[30]

- An amendment to Rule 7.1 "to require parties to disclose only the *name* of any litigation funding company paying the fees or costs in the case" would be "inappropriate because it would expand that rule beyond its carefully crafted scope."[31] (emphasis in original)

- "[A]ny concern about judicial conflict of interest is so attenuated that it cannot support a broad disclosure rule of the kind suggested by the Chamber."[32]

- "Courts would see a multiplication of motions to compel *further* disclosures regarding the funder, the source of its funds, the identities and backgrounds of its decision makers, the nature of its case-selection and due-diligence processes, its communications with its counsel and subject-matter experts, and its communications with the plaintiff, the plaintiff's counsel, and the plaintiff's experts."[33] (emphasis in original)

- "The Chamber's proposal is an attack on the sound discretion of district judges and magistrate judges, as well as on financial privacy, client confidentiality, the attorney work-product protection, the goals of the federal rules, and Rule 26's renewed emphasis on proportionality."[34]

In light of the inconsistencies and uncertainties surrounding the 30 federal local rules that require disclosure of litigation funders, these arguments fail to provide any reason for the Committee to conclude, once again, that it would be "premature" to undertake drafting a clear, uniform rule.

OBSERVATION NO. 10

The Committee should proceed with a rulemaking effort concerning MDL cases even if it finds that some MDL cases appear to be working or that the worst problems are concentrated in mass tort cases.

Even if the Committee were to conclude that some MDL cases function adequately in the absence of FRCP guidance with unwritten, *ad hoc* practices, the Committee nevertheless should undertake the effort to draft FRCP amendments that provide more clarity, uniformity and predictability for courts and parties alike. Perhaps not every MDL case will utilize every new rule provision—just as cases in the other 55 percent of proceedings do not always use every facet of the FRCP. For example, an amendment to Rule 7 acknowledging that master complaints are pleadings would not apply to an MDL in which no master complaint is filed, and a rule allowing interlocutory appeal of rulings on pre-emption motions would not apply in cases without pre-emption motions. If a particular amendment wouldn't be needed in all cases, it may nevertheless

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[29] Letter from Kathleen L Nastri, President, American Association of Justice, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure, (Jan. 17, 2018), Agenda Materials at 233.
[30] Burford letter at 12.
[31] Bentham IMF letter at 12.
[32] Burford letter at 12.
[33] Bentham IMF letter at 6.
[34] *Id*. at 16.

serve a very important function in others, and therefore it would be an appropriate addition to the FRCP.

CONCLUSION

The FRCP can and should provide principled procedures and protections in MDL cases just as they do in the other 55 percent of federal civil cases. Leaving this task undone in the belief that the "different needs" of MDL cases means that "no rules should apply" would be a grave error. The false notion that MDLs are so special or so complex that the Committee cannot or should not undertake an effort to provide improvements risks diverting the Committee from its responsibility. Only the Committee can ensure the FRCP achieve the goal of effective administration of justice "in all civil actions and proceedings."[35] And only the Committee can undertake an examination of the FRCP in the open, thoughtful, credible manner for which it has a well-deserved reputation. Accordingly, the Committee and the Subcommittee should push forward to prepare for the task of drafting a few amendments that adapt well-established FRCP principles to the realities of MDL cases, particularly in the areas of discovery disclosures, interlocutory appeals and trials.

[35] FED. R. CIV. P. 1.

TAB 7

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TAB 7A

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7. Social Security Review Subcommittee Report

The Social Security Review Subcommittee has continued to refine a short set of possible rules to govern district-court review of social security disability benefit decisions under 42 U.S.C. § 405(g). The current draft is set out below. The Subcommittee has decided that the new provisions would best be brought into the main body of Civil Rules and consolidated as a single Rule 74, filling the space opened by abrogating former Rule 74 and leaving designations as Rule 75 and 76 available when that may serve some future need. But this draft retains the three-rule format adopted for earlier versions cast as a set of new supplemental rules. The designations as Rules 74, 75, and 76 are temporary. The transition to Rule 74 should be straight-forward, but is better managed when more time is available.

Presenting this draft does not imply a recommendation that the Committee should eventually begin work to frame rules that might be proposed for publication and adoption. There are good reasons to hope that a nationally uniform set of simple rules would improve practice in many districts. The Administrative Conference of the United States, vigorously supported by the Social Security Administration, has championed adoption of new rules. They provide a convincing picture of widely divergent local practices among the district courts, and believe that some of these practices are inefficient or worse. These positions are supported by a careful academic study and experience with the 17,000 or more review actions that annually find their way to district-court dockets. But there also are good reasons to hesitate about adopting Enabling Act rules for a specific substantive area, even one that accounts for a substantial share of all civil actions. One concern is that any departure from the transsubstantive character of the Civil Rules will invite pressures for more departures, generating proliferation and complexity in a body of rules already long and often complex. A more important concern is that crafting good substance-specific rules requires deep familiarity with both the substantive law and the peculiarities that arise from effective enforcement. The Civil Rules are deliberately framed in open-ended terms that rely heavily on the exercise of wise discretion in case management. Specific answers for substance-specific issues may well prove ill-advised, or at least too inflexible to adapt to the circumstances of individual cases and individual courts.

Brief illustrations of the risks of crafting substance-specific rules are provided below in noting some of the provisions included in a set of draft rules prepared by the Social Security Administration but not recommended by the Subcommittee.

The Subcommittee's next step will be to seek one more round of review by the Social Security Administration and other groups that have provided valuable assistance in reviewing earlier drafts. That review should bring the process to a point that will support a Subcommittee recommendation whether to proceed further with this project.

Several general issues may be noted before turning to the draft rules themselves.

The scope of any new rules is the first question. It is resolved in draft Rule 74 by limiting the rules to the core actions for § 405(g) review. These actions involve one claimant, the

Commissioner of Social Security as the only defendant, and arguments confined to asserting that the Commissioner's final decision is not supported by substantial evidence on the administrative record. Such core actions apparently make up the vast – indeed overwhelming – majority of § 405(g) review actions. If good rules can be crafted for them, much will be accomplished. Undue complications are likely to beset attempts to extend new rules to the few actions that are complicated by adding more than one plaintiff (even as a class action), one or more defendants in addition to the Commissioner, or claims that go beyond the substantial-evidence argument.

Footnotes to the draft rules identify several specific questions that remain open. Careful study by Committee members will provide important benefits as the Subcommittee continues its work.

Perhaps the most important of the footnoted issues are interrelated, going to the breadth of the complaint and the corresponding duty or opportunity to answer. It would be possible to limit the complaint to a bare statement that the decision is not supported by substantial evidence on the administrative record, leaving the details to the motion for relief and supporting brief. But there may be advantages in allowing a claimant to detail the deficiencies in the complaint, particularly in assisting the Commissioner to make a prompt decision whether to seek a voluntary remand, a very common practice. This draft leaves this opportunity open for the claimant. The provision for the answer is a compromise. The Commissioner has urged a rule that recognizes the administrative record as the answer without any additional pleading. There has been a fear that failure of overworked SSA lawyers to answer each allegation in the complaint could result in implied admissions. But the Subcommittee has been concerned that the claimant should have notice of any affirmative defenses the Commissioner may plead. The result is to require pleading of affirmative defenses but to give the Commissioner freedom to choose whether to respond to specific allegations in the complaint. As described in footnote 11 to draft Rule 75(c)(1)(A), this compromise deserves further consideration.

Three sets of issues omitted from the draft rules may be noted, two of them briefly.

The rules proposed by the SSA draft would impose specific page limits on briefs. The Subcommittee does not believe that a uniform national rule would fit the circumstances and practices in all districts, nor is it anxious to intrude such provisions into the Civil Rules. The parallels to page limits in the Appellate Rules do not carry over.

SSA also is anxious to eliminate practices that it describes as "joint statements of fact, joint briefs, or simultaneous cross-briefing." Many of the practices that may fit into these general descriptions are likely to be inconsistent with the specific briefing rules in the draft. More pointed outlawry would be an uncertain enterprise.

A third set of omitted issues deserves discussion in somewhat more detail. 42 U.S.C. § 406(b) provides for a court order that sets an award of attorney fees for representation before the court. The award is capped at 25% of past-due benefits. In setting the amount of the award the court may consider the fee agreement, any award by the Commissioner for representation in the

administrative proceedings, and any award by the court under the Equal Access to Justice Act. The procedure established for awarding fees by Civil Rule 54(d)(2) may not be adequate for § 406(b) awards because the award often is made following remand of the action for further administrative proceedings that determine the actual amount of past-due benefits. The fee award may be the only occasion for returning to the court after completion of the administrative proceedings on remand. SSA has prepared a draft rule that undertakes to coordinate the court's proceedings with the completed administrative action. The rule is, to say it gently, complex. It illustrates vividly the potential challenges in attempting to craft uniform national rules for a specific substantive regime. The SSA draft is attached below to demonstrate the detailed issues that must be understood and might need to be addressed in a workable rule. The Subcommittee believes that it is better to pass by this question, in part because it is unclear how many cases actually present these questions.

Notes on Subcommittee meetings by conference calls are attached after the draft rules texts.

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RULES 74, 75, 76[1]

Rule 74. Scope

(a) SECTION 405 (g). [This rule applies] [Rules 74,75, and 76 apply] to an action in which the only claim is made by an individual or personal representative for review [on the administrative record][2] of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure also apply to a proceeding under [this rule] [Rules 74, 75, and 76], except to the extent that they are inconsistent with [this rule] [these Rules].

COMMITTEE NOTE

This rule establishes a simplified procedure that recognizes the essentially appellate character of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g). *See*[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as the sole defendant and seek only review on the administrative record as provided by § 405(g). This rule governs only these actions, and is supplemented by the general provisions of the Civil Rules that are not inconsistent with this rule.

Some [– apparently very few –] actions, however, may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such actions fall outside this rule and are governed by the other Civil Rules alone. [But pleading the § 405(g) review parts of such actions may[3] properly rely on the model provided by Rule [2].]

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[1] The three-rule format adopted in earlier drafts is carried forward for reasons of convenience. If we move forward with proposed rules, the plan is to consolidate all provisions into Rule 74 ― Rule 1 as 74(a), Rule 2 as 74(b), and Rule 3 as 74(c).

[2] "on the administrative record" is retained, at least provisionally, to emphasize that these rules do not apply when the plaintiff makes claims that go outside the administrative record.

[3] If we carry forward the requirements that the § 405(g) complaint include name, address, and last four ssn digits, this might be "must." SSA may need those details as much in the more complex cases. But that may be rulemaking by Committee Note.

Rule 75. Initiating the Action; Complaint; Service; Answer

(a) THE COMPLAINT. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf – or on whose wage record – the plaintiff brings the action;[4]

(2) Identify the titles of the Social Security Act under which the claims are brought;[5]

(3) Name the Commissioner of Social Security as the defendant;

(4) State [generally {and without reference to the record}][6] that the final administrative decision is not supported by substantial evidence or [must be reversed for errors of law][7]; and

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[4] This provision is carried forward for the moment, despite serious questions about both the address and last-four-digits elements. SSA vigorously maintains that this information is essential to ensure that it can identify which administrative proceeding is involved. One question that might be asked is why SSA cannot establish a numbered docketing system that will provide real advantages throughout the administrative process as well as in the relatively small fraction of cases that make their way to judicial review.

[5] Some uncertainty has been expressed about this rule. It could be useful if the basis for the plaintiff's claims has not been made clear in the administrative proceedings. That may be likely when a claimant proceeds pro se before the agency. Clearer identification of the underlying statutory provisions may be advanced if counsel is retained on review. But it may be wondered how often there is any uncertainty, and whether the ready availability of amendments diminishes the value of an initial identification in the complaint. Compare the first paragraph of the Rule 74 Committee Note, which states that these rules apply to an action brought under § 405(g), including those that rest on other statutes that provide for review under § 405(g).

Separately, we should learn whether "titles" is a term of art so well understood that courts and claimants will not be confused.

A different purpose might be to establish the grounds of subject-matter jurisdiction. That could be accomplished by "State that the action is brought under 42 U.S.C. § 405(g)." That requirement might be implicit in the first part of Rule 75(a): "The complaint in an action for review under § 405(g) must * * *." But it seems more orderly to provide an explicit reminder of Rule 8(a)(1).

[6] With or without the perhaps awkward words enclosed in brackets, this simple pleading element opens the way to questions that involve both complaint and answer. For the complaint, the questions are whether the plaintiff should be required to at least state the substantial-evidence argument, whether anything more should be required, and whether anything more should be permitted although not required. For the answer, the questions are whether SSA should be allowed to file the administrative record as the sole answer (the provision it prefers), and just what additional answering requirements might be imposed.

(5) State the relief requested.[8]

(b) SERVING THE COMPLAINT. The court must[, through its Case Management and Electronic Case Files system,] notify the Commissioner [of Social Security] of the commencement of the action by transmitting a Notice of Electronic Filing [with a link to the complaint] [to the Commissioner,][9]to the [appropriate] regional office of the Social Security Administration, and to the United States Attorney for the district. The plaintiff need not serve a summons and complaint under Rule 4.[10]

Denial of the "no substantial-evidence" argument? Response to anything included in the complaint beyond the no substantial-evidence argument? Identification of affirmative defenses? Challenges based on finality, timeliness, and exhaustion of administrative remedies?

The analogy to the notice-of-appeal procedure for appeals from a district court to a court of appeals pushes toward limiting the complaint to a no substantial-evidence statement, and treating the administrative record as the answer. But a plaintiff may wish to plead more. More detail may tell a story that encourages the Commissioner to seek a voluntary remand, a common event. It might encourage early discussions that lead to resolution without briefing. And it may focus legal issues in helpful ways. The current draft continues to allow a plaintiff to plead more.

Pleading more than the minimum no substantial-evidence theory has consequences for the answer. The resolution discussed at notes 11-12 below is to relieve the Commissioner of the obligation to respond otherwise imposed by Rule 8(b), but to require pleading of any affirmative defenses under Rule 8(c).

[7] Adding reference to errors of law may be unnecessary. A substantial-evidence argument can be framed as a lack of substantial evidence when measured by the right law. On the other hand, there may be some advantage in encouraging plaintiffs to identify their arguments of law, even if they were made in the administrative proceedings. The advantage is increased if, as compared to appeals from district courts, plaintiffs — and particularly plaintiffs who proceeded pro se in the SSA proceedings — are allowed greater freedom to raise legal arguments for the first time on review. The question is what should be in the complaint, but there may be some risk that omission of any reference to law in rule text might lead some claimants to overlook arguments of law in their briefs.

[8] This provision provides an analog to Rule 8(a)(3).

[9] The Social Security Administration will provide important information on the question whether sending notice to the Commissioner is useful. It may be pure waste if notice to the regional office is the event that actually engages the Administration in the litigation.

[10] This version does not undertake to identify the electronic addresses. There should be no difficulty – the court knows the addresses. And any of the recipients is free to adopt a new address so long as it notifies the court.

(c) THE ANSWER; MOTION; VOLUNTARY REMAND; TIME.

(1)(A) {*Alternative 1*} The answer must include a certified copy of the administrative record and any affirmative defenses under Rule 8(c). Rule 8(b) does not apply.[11] {*Alternative 2*} A certified copy of the administrative record and a statement of affirmative defenses [under Rule 8(c)] suffices as an answer.[12]

(B) The answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 75(b) unless a later time is provided by Rule 75(c)(2)(C).

(2)(A) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 75(b).

(B) A motion to voluntarily remand the case to the Commissioner may be made at any time.

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[11] This approach deserves further attention for reasons explored at the end of this footnote. It might be supplemented by restoring a sentence deleted after discussion of earlier drafts: "Rule 8(b) does not apply – the answer may, but need not respond to the allegations of the complaint."

As to Rule 8(b), the main concern is to avoid the risk that a failure by overworked SSA attorneys to respond to every allegation permitted by Rule 75(a)(4) will lead to admission by forfeiture under Rule 8(b)(6). This compromise preserves the potential values of allowing the plaintiff to plead more than the bare minimum no substantial-evidence theory, while avoiding the risks.

As to affirmative defenses, the concern is that notice to the plaintiff is likely to be even more important than in many other kinds of cases because affirmative defenses are rare. Res judicata is one example. Failure to exhaust administrative remedies likely is an affirmative defense, not a matter of jurisdiction. Lack of finality is jurisdictional. Timeliness is mandatory; if it is to be used as an example, we should find out whether it is also jurisdictional because specified in § 405(g).

The result is a compromise that, apart from affirmative defenses, allows the Commissioner to treat the administrative record as the sole answer. As with many compromises, there is a risk that the result is worse than either of the contending alternatives. It is not unusual for a rule to allow a party to choose whether to seize a procedural opportunity, although consequences often follow a choice to forgo the opportunity. A defendant's choice to forgo an answer and default is a familiar illustration of a choice with consequences. Rule 76(c) of this draft illustrates a choice – whether to file a reply brief – with no formal consequence. But it is unusual to allow a defendant to decide not to respond to properly pleaded allegations in the complaint. One obvious alternative would be to provide that the Commissioner may answer only by filing the administrative record and pleading any affirmative defenses. Another, still more obvious, would be to carry forward the general Rule 8(b) obligation to respond to every allegation in the complaint. It is fair to ask whether the Commissioner should be excused from this ordinary requirement by the burdens that result from forcing SSA lawyers and Assistant United States Attorneys to deal with an annual onslaught of 17,000 to 18,000 disability review cases.

[12] This second version picks up the "suffices" approach. It would be supplemented by a Committee Note statement that Rule 8(b) is ousted.

(C) Unless the court sets a different time or a later time is provided by Rule 75(c)(2)(A), serving a motion under Rule 75(c)(2)(A) or (B) alters the time to answer as provided by Rule 12(a)(4).[13]

COMMITTEE NOTE

Section 405(g) provides for review of a final decision "by a civil action." Rule 3 directs that a civil action is commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. The elements specified in Supplemental Rule 75(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under § 405(g).[14] A bare assertion that the Commissioner's decision is not supported by substantial evidence suffices to state a claim – the facts are developed in the administrative record and, along with the law, are known to the Commissioner. Stating the relief requested provides the proper focus.

Rule 75(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices. The plaintiff need not serve a summons and complaint under Rule 4.

Rule 75(c)(1)(A) builds from this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made." The record suffices as an answer unless the Commissioner wishes to plead any affirmative defenses.[15] Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer is set at 60 days after notice of the action is given under Rule 75(b) unless a later time is provided under Rule 75(c)(2)(C). The time to file a motion under Rule 12 is set at 60 days after notice of the action is given under Rule 75(b). If a timely motion is made under Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different time.

The Commissioner at times seeks a voluntary remand for further administrative

[13] Rule 12(a)(4) calls for a responsive pleading within 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. Rule 75(c)(1)(B) means that there will be at least 60 days from notice of the action to answer even if the Rule 12 motion is made and the court rules in 46 days or less. It does not seem appropriate to subject social security plaintiffs to delays greater than plaintiffs in other actions.

[14] If we retain the direction to identify the titles of the Social Security Act under which the claims are brought, that provision would be added to the Note.

[15] It seems better to avoid any suggestions as to what might be affirmative defenses. Compare note 11 above.

proceedings before the action is framed for resolution by the court on the administrative record. Rule 75(c)(2)(B) recognizes that the Commissioner may move to remand before or after filing and serving the record.

Rule 76 Plaintiff's Motion for Relief; Briefs

(a) PLAINTIFF'S MOTION FOR RELIEF AND BRIEF. The plaintiff must serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief within 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 75(c)(2)(A) or (B), whichever is later. The brief must support arguments of fact by citations to the [parts of the] record [on which the plaintiff relies].[16]

(b) DEFENDANT'S [RESPONSE] BRIEF. The defendant must serve a response brief on the plaintiff within 30 days after service of the plaintiff's motion and brief. The brief must support arguments of fact by citations to the [parts of the] record [on which the defendant relies].

(c) REPLY BRIEF[S]. The plaintiff may, within 14 days of service of the defendant's brief, serve a reply brief on the defendant.

COMMITTEE NOTE

Rule 76 addresses the procedure for bringing on for decision a § 405(g) review action that has not been remanded to the Commissioner before review on the record. The plaintiff serves a motion for the relief requested in the complaint or any amended complaint. The motion need not be lengthy; it is supported by a brief that is similar to a brief supporting a motion for summary judgment, citing to the parts of the administrative record that support the argument that the final decision is not supported by substantial evidence. The Commissioner responds in like form. A reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

[16] The phrases in brackets are lifted from Appellate Rule 28(a)(8)(A). They do not seem necessary, but do serve the cause of parallelism between rule sets.

NOTES
SOCIAL SECURITY REVIEW SUBCOMMITTEE
APRIL 24, 2018 CONFERENCE CALL

The Social Security Review Subcommittee met by conference call on April 24, 2018. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; and Subcommittee members Laura A. Briggs, Esq., Professor A. Benjamin Spencer, and Ariana J. Tadler, Esq. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Joshua Gardner, Esq., represented the Department of Justice, and Rebecca A. Womeldorf represented the Administrative Office. Several representatives of the Social Security Administration participated, including Asheesh Agarwal (General Counsel), Jeff Blair, David V. Foster, Dennis Foley, John Lee, Sandra Krider, Robert Bowman, David Mervis, Dan Callahan, Naomi Mendelsohn, and Susan Reiss.

Judge Lioi opened the call by remarking that the Subcommittee has been authorized to gather reactions to the "bare bones" draft of supplemental rules for reviewing denials of social security disability benefits. The purpose of this call is to hear the first reactions of the Social Security Administration to the bare bones draft.

Representatives of the Social Security Administration began by thanking the Subcommittee for setting up this call, and for engaging in this project. The speedy production of a discussion draft provides a welcome occasion for deeper examination of the shape and content of an eventual recommendation.

The SSA General Counsel said that their purpose today is to frame the issues from the Administration standpoint, to suggest added rules provisions. It is generally recognized that there is a need for special rules. The Administrative Conference recommendation rests on recognition that review on an administrative record, although lodged in the district court, is essentially an appellate process. The first need is to develop uniform rules that recognize the appellate character of review. Now 62 districts have their own special rules. Some others recognize the process as traditional appellate review. Some circuits have ruled that Rule 56 summary-judgment procedure is not appropriate in these cases, but some courts in other circuits continue to invoke Rule 56.

Uniform rules will benefit all participants. All, including the courts, will gain from increased efficiency. "The disability workload is enormous." There are 1,200,000 claimants waiting for a hearing before an administrative law judge. Starting after exhaustion of the first-line process in state disability agencies, many of which include an appeal process, it takes on average of 600 days to get to an administrative law judge hearing. "We are not serving claimants very well." The Administration is actively looking for ways to improve its processes.

There are some 17,000 to 18,000 district-court review actions every year. They occupy approximately 7% of the federal docket. Habeas corpus cases likewise occupy approximately 7% of the federal docket, and they have their own special rules. Appeals from bankruptcy courts to district courts likewise are governed by their own special rules. Social security review cases

deserve their own special rules for comparable reasons. No other agency generates so many review proceedings; adopting social security rules will not set a precedent for other district-court actions for review on an administrative record.

Uniformity will enable more claimants' attorneys to practice across districts, achieving efficiencies that will work to benefit their claimant-clients. They will help pro se claimants as well. And courts will "benefit from having less paper to review." Uniformity also will help SSA lawyers. There are 440 SSA lawyers across the country dealing with these cases. That means each of them has to handle 40 to 45 cases a year. Saving even two or three hours per case would save many lawyer-years of effort.

The bare bones draft rules hit many of the key elements that the rules should include.

The traditional complaint does not work. The procedure should be the equivalent of a petition for review, and one that can be filed electronically. The draft rule can be improved to clarify some points. Claimants' attorneys will benefit from simplification. They do not want to waste time on the complaint.

Other issues to be addressed include discovery, and page limits – even if higher than the limits proposed in the SSA draft rules.

It is important that the rules be outcome-neutral. The SSA has no wish to shift the playing field to its advantage. An examination of case outcomes across the country shows that outcomes do not vary in response to the wide variations in local practice.

David Foster repeated real appreciation for the draft rules. But the problem remains that different courts may interpret the rules differently. One particular problem is the footnote that suggests thought might be given to a rule that reverses the order of briefing, so that the Commissioner would have to file an opening brief to defend against challenges that have not yet been made. It is good to have the claimant go first. This concern was met by reassurances that the question, raised by footnote 23 in the draft considered by the Commission, was meant only to identify the possibility. Draft Rule 3 is clear that the claimant-plaintiff files the first brief and identifies the issues. Footnote 23 itself explains why that it the order that should be followed. Finding no support for this alternative, it will be modified or abandoned entirely in the next draft.

The scope of the rules came on for discussion, with a partial focus on discovery. Recognizing that most cases are truly confined to review on the administrative record, with no occasion for discovery beyond what is in the record, the question remains whether there are some circumstances that call for discovery. If so, care must be taken to ensure that the rules do not foreclose this opportunity.

The immediate response was that review is available only after exhausting administrative remedies to reach a final agency decision. There is no factfinding on review. Review is confined to the administrative record. If new evidence is offered outside the record, sentence six remand

enables the court to remand for presenting the evidence to the agency. The agency disposition then can be taken back to the district court.

A question was raised about the "five-day rule" that requires that evidence be presented to the agency 5 days before the hearing before the administrative law judge. This rule began as a local practice in the Boston region, and was adopted as a general agency rule in 2017. Years of experience in the Boston region suggest there is no difficulty in administering the rule. It should not be an occasion for discovery in the review action. But what if a claimant argues that the record is not complete because it does not include the evidence excluded on this ground? Or a claimant argues that the evidence was timely offered and that the record is inaccurate? Might that be an occasion for discovery? In later discussion it was agreed that discovery might be appropriate if a claimant claims that something is missing from the record.

Other examples were offered to develop the question whether discovery may be appropriate. Suppose, for example, that a claimant argues that the agency procedure was tainted by pressure from supervisors who assert that administrative law judges should be deciding more cases every year? That issue has appeared in other agencies. Or, worse, suppose supervisors complain that too many claimants are receiving benefits, and suggest that good administrative law judges will increase their rates of denial? May not discovery be important to flesh out and support these allegations? There are good reasons to suppose that these problems do not now exist, but might history provide a guide for what the rules should anticipate?

Another possible example is an allegation of the administrative law judge's bias. It was urged that this question can be raised and made part of the record by argument in the Appeal Council.

Discovery also may be desirable in the class-action context. About a dozen class actions against the Commissioner are pending now. Some allege "systematic error." Others challenge the legality of the Commission's means of collecting overpayments. An action could be brought as a class action on the record, but these actions tend to be brought by plaintiffs who have not yet exhausted their administrative remedies. The Administration believes, however, that § 405(g) is the only basis of jurisdiction. At any rate, discovery may be appropriate in class actions.

If something is missing from the record, a supplemental transcript is prepared. Review still is on the administrative record. The SSA draft rules include a provision for supplementing the original administrative record. "We included it to be thorough." Rule 2(d)(1) of the draft bare bones rules assumes that the record will be complete, and seems to allow an incomplete record to be cured by supplementing. Supplementation corrects an error; it does not involve substantive dispute about extra-record evidence.

The participants were reminded that discovery is an issue that has been faced in attempts to define the scope of the draft rules, not in any explicit draft rule provision. Discovery has not been, and will not be, practiced in the vast majority of actions. One claimant sues the Commissioner as the only defendant and rests only on the administrative record. There is no occasion for discovery.

But the discussion has provided examples of circumstances where discovery seems appropriate. The question is how to recognize this. A rule that, for example, referred only to discovery incident to a class action might generate negative implications that would thwart discovery in other settings where it is desirable. A different approach would be to draft rules that do not apply at all when class-action claims are made. That issue was discussed with NOSSCR representatives when the Administration was considering the scope of their draft rules; a record of that discussion will be provided. But it also was recognized that uniform rules that have a broader scope still will prove a great help because almost all actions will be in the simple model of one plaintiff, one defendant (the Commissioner), and review confined to the administrative record.

The question of multiple defendants came up. An over-cautious claimant might sue both the Commissioner and the Administration. That is not really a multiple-defendant event. But a single claimant may seek review under § 405(g) and, at the same time, challenge a denial of supplemental nutrition benefits by the Secretary of Agriculture and a denial of still other benefits by HHS.

The model of electronic service of the complaint used in the Southern District of Indiana was noted. Several other districts are using similar practices, and more are thinking about it. The Administration finds it desirable. It was noted that the draft bare bones rule has been revised to direct that service be made on the local United States Attorney, a revision strongly supported by the Department of Justice. But the rest of it still provides that the court should send e-service to an address established by the Commissioner. Two reasons support this approach. One is that the Commissioner is in the best position to determine what system will best serve administrative needs − service directly on the Commissioner, service on a regional office, service on both, or perhaps some still different system. The other reason is related to this one. The address that works best now might not work so well in the future as administrative structures evolve and experience accumulates. It is much easier for the Commissioner to establish a new address than to amend a court rule.

The bare bones draft rule for briefing suggested a particular question. Some courts require the claimant and the Commissioner to agree on a joint statement of facts. A joint statement can expand up to as many as 200 pages. That is an undesirable burden that should be prohibited. The Administration draft rules do prohibit it, *see* their Rule 7(a). But rather than adopt an explicit prohibition of this dubious practice in a national court rule, it may be enough to add more detail about what a brief should include, such as a statement of facts.

The meeting concluded with a request that the Administration provide a detailed response as proves convenient to the questions raised by the footnoted version of the bare bones draft.

NOTES
Social Security Review Subcommittee
Conference Call June 4, 2018

The Social Security Review Subcommittee met by conference call with members of the American Association of Justice on June 4, 2018. Subcommittee participants included Judge Sara Lioi, Subcommittee Chair and Subcommittee members Professor A. Benjamin Spencer and Ariana J. Tadler, Esq. Alison Chestovich participated for Subcommittee member Laura A. Briggs. Professor Edward H. Cooper participated as Reporter and Professor Richard L. Marcus participated as Associate Reporter. Joshua Gardner, Esq., represented the Department of Justice, and Rebecca A. Womeldorf represented the Administrative Office. Participants for AAJ included Sue Steinman (AAJ Staff); Amy Brogioli (AAJ Staff); Henri Benoit II; Jennifer Danish; Nicholas Feden; Francesca Zeltmann; Meredith Marcus; Gerardine Delambo; Joanna Suyes; Chris Latham; Donna Simpson; Tom Giordano; Kenneth Hampton; Jan Dils; and Leslie Nixon. Among them, these participants practice in courts in the First, Second, Third, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits.

Judge Lioi opened the call by noting that discussion would be welcome on all issues, broad and narrow. The broad question is whether it would be desirable to adopt a set of uniform national rules for review of social security disability claims. Another broad question is just what should be the scope of these rules. Narrower, more specific questions are raised by the provisions of the "bare bones" draft rules that were considered and discussed at the April meeting of the Civil Rules Advisory Committee. That draft can provide a stimulus for discussion today.

At the end of the call, those who expressed a view agreed that it would be desirable to adopt a set of uniform national rules. An example was that even within a single district in New York, there are standing rules for these cases but each district judge is free to have individual rules. Lawyers have to spend time determining how each judge handles these cases.

There was little direct response to the question of scope. New rules might be limited to cases that involve nothing more than a single claimant who seeks review on the administrative record under § 405(g); all other cases that include a § 405(g) review claim but something more in addition would be excluded. Or the new rules could apply to the § 405(g) component of any case, leaving other requests for relief to the general Civil Rules alone. However that is resolved, it also will be important to determine whether the new rules should be drafted to rely on the foundation provided by the general rules. So draft Rule 1(b) provides that the Civil Rules apply except to the extent they are inconsistent with the new rules. Later discussion, however, addressed such topics as discovery and substitution of parties under the general rules.

Discussion of draft Rule 1(a) addressed the reference to an action "brought by an individual or personal representative." The question is how this applies to substitutions. Social Security Administration regulations allow a spouse or children to be substituted for a deceased claimant without requiring that a probate estate be opened. If the need arises after a complaint is filed in district court, Rule 25 allows substitution. The draft language is intended to cover these

circumstances. No suggestions were made to revise the language, but the question remains open.

Rule 1 discussion also asked whether there are actions that involve more than one plaintiff, or more than one defendant, or class actions. An illustration was suggested: Suppose two independent claimants, in two independent administrative proceedings, each challenge an SSA practice, or regulation, or interpretation of a statute or regulation, and want to join in a single review action to decide this question of law? Discussion suggested that such things have happened, although they are rare. As for class actions, they seem more likely to rely for jurisdiction on civil rights laws than on § 405(g), but there was some thought that there have been examples of class actions that rely on § 405(g).

Draft Rule 2 discussion also raised questions about the provision in Rule 2(b)(1) that the complaint should identify the plaintiff and others by the last four digits of the social security number. It is possible to reconstruct a full number by building from the last four digits and other information that can be obtained rather easily. This provision raises questions about identity theft. The reason SSA wants something like this is that their docket identifies cases by a claimant's full social security number. There is a risk that simply naming the claimant will not distinguish among several claimants who have the same name and encounter final administrative decisions at about the same time. In practice, some courts require that even the final four digits be redacted. The need to identify who is the claimant is met by various means – the plaintiff may call a government attorney, or the U.S. Attorney may call the plaintiff, disclosing the full number to ensure the proper record is filed. In another court the last three digits of the number are included in court documents, and available for electronic access under Civil Rule 5.2(c) only at the courthouse.

A specific question asked about the Rule 2(b)(4) direction that the complaint allege that the plaintiff exhausted all administrative remedies. It was agreed that this is appropriate. At least some courts treat this as a matter of jurisdiction. As with Civil Rule 8(a)(1), it is appropriate to require that the grounds of jurisdiction be pleaded.

Much of the discussion focused on submitting the SSA record to the court as part of the answer. Several participants noted that the record submitted by the SSA often is incomplete because it does not include "case documents" that have been proffered to the administrative law judge but not "exhibited" to become part of the record. A common illustration is provided by the relatively new "5-day" rule that requires that documents be submitted to the AAJ at least 5 days before the hearing. The AAJ begins the process by listing as exhibits documents that will be considered as part of the record. The claimant then proffers additional documents. Those that are accepted are "exhibited" and made part of the record. Those not accepted are retained in the file, but not considered part of the transcript. Whether they are treated as part of the record may be variable – sometimes they are included, but sometimes not. Another example was "medical evidence submitted to the appeals council."

Under present practice, claimants can move in the district court to supplement the record filed by SSA. The motions are treated as a matter of discretion, but at least at times are granted. The consequence of granting the motion may be a remand for further administrative consideration,

or it may become a basis for decision by the district court.

A question raised by draft Rule 2(d)(1) is what provision might be made in the rules to ensure a complete administrative record. The draft includes a suggestion that the rule might require "a certified copy of the [complete] administrative record." There may be a risk that SSA will regard the transcript as a complete record even though it does not include documents that were lodged but not "exhibited" to become part of the record. Further thought on this question will be desirable.

Further discussion raised the question whether there is a risk that allowing supplementation of the administrative record might generate voluminous records that impose undue burdens on all parties. But this concern was addressed to adding materials that were not proffered in the SSA proceedings. Simply including materials that were offered in the SSA was not seen to be a problem.

Discovery was discussed briefly. One participant said that the rules should not bar discovery. Due process may require that it be available. An example was offered of a case in which SSA argued flatly, without any elaboration, that adopting the rule of law proposed by the claimant would impose undue burdens. Discovery would have been helpful to prompt a further explanation. Another example was a Rule 12 motion with a dispute about whether it was properly served – discovery could be useful to resolve that issue. But the participants could not think of a case in which they had actually resorted to discovery, as something distinct from supplementing the record.

Brief discussion of summary judgment revealed that Rule 56 is used as the means of framing review in SSA cases in the Eastern District of Tennessee, while in the Middle District the means is a motion by the plaintiff for judgment on the record.

This discussion brought up draft Rule 3(a), which directs that the action be framed by a motion for the relief requested in the complaint, accompanied by a brief with references to the record. The question is whether the motion is a useful part of this procedure, or whether it suffices to provide the brief. It was suggested that the brief is similar to a brief on appeal from a district court to a court of appeals: why is it not enough to rely on the brief alone? There was some support for relying on the brief alone by a participant who described practice in Maine as including a statement of errors as part of the claimant's brief.

The provision for a reply brief by the claimant was warmly approved by one participant.

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NOTES
Social Security Review Subcommittee
Conference Call August 17, 2018

The Social Security Subcommittee met by conference call on Friday, August 17, 2018. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Laura A. Briggs, Clerk Liaison; Ariana J. Tadler, Esq.; and Professor A. Benjamin Spencer. Joshua Gardner, Esq., participated for the Department of Justice. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi opened the call by noting that since the last Subcommittee deliberations there had been a conference call with several members of the American Association for Justice and a June 6, 2018, letter from the Social Security Administration. It is clear that SSA continues to support development of uniform national rules for § 405(g) review cases. Further discussion found some uncertainty about the views of the AAJ members who participated in the call. Earlier expressions on behalf of the AAJ seemed receptive to developing a set of national rules. Support, however, will depend on whether any proposed rules seem to be good rules. The Department of Justice, which represents SSA in review proceedings, is not opposed to the idea of uniform national rules but is opposed to rules that provide too much detail.

These mixed reactions bear on the still unresolved question whether the Subcommittee should recommend that this project be pursued to the point of developing rules for publication and comment. Doubts persist as to the wisdom of adopting rules that are specific to a particular subject, even a subject that every year brings as many as 18,000 cases to the federal courts. Continuing revision of draft rules is an important part of determining whether it will be possible to develop rules that seem so strong as to justify displacing the wide variety of practices now encountered in the district courts. The recommendation of SSA and the Administrative Conference that uniform national rules should be developed is a strong reason to continue work. "We can facilitate what they want." But given that, at least some Subcommittee members are not "fervent supporters."

Supplemental or In-Rules Rules?

The form of any new rules will remain to be decided if the Subcommittee comes to recommend development of proposed rules for publication. Concern was expressed that adding a second set of "Supplemental Rules" could become a tacit invitation for proposals to develop still more separate sets of rules tailored to the perceived needs of litigating particular subjects. It may be better to fit any new rules into the general Civil Rules. Rules 74, 75, and 76 remain vacant. They could offer a convenient location for § 405(g) review rules, particularly if any eventual recommendations retain the three-rule format of the current draft. Or thrift might suggest using only one of these open numbers, although a single rule likely would be a long rule. This question remains open.

Scope

The scope of any eventual rules remains an open question. Almost all § 405(g) review actions involve one plaintiff seeking only substantial-evidence review on the administrative record. New rules could be limited so that they apply only to such actions. Any action that combines § 405(g) review on the record with additional claims or parties would be left to application of the ordinary Civil Rules. That approach is illustrated by an alternative draft Rule 1(a) that would apply the new rules "to an action in which the only claim is made by an individual for review of a final decision of the Commissioner of Social security under 42 U.S.C. § 405(g)." Another alternative approach is illustrated by the earlier drafts that would apply the new rules to the part of an action that seeks § 405(g) review, leaving to the regular rules any additional claims or parties joined in a single action. That version uses general rule text, supplemented by a Committee Note statement that the new rules "apply to the § 405(g) parts of the action."

Discussion focused in part on the question whether there are many actions that reach beyond the simple model of one plaintiff, one defendant – the Commissioner – and nothing beyond a claim that the Commissioner's decision is not supported by substantial evidence on the record. All indications are that such actions are rare. There have been some attempts to bring class actions that may rely in part on § 405(g) for jurisdiction. Occasionally an attempt is made to join a defendant in addition to the Commissioner. More than one claimant might be involved. But even taken together, such actions comprise a very small fraction of the 18,000 § 405(g) cases that come to the federal courts every year.

Concern was expressed at the prospect of governing part of a single action by a separate and special set of rules, while governing parts by the full body of Civil Rules. Rule A of the Supplemental Rules for Admiralty or Maritime Claims applies to "claims within the meaning of Rule 9(h) with respect to the following remedies * * *." Rule 9(h) likewise seems to call for designating a claim as an admiralty or maritime claim, leaving the way open for a single action that combines one or more claims subject to the Supplemental Rules with other claims that are not. However that in fact plays out – a matter not confidently answered in the discussion – the combination seems rife with opportunities for confusion. Section 405(g) cases are governed by the Civil Rules now. The reason for examining the possibility of special rules is in part the wide disparity in practices across the districts and in part concern that some of the disparate practices are not as efficient as could be. But if the vast bulk of straight § 405(g) cases are governed by new rules, it may be more efficient and effective to carry forward with the general rules for the rare cases that combine § 405(g) review with other parties or claims.

This discussion led to the conclusion that it would be better to develop the draft that applies the new rules to actions in which the only claim is made by an individual for § 405(g) review. This draft might be elaborated by adding a few words: "for review <u>on the administrative record</u> of a final decision * * *." That version will be shown in brackets in the next draft.

Narrowing the scope of the new rules means that there is no longer any reason to carry forward draft Rule 2(b)(6), which would provide that the complaint must "state any other ground

for relief." The statement that the final administrative decision is not supported by substantial evidence suffices. This paragraph will be omitted from the next draft.

Pleading: Complaint

Draft Rule 2(b)(4) says that the complaint must "State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed."

The first question was whether this provision means that these elements are part of the claim. That was not the intent. Draft Rule 2(b)(5), calling for a statement that the final administrative decision is not supported by substantial evidence, is meant to state the claim. A final decision is a jurisdictional requirement, and timely filing is likely a mandatory claim-processing rule. Exhaustion likely is not jurisdictional – it seems to be largely a judicially created and discretional rule – but it may be useful to focus the plaintiff's attention on exhaustion as something closely related to finality. Even then, concern remained that including these elements in the complaint might prompt motions to dismiss, either under Rule 12(b)(1) or under Rule 12(b)(6). Why provoke motions that otherwise might not be made? One participant noted that the AAJ lawyers seemed to support (b)(4) during the AAJ conference call. And it was suggested that SSA is able to make these motions now, but generally prefers to point any such problems out to the plaintiff for corrective action. The rule does not create any new grounds to dismiss, and SSA knows these requirements full well. The purpose of the rule is to encourage plaintiffs to pay attention to finality, timeliness, and – if it remains – exhaustion.

A more general question asked why draft Rule 2(a) includes so much particularity. This question tied back to the fear that spelling out required elements would elicit more motions to dismiss when a required element is omitted or poorly stated. Exhaustion, as a specific example, should be treated as an affirmative defense.

Draft Rule 2(b)(1) met similar questions. It requires the plaintiff to state the plaintiff's name, address, and the last four digits of the plaintiff's social security number. Why demand so much particularity? This concern was seconded. But it was pointed out that SSA has continually asserted that it needs this much information to enable it to identify the underlying administrative proceeding. The plaintiff's name alone does not suffice because the annual flood of claimants includes many who have the same name. And similar reasons underlie the requirement in 2(b)(2) that the plaintiff identify the titles of the Social Security Act under which the claims are brought. But the participating judges observed that they never had encountered a case that presented an actual problem on this score.

Further discussion concluded that draft Rule 2(b)(2) requiring identification of the relevant statutory titles should go forward with a footnote questioning its value. Draft Rule (b)(4) on finality, timeliness, and exhaustion should be deleted, but shown with a footnote to provide a focus for future discussion. SSA will support both proposals because they reduce the burden of litigation on its staff. That is a reasonable motive. But burdens on plaintiffs and the risk of stirring more

frequent motions to dismiss must be balanced against administrative convenience.

The requirements in 2(b)(1) for identifying the plaintiff and in (b)(3) for naming the Commissioner as defendant were accepted.

Finally, it was pointed out the draft Rule 2(a) is redundant. It provides that a § 405(g) action is commenced by filing a complaint. But Rule 3 establishes that procedure for all civil actions. The opening line in draft Rule 2(b) dispels any doubts: "The complaint in an action for review under § 405(g) must * * *." This subdivision will be omitted from the next draft.

Notice of Filing, No service

Draft Rule 2(c) provides that the court must notify the Commissioner of the commencement of the action by transmitting the complaint to an address established by the Commissioner and to the local United States Attorney. An optional final sentence states that no other service is required. This provision has met universal approval in earlier discussions.

But it turns out there are problems. The CM/ECF system does not transmit complaints. It sends out a notice of electronic filing with a link to the e-complaint. And it is not clear whether there is any reason to transmit notice to the Commissioner. Perhaps notice to the regional SSA office and the United States Attorney is enough to bring the case to the attention of those who will actually handle it. That is the system that has been adopted in the Southern District of Indiana, and in some other courts, by agreement with SSA and the United States Attorney. But it may be better to draft a rule that leaves it to the Administrative Office to direct district courts to use addresses established by the Administrative Office, rather than attempt to fix all these details in rule text. The Administrative Office could work out any questions with SSA, and could respond quickly when changes might be indicated. The next draft will illustrate this approach. This approach will alleviate a further concern that the draft Committee Note seems to leave too much latitude to SSA in choosing what addresses to designate for service.

It also was suggested that there should be a more explicit statement that service of summons and complaint under Rule 4 is not required. That too will be included in the next draft.

The Answer

Two questions were addressed to draft Rule 2(d) at the outset. It calls for a "complete" administrative record, and it says only that the answer must "include" the record. Each of these provisions is likely to be resisted by SSA.

The requirement of a "complete" record responds to concerns expressed by some lawyers that the transcript filed by SSA does not always include everything it should. But SSA disputes this, and argues that its internal policies for generating the record for review should not be disrupted by a court rule. It also was suggested that simply requiring a "complete" record does not resolve the question. Instead, it pushes the issue into what is required in a complete record,

something the draft does not attempt to define. It was agreed that "complete" would be deleted from the next draft.

SSA has suggested a rule that would treat the administrative record as the complete answer. Some courts have adopted this approach, and do not seem to have encountered any problems. Indeed, they believe there is no benefit in a traditional answer. In the past the Subcommittee has resisted the "record-as-answer" approach. The current draft Committee Note says that the draft rule "incorporates the general provisions of Civil Rules 8 and 12 for answers, including affirmative defenses, and motions." It also observes that § 405(g) says only that the Commissioner shall file a certified transcript as "part" of the answer. This approach would mean that the Commissioner must respond to however many allegations the plaintiff chooses to make in the complaint, and at a minimum must always deny the required allegation that the decision is not supported by substantial evidence. It directly includes the Rule 8(b)(6) direction that an allegation not denied is admitted.

The question whether the answer should include more than the record itself ties to the scope of the rules. Does a complaint that alleges matters in addition to the core substantial-evidence challenge seek only review on the administrative record? Two examples were suggested. One is an allegation of "bad faith" – for example, a claim that the administrative law judge was influenced by an ex parte conversation with a medical witness who urged decision in accord with the witness's testimony. The second was an argument that the claim was decided under an invalid administrative regulation. Why not require an answer? If such allegations take the action outside the scope of the § 405(g) review rules, Rule 8 applies as part of the general rules. But even adding review "on the record" to draft Rule 1(a) may not make this clear.

This discussion led to a decision to retain the rule text directing that the answer "include" the administrative record, but to delete this sentence from draft Rule 2(d): "The answer [may, but] need not respond to the allegations in the complaint that seek review under § 405(g)." That approach would retain the requirement that the answer respond to allegations that go beyond review on the administrative record. At least for now, the next draft will retain the part of the Committee Note stating that this rule incorporates the general provisions of Civil Rules 8 and 12.

Time to Answer

The core part of draft Rule 2(d)(2)(D) provides that if the Commissioner makes a motion under Rule 12 or moves for voluntary remand the time to answer is governed by Rule 12(a)(4) unless the court sets a different time. Rule 12(a)(4) allows 14 days after notice that the court has denied the motion or postpones its decision until trial. That is not very much time. A motion for voluntary remand may have required the defending lawyers to become somewhat familiar with the record, but motions based on finality, timeliness, or exhaustion may not require much study of the record. It may be that 14 days is unreasonably short. On the other hand, the Commissioner has 60 days to file an answer or Rule 12(b) motion, and can move for voluntary remand at any time. It may not be unreasonable to expect study of the record in a way that will enable the Commissioner to file the record within 14 days after action on the motion. The Subcommittee concluded that it is

important to gather more information about the process of preparing the administrative record.

Ousting Rule 16

SSA has urged that Rule 16 scheduling orders and pretrial conferences are superfluous in § 405(g) review actions, and proposes this rule: "These rules make unnecessary the procedures contemplated under Federal Rule of Civil Procedure (FRCP) 16, such as pretrial and scheduling conferences." Apart from drafting issues, the central question is whether this is a good idea. The Subcommittee concluded that Rule 16 may at times have a role to play. This proposal was rejected.

Bringing Case on for Decision

Draft Rule 3 presents alternative provisions for bringing the case on for decision. One requires a motion and supporting brief. The other requires only a brief.

Initial discussion agreed that it is important to do whatever these rules can do to move the review toward a speedy decision. Complaints of years-long delays primarily address the administrative process, but delay in receiving benefits can have drastic consequences and judicial review should be as expeditious as possible. The time for judicial decision may be extended in courts that refer these cases to magistrate judges for reports and recommendations. The times for filing the plaintiff's brief should remain at 30 days after the record is filed or 30 days after the court disposes of motions under Rule 12(b) or for voluntary remand. And the time for the Commissioner's brief should be 30 days after service of the plaintiff's [motion and] brief.

Turning to the motion requirement, it was urged that it makes no sense to require a motion. Some courts rely on briefs alone, treating the case as an appellate court treats an appeal.

It was countered that actions under the Administrative Review Act are brought on for decision by motions or by proceeding to trial. Rule 7(b), further, directs that "A request for a court order must be made by motion." To dispense with a motion would be to depart from Rule 7(b). A complaint is not a motion.

Discussion moved to an analogy to Rule 56. Some courts move § 405(g) cases to decision by motions for summary judgment. The advantage of borrowing this procedure is that it provides for argument by specific citations to the record. The potential disadvantage is that many parts of Rule 56 do not apply, most notably the standard for decision that there be no genuine dispute as to any material fact. The brief presents the arguments. The motion adds nothing.

The analogies to other administrative-review actions and to Rule 56 were discussed further. It was suggested that the problem with the Rule 56 approach is not that it entails a motion but that it involves Rule 56 procedures and invokes a misleading analogy to the Rule 56 standard of decision. As for other administrative review proceedings, they may be different from the high volume of § 405(g) cases that ordinarily present no more than a case-specific substantial evidence argument that can be presented by briefs alone.

The motion requirement was further defended by a suggestion that the motion will be a brief document of one or two pages. The work will be done in the briefs. And the response again was that courts that rely on briefs alone find the practice satisfactory.

The alternative drafts will be carried forward to support further discussion of the advantages of requiring a motion or of relying on briefs alone.

Attorney Fees

SSA reports that the general Civil Rules provisions work well for awarding fees under the Equal Access to Justice Act. But there are serious difficulties with the procedure for awarding fees under § 406(b). These fees, which come out of the award of benefits, are for attorney services in the court. The award is made by the court, not SSA. The substantive calculation can be difficult, including integration with fees awarded by the Commissioner for work in the administrative proceedings under § 406(a) and fees awarded by the court under the Equal Access to Justice Act. Rule text addressing those substantive issues does not seem appropriate, even if the substantive rules are clearly established.

It may be possible, however, to address the problem of timing a motion for an award by the court under § 406(b). In a great many cases the result of the court's judgment is a remand to SSA for further proceedings. The Civil Rule 54(d)(2) timing requirements geared to judgment do not fit well with a motion that cannot become ripe until conclusion of the administrative proceedings. There are serious problems.

To recognize that there are serious problems, however, is not to agree that they can be resolved by a new court rule. There is a mess, but it originates primarily outside the Civil Rules. Attempts to clean it up would be difficult and might make matters worse.

Despite the sentiment that these problems may be too varied and too complicated to address by rule, the Subcommittee concluded that the topic should be carried forward for further consideration.

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NOTES
Social Security Review Subcommittee
Conference Call September 11, 2018

The Social Security Subcommittee met by conference call on Tuesday, September 11, 2018. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Laura A. Briggs, Clerk Liaison; Ariana J. Tadler, Esq.; and Professor A. Benjamin Spencer. Joshua Gardner, Esq., participated for the Department of Justice. Rebecca A. Womeldorf, Esq., and Julie Wilson, Esq., represented the Rules Committee Support Office. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi began the call by noting that the August 17 call had provided a close look at rule text drafting issues, and led to the revised draft provided for today's call. Many of the issues that remain open are flagged by alternative rule text or by footnotes. After the Subcommittee finishes its work on this draft it may be time to ask for comments by the Social Security Administration and the other groups that have provided helpful advice on earlier drafts.

The "big questions" were recognized, but slated for later discussion. These include the fundamental question whether it is wise to adopt rules that focus narrowly on a specific substantive area and the subsidiary question whether any rules should be framed as a new set of Supplemental Rules or instead be located somewhere in the body of the Civil Rules. The Subcommittee has settled on a narrow approach to the scope of any rules that might be adopted, limiting them to actions that involve nothing more than one plaintiff pursuing a claim under § 405(g) against the Commissioner as the only defendant, and seeking nothing more than review on the administrative record. Any other action would be governed entirely by the ordinary Civil Rules. But the question of scope should be carried forward for discussions with the SSA and others.

Rule 1(a)

Draft Rule 1(a) defines the scope of the review rules and includes two bracketed phrases for discussion. The first refers to an action "by an individual [or personal representative]." This phrase has been accepted in earlier discussions, and, even if perhaps redundant, adds a reassuring note of clarity. The second is "for review [on the administrative record]." Referring to review on the record may seem redundant – that is what § 405(g) governs – but it was added to entrench the proposition that these rules do not apply when the action joins more than one plaintiff, or a defendant in addition to the Commissioner, or claims that go beyond the record. Brief discussion accepted both phrases, but they will continue to be set off by brackets to prompt further discussion.

Rule 2(a)(1)

Discussion began with draft Rule 2(a)(1). The first question renewed a long-running issue. Rule 5.2(a)(1) recognizes the propriety of filings that include the last four digits of a social security number. But privacy concerns continue to grow as techniques for invading computer information systems become ever more sophisticated. The Rule 5.2(c) limits on remote access to court files in

social security cases provide some comfort, but legitimate concerns remain. Why, exactly, does SSA need to have this information in the complaint? They have said repeatedly that with millions of disability cases on their docket they need the number to identify which administrative proceeding is involved. Often they have independent proceedings involving different people with the same name. But if an address is provided, what is the risk? That family members living together may share the name? That claimants may change addresses during the years-long processing at the administrative level? Why do they not solve the problem by assigning a distinctive docket number to each proceeding, so that the complaint can identify the decision by date and docket number? (It was noted that if they already have a docket number system it would be disingenuous to argue so strenuously that they need the last four digits of the social security number as well.)

That discussion led to the question whether plaintiffs' addresses are routinely provided now. Rule 11(a) requires a complaint to be signed by an attorney or by an unrepresented plaintiff and to provide the signer's address, e-mail address, and telephone number. If the claimant is represented by an attorney, the rules do not require the claimant's address. Perhaps the docket sheet does.

Further discussion noted that the Committee on Court Administration and Case Management has done a lot of work on the use of social security numbers, and has recently proposed an amendment of Rule 5.2 that would require courts to use only the first name and last initial of a social security plaintiff in their opinions. It will be important to maintain close contact with CACM as this issue is explored. That process will be advanced by asking that SSA provide the strongest case it can to support the four-digits pleading requirement.

Discussion also addressed a concern reported in a draft footnote. Concerns have occasionally been expressed that as foolish as it seems, SSA might pursue failures to identify name, address, and four digits in the complaint by motions to dismiss. It was agreed that this concern seems unlikely. SSA has repeatedly stated that informal inquiries are much more efficient when the absence of such details leaves it uncertain which administrative action is involved.

Similar questions were addressed to draft Rule 2(a)(2), which requires the complaint to identify the titles of the Social Security Act under which the claims are brought. Why does not identification of the administrative proceeding provide the answer? Is it not enough simply to identify the proceeding as one under § 405(g), a sufficient basis to establish subject-matter jurisdiction? Is there a prospect that plaintiffs may change "titles" in the action for review — particularly if a plaintiff proceeded pro se before SSA and has a lawyer in the action for review? Although this provision does not seem to have troubled the plaintiffs' bar, it should be explored further with SSA.

Rule 2(a)(4) – (c)(1): Bare-bones Complaint & Answer?

Interrelated questions revolve around the level of detail to be required or permitted in the complaint and the corresponding opportunities or obligations to answer.

The arguments for limiting detail in the complaint arise from the analogy to a notice of appeal. On this view, the complaint does nothing more than identify the Commissioner's final decision and, as a formal matter, state that the decision does not have the statutorily required support by substantial evidence in the record. The answer is correspondingly simple. Earlier rule drafts provided that the answer is the administrative record. This simple package is easier to draft and justify if the rules are limited to actions with one plaintiff, the Commissioner as sole defendant, and no claims beyond a lack of substantial evidence.

The arguments for allowing greater detail in the complaint are that a plaintiff who wishes to advance the course of the proceedings – and possibly provoke a voluntary remand, a frequent event – should be free to state focused reasons of fact and law that require reversal. And if the plaintiff does that, the Commissioner should be free, or perhaps obliged, to respond to whatever is in the complaint.

Discussion began by asking whether there is any benefit in requiring the plaintiff even to plead that the decision is not supported by substantial evidence. That is the statutory standard. Why not let identification of the action as one for review under § 405(g) do the job? The first response was that the lack of substantial evidence is the baseline for the claim, and should be included both as a matter of form and to ensure that the action is one to be governed by the social-security review rules, not by the general rules. And including this in the rule not only focuses attention but may provide important guidance to pro se plaintiffs.

The defense of requiring a pleading on substantial evidence continued, however, to question as "awkward" bracketed alternatives included in rule text. "State [generally {and without reference to the record}]" adds little. So too, is it useful to identify the alternative pleading that the decision must be reversed for errors of law? Why is it not enough to support an argument about substantial evidence by framing it as the lack of substantial evidence to support the decision under a proper view of the law?

Discussion took a different turn by asking how a bare statement about substantial evidence satisfies the Rule 8(a)(2) requirement that 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? The immediate response was that this element was included to resolve any doubts about what satisfies the pleading standards reflected in the Twombly and Iqbal decisions. Without it, courts around the country are likely to invoke the many phrases of those opinions in different ways, and to no real advantage. Requiring sufficient detail to make it plausible that the court will be able to draw the inference that there is not substantial evidence would be unnecessary waste for the plaintiff, who may not yet even have access to the full record. And requiring an answer that responds to this detail would impose an unnecessary burden on attorneys defending the SSA decision. It works better to require

them to develop deep familiarity with the record only once, at the briefing stage. The Committee Note can say that this pleading standard establishes the appropriate meaning for the general pleading standards for this particular type of litigation.

The complaint provision will be carried forward as the basis for broad inquiry with SSA and other groups. It can be enclosed in brackets to raise the question whether the rule should say anything about this subject.

The corresponding questions about the answer are framed around draft Rule 2(c)(1). As revised, it says only that the answer must include a certified copy of the administrative record. The Subcommittee has determined to delete an earlier second sentence: "The answer [may, but] need not respond to the allegations in the complaint." The current version reflects a tentative choice to depart from SSA's suggestion that the rule provide that the administrative record is the answer. That approach was adopted in earlier drafts, but dropped from concerns that SSA might want to respond to specific allegations in the complaint, and that there should be some provision for affirmative defenses. In addition, reliance on regular Rule 8 obligations seemed important so long as the new rules were drafted to reach actions that go beyond the core actions that ask only review on the administrative record. (That concern vanishes if the rules are confined to core § 405(g) actions.) The Committee Note for the current draft states explicitly that this rule "incorporates the general provisions of Civil Rules 8 and 12 for answers, including affirmative defenses and motions."

Incorporation of Rule 8 raised doubts. As a general matter, SSA does not want to be obliged to respond to whatever a plaintiff may seek to add to the complaint. More pointedly, Rule 8(b)(6) treats failure to deny an allegation in the complaint if it is not denied in the answer. Filing the record, as required, should avoid default. But it does not avoid the impact of Rule 8(b)(6).

Discussion led to the suggestion that the rule might spare SSA the obligation to respond, while leaving it free to do so, by providing that filing the record "suffices" as an answer. Further discussion suggested that this would leave matters ambiguous, perhaps as to the Rule 8(b)(6) problem, and surely as to affirmative defenses. In turn this led to the suggestion that the rule would be made clear by express statements that the record suffices as an answer, that Rule 8(b) does not apply, and that Rule 8(c) does apply. This approach will be reflected in an alternative draft, retaining the present "must include a certified copy of the administrative record" as the other alternative.

Discussion of the provision for answers concluded with a suggestion that it might be restructured so that the time to answer is included in the first subdivision with the provisions describing the answer. The remaining time provisions for motions to dismiss or to remand, and for answering after making a motion to dismiss or remand, would be included in the second subdivision.

Brief discussion concluded that, as in the draft, the basic time to answer should be 60 days, the same as in other actions against the government. The time to answer after the court decides or

defers action on a motion to dismiss would continue to be governed by Rule 12(a)(4), which allows 14 days. Social security review cases should not be placed on a slower track than other civil actions.

In a related vein, it was agreed that the time for a plaintiff's reply brief should be set at 14 days, not 15 days, in keeping with the standard practice that uses 7-day intervals for time periods shorter than 30 days.

Notice of the Action

Rule 2(b) provides that the plaintiff need not serve a summons and the complaint in a § 405(g) review action. Instead, the court sends a Notice of Electronic Filing to specified recipients. This bypass of Rule 4 has met with widespread approval. Two sets of questions remain: who should get the notice? And should the rule say anything about addresses in addition to identifying the recipients?

The drafts provide for notice to the Commissioner, the regional office of the Social Security Administration, and the United States Attorney for the district. The local procedure adopted by the Southern District of Indiana with the consent of SSA and the United States Attorney provides for notice only to the regional office and the United States Attorney. That works well. It will be important to ensure that SSA is content with this arrangement as a national practice. If so, the rule can dispense with notice to the Commissioner as unnecessary in light of notice to the regional office that will actually do the work.

The draft identifies the regional office as the "[local]" office. The brackets indicate the view that "the regional office" is identification enough; the court knows which office that is. But the idea can be carried forward with a new word: "[appropriate]" regional office. The draft also offers alternatives for identifying the U.S. Attorney: "the District's" United States Attorney, or "the United States Attorney [for the district]." Here too it may work to eliminate any reference to the district. If a reference remains, style preferences will resolve the choice.

A second question is whether the rule should say anything to identify the addresses for receiving the Notice of Electronic Filing. Earlier drafts provided that the Commissioner would choose the addresses. That was modified to an address designated by the Judicial Conference of the United States. But there is no apparent reason to impose that burden on the Judicial Conference. Nor is there any apparent need to say anything in the rule. Courts will know where to send the notice.

Questions For Next Call

Competing demands forced several participants to withdraw from the call at the end of the hour. The remaining members agreed that another call should be scheduled to consider the larger questions left open, as they might be affected by the revised draft rules to be prepared to reflect this discussion. The most specific question is whether the plaintiff should be required to file a motion

for relief along with the brief setting out the reasons for the relief. This question has produced divided views in earlier discussions, and it would be good to resolve it. The discussion in August seemed to pretty much agree that the rules should not apply to actions that include anything more than one plaintiff's demand for relief against the Commissioner for want of substantial evidence to support the decision. But it would be good to settle this question firmly. The question whether to frame new rules as Supplemental Rules for § 405(g) cases or to fit them into the general rules deserves further discussion, although it does not go to the content of the rules. The ultimate question whether to recommend that the Committee approve a project to develop proposals for publication and comment need not be finally resolved before another round of informal review of the next draft by interested constituencies. But continued discussion will be useful.

NOTES
Social Security Review Subcommittee
Conference Call October 1, 2018

The Social Security Subcommittee met by conference call on Monday, October 1, 2018. Participants included Judge Sara Lioi, Subcommittee Chair; Judge John D. Bates, Committee Chair; Laura A. Briggs, Clerk Liaison; Ariana J. Tadler, Esq.; and Professor A. Benjamin Spencer. Joshua Gardner, Esq., participated for the Department of Justice. Rebecca A. Womeldorf, Esq. represented the Rules Committee Support Office. Professors Edward H. Cooper and Richard L. Marcus participated as Reporters.

Judge Lioi began the call by noting that the September 11 call did not have time for a full review of draft Rule 3, and adjourned without deciding whether to require a motion for relief to be supported by a brief, or to require only a brief. Nor was there any discussion of the biggest open question – whether to recommend, likely after some further initial study, that the Subcommittee and Committee work toward drafting a rule proposal to be published for comment. The further study could include another round of discussions with the Social Security Administration and organizations representing plaintiffs' attorneys. The value of uniform national rules could be considered in relation to the modest scope of the current draft rules. Additional questions are whether to undertake a rule for attorney fees awarded by the court under § 406(b), and where social-security review rules should be located in the rules.

Motion and Brief

Several successive drafts of Rule 3 direct that "[t]he plaintiff must serve on the Commissioner a motion for the relief requested in the complaint and a brief[, with references to the record], within 30 days after the record is filed * * *." Should a motion be required? The analogy to an appeal would suggest not. But a motion will serve in a district court to call the judge's attention to the case in a way that simply filing a brief does not. Motions are the routine method of asking a district court to make an order, *see* Rule 7(b). In this respect district court practice differs from practice in the courts of appeals.

Nor is there reason to be concerned that requiring a separate motion will needlessly expand the volume of filings. Motions themselves are seldom lengthy. At least for the most part, they are short, running a page or two. Here the motion would serve as the vehicle for transmitting the brief.

The Subcommittee agreed by consensus to retain the motion requirement.

Time

The time periods set at 30 days were retained despite the attraction of using 28 days to retain the weekly multiples of 7 that were adopted for periods of 7, 14, and 21 days. Rules 50, 52, and 59 use 28-day periods, but that is because they are tied to the time for appeal. The Time Project concluded that 30-day periods should be retained elsewhere. So it will be here.

Brief note was made of the time to file the plaintiff's brief. These provisions may deserve further thought. Perhaps the time should be set to run from the defendant's answer, not from filing the transcript. And the effect of a motion for voluntary remand might be separated from a Rule 12(b) motion and Rule 12(a)(4). These questions were left open.

References to Record

The Rule 3 draft provides alternative versions of a requirement that briefs include references to the record. This follows the model of Appellate Rule 28(a)(8)(A) that a brief on appeal include "citations to the authorities and parts of the record on which" the party relies. Rule 56, used by many districts for social-security review actions, directs that arguments about genuine disputes of material fact cite to particular parts of materials in the record, Rule 56(c)(1). The administrative record, moreover, is often difficult to read and review. Specific citations will definitely help. Some concern was expressed that a failure to provide citations will generate a motion to strike, but that concern was passed by. The agenda for the November Committee meeting will discuss this issue, with the thought that Committee members may have useful experience.

§ 406(b) Attorney Fees

SSA provided a long and complex draft rule to govern an award of attorney fees by the court under § 406(b). The award is for services in court; awards for services before SSA are governed by § 406(a) and made by SSA. The amount of the fee is capped at 25% of past-due benefits, and coordinated with awards under § 406(a) and under the Equal Access to Justice Act. Problems arise when the court remands for a determination of the amount of benefits, particularly with respect to the time for seeking an award from the court following completion of SSA proceedings on remand.

The SSA draft rule, as slightly revised to reflect Civil Rules drafting conventions, was used as a foundation for discussion. The draft "bristles with things we do not know about. It is complex." It reflects all of the dangers that inhere in undertaking to craft rules for specific substantive areas. And although it is clear that SSA is justifiably frustrated with the lack of any clear common procedure for making § 406(b) awards, such motions seem to be relatively rare. Only speculation could imagine why the motions are not routine. But a recent Sixth Circuit decision reflects the prospect that the motions may be made late, after the SSA has distributed to the claimant any part of the award it may have retained to protect a fee award, generating the prospect of recapturing an administrative overpayment.

No Subcommittee member favored going ahead with a § 406(b) fee provision. But the question will be identified in the November agenda materials, without including the full SSA draft rule text.

Continue The Project?

The Subcommittee has not yet reached a recommendation whether to carry this project forward to develop draft rules with an eye to publication for comment and possible addition to the Civil Rules.

Conflicting pressures pull in both directions. The Administrative Conference and SSA have championed development of uniform national rules. It seems apparent that practices vary widely among the districts. Some of the practices, as described, seem of uncertain value. Good national rules could provide real benefits, both to SSA and to claimants. But that prospect depends on framing good rules that actually fit the needs of a specific substantive area. Few actors in the Enabling Act process have expert familiarity with the practical procedural needs of this litigation. There is always a risk that new rules will not be as good as should be, or may be thwarted by supplemental local rules.

Further discussion concluded that it would be premature to attempt to decide on a recommendation now. It will help to seek advice on the current draft from the groups that have provided helpful advice in the past — SSA, AAJ, the organization of claimants' representatives, the Department of Justice, and any others who may be identified. The Administrative Conference should be informed of the ongoing work. It seems unlikely that the Subcommittee or Committee will be prepared to draft rules as comprehensive and detailed as SSA has proposed. It will be important to learn whether SSA would prefer a set of short and rather simple rules or, instead, would rather live with present diverse district practices. The Department of Justice seems ambivalent for now, but the EOUSA office is trying to persuade some districts to adopt, at times with variations, a set of protocols that look much like the current draft rules. (This approach reflects the possibility that the draft rules could be proposed as model local rules rather than developed for adoption as uniform national rules.) Some confusion was expressed as to the reasons for pursuing divergent local practices. Divergences may be important, however, in persuading courts with different local cultures to adopt protocols that fit within the local culture.

This discussion prompted the observation that the Committee should remember that if it does pursue uniform national rules, the district will remain free to adopt local rules that supplement the national rules. Only inconsistency will be prohibited.

Place in Rules

The draft rules have been framed as "Supplemental Rules," using the model of the Supplemental Rules for Admiralty or Maritime Claims. But continuing discussions have reflected deep concerns that this approach will be read as an invitation to propose ever more sets of supplemental rules for specific substantive categories of litigation. The Subcommittee will recommend to the Committee that any new rules should be located within the present body of the Civil Rules.

The current draft includes three rules that could be adopted to fill the spaces left vacant by

abrogation of former Rules 74, 75, and 76. But a spirit of parsimony emerged, suggesting that they be recrafted to fit within a single rule. None of the drafts breaks as far down as items, so the conversion would be relatively straightforward in the present form: Each draft rule would become a subdivision of the new rule. Each subdivision would become a paragraph, and so on to make each subparagraph into an item. There will be a lot of "white space," but the structure should be easy to follow.

That leaves the question whether to use Rule 74, or instead to make a new Rule 71.2 to follow Rule 71.1 on condemnation. It was suggested that Rule 71.2 might be a better choice because it would bring special procedures for the two substantive areas together, without dividing them by the less related provisions of Rules 72 and 73 for magistrate judges. But it was pointed out that Rules 71.1 through 76 all fall within "Title IX. Special Proceedings." The choice of Rule 74 prevailed.

Time Limits

The question of time limits returned from the perspective of the rules that require reporting of pending matters that remain unresolved after defined times. For social-security proceedings, the case becomes reportable when it has been "pending" for six months. But the case becomes pending 120 days following the later of the following two events: the filing of the transcript * * * (where the transcript is served upon a party before it is filed with the court), or the filing of a supplemental transcript. When the case is assigned to a magistrate judge for a report and recommendation, processing time is expanded by the need to allow time for objections and review. The time intervals set in the draft rules must be reviewed further to measure their consequences in this setting.

SSA DRAFT: § 406(b) FEE RULE

This draft is based on Rule 6(c) of the model submitted by SSA several months ago, with modest adjustments to fit standard Rules format:

(c) PETITIONS FOR ATTORNEY'S FEES UNDER 42 U.S.C. § 406(b).

(1) Timing of petition. Plaintiff's counsel may file a petition for attorney's fees under 42 U.S.C. § 406(b) no later than 60 days after the date of the final notice of award sent to Plaintiff's counsel of record at the conclusion of Defendant's past-due benefit calculation stating the amount withheld for attorney's fees. The court will assume that counsel representing Plaintiff in federal court received any notice of award as of the same date that Plaintiff received the notice, unless counsel establishes otherwise.

(2) Service of Petition. Plaintiff's counsel must serve a petition for fees on Defendant and must attest that counsel has informed Plaintiff of the request.

(3) Contents of petition. The petition for fees must include:

(A) a copy of the final notice of award showing the amount of retroactive benefits payable to Plaintiff (and to any auxiliaries, if applicable), including the amount withheld for attorney's fees, and, if the date that counsel received the notice is different from the date provided on the notice, evidence of the date counsel received the notice;

(B) an itemization of the time expended by counsel representing Plaintiff in federal court, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by number of hours expended);

(C) a copy of any fee agreement between Plaintiff and counsel;

(D) statements as to whether counsel:

(i) has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for work performed on behalf of Plaintiff at the administrative level;

(ii) is aware of any other representative who has sought, or who may intend to seek, fees under 42 U.S.C. § 406(a);

(iii) was awarded attorney's fees under 42 U.S.C. § 2412, the Equal Access to Justice Act, in connection with the case and, if so, the amount of such fees; and

(iv) will return the lesser of the § 2412 and § 406(b) awards to Plaintiff upon receipt of the § 406(b) award.

(E) any other information the court would reasonably need to assess the petition.

(4) Response. Defendant may file a response within 30 days of service of the petition, but such response is not required.

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TAB 8

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TAB 8A

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8. 18-CV-H: Rule 73(b)(1), (2) Consent to Magistrate Judge

Rule 73(b)(1), set out in full below, provides for referral of a civil action or proceeding to a magistrate judge. The clerk notifies the parties of their opportunity to consent by filing a joint statement or separate statements. The reference is made if all parties consent. The district judge and magistrate judge are typically informed of a party's response to the clerk's notice only if all parties consent to the referral. The purpose of providing anonymity is to implement the statutory requirement that rules for reference "shall include procedures to protect the voluntariness of the parties' consent."

The problem identified by 18-CV-H arises from the design of the CM/ECF system. As reported, the system automatically sends notice to the district judge or magistrate judge when a separate consent is filed. And we are told that the obvious solution is not possible – the system cannot be revised or manipulated to eliminate this feature.

Discussion at the April meeting concluded that this question should be pursued further. Discussion then, and also in the Standing Committee in June, suggested that two related issues be considered. One is closely related to the basic consent procedure: should Rule 73 address the procedure for withholding consent in a district that places magistrate judges for random assignment of cases alongside district judges? The second is only one step removed: should Rule 73 address the procedure for consent by a party joined to the action after all original parties have consented to a referral?"

These issues are presented by copying the April agenda materials that provide the full context and illustrate an amendment that addresses only the immediate issue. This version addresses the problem by forbidding individual consents. Only a joint consent statement is allowed. This is only an illustration. Further consideration may suggest other approaches.

The materials that follow the background discussion approach the two added issues: consent under the practice in some courts to make random initial assignments to magistrate judges, and consent by parties added after an assignment is made with consent of all original parties.

Background: The April 2018 Agenda Materials

This item arises from the intersection between electronic court dockets and a procedure adopted in earlier days to preserve the anonymity of a party who fails to consent to trial before a magistrate judge. The question is whether the rule should be amended to conform to the contours of the present CM/ECF system, even if there is some cost in doing so.

Rule 73(b)(1):

(b) CONSENT PROCEDURE.

(1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to

consent under 28 U.S.C. § 636(c). To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

(2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

Rule 73(b) implements 28 U.S.C. § 636(c)(2), which provides that when a magistrate judge is designated to exercise civil jurisdiction:

> the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate judge to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate judge may again advise the parties of the availability of the magistrate judge, but in doing so, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. *Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.*

The requirement of Rule 73(b)(1) that a district judge or magistrate judge may be informed of a response to the clerk's notice only if all parties have consented to the referral is designed to "protect the voluntariness of the parties' consent." A party who fails to file a statement consenting to the referral can trust that the judge will know only that not all parties consented.

The problem identified by 18-CV-H arises from the routine operation of CM/ECF systems. When a party files a consent to refer the action to a magistrate judge the filing is automatically routed to the district judge's computer. So much for anonymity.

The best way to address this issue would be to find a means of preventing automatic notice to the district judge when a consent is filed. Programming the CM/ECF system to accomplish this result, however, seems to be impossible. Waiting for the design of the next next-gen system is not an attractive option.

Failing solution through the CM/ECF system directly, Rule 73(b)(1) could be amended to track the language of § 636(c)(2), displacing the present rule direction to "file" the statement of consent. Instead, the rule could direct that each party shall communicate to the clerk its statement consenting to the referral, and further direct that the clerk file the statements only if all parties consent. That approach would impose a heavy burden on clerks' offices, fraught with opportunities for error.

CV-18-H proposes a solution easily drafted: "the parties must jointly ~~or separately~~ file a statement consenting * * *." Leaving the rule in this form might at times defeat referral to a

magistrate judge when all parties are willing but none is willing to take the lead in advancing the question. This approach would require discussion among the parties. Something might be lost by that. Each party might prefer trial before a magistrate judge, but hesitate to initiate the discussion. To ask consent is to invite bargaining about other matters. To ask might be read to imply concern that the assigned district judge is less favorable to the party who opens the consent discussion than to other parties, causing the others to react in a familiar pattern – "I thought I wanted it, but knowing that you want it makes me not want it." Some help from the court could be useful, and may be provided through the initial scheduling order procedure, *see* Rule 16(c)(2)(H).

An example of help from the court is provided by the Southern District of Indiana Form "Notice, Consent, and Reference of a Civil Action to Magistrate Judge." The Form, a modification of AO 85, is attached. It is issued to the plaintiff's attorney when the case is opened. A prominent NOTICE in the form states that the form can be filed only if executed by all parties. In practice, a plaintiff's attorney who consents to referral transmits the form to all other attorneys in the case. If all sign on, the form is filed. This practice seems to work. And it has an added advantage that the form addresses an issue not covered by Rule 73: it allows any party to object within 30 days from reassignment of the case to a different magistrate judge.

It is not clear whether this practice can be fostered without somewhat greater revision of Rule 73(b)(1). The rule requires written notice to all parties. That can be accomplished by providing the form to each party when it first appears. There might be some advantage in sending notice from the court to all parties, even if all know the plaintiff has the form and can defeat a reference by simply remaining quiet. Some other party, reminded by the form, might initiate discussion.

Remembering that the object is to forestall filing any party's consent with the court until all parties consent, it may work to revise the second sentence of Rule 73(b)(1) a bit more extensively:

> (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent [to a referral] under 28 U.S.C. § 636(c). ~~To signify their consent, the parties must jointly or separately file a statement consenting to the referral.~~ The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.] ~~A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.~~[17] [18]

[17] This sentence seems superfluous if the rule text prohibits individual consents.

[18] The rule does not say what happens after all parties consent. No questions have been raised about this silence. A question might be raised whether consent of all parties should require referral. It seems better to forgo consideration of this question. Local practices may vary, and there may be times when the designated magistrate judges cannot handle more cases.

Yet other approaches are possible. It may be that the direction to adopt procedures to protect the voluntariness of the parties' consent does not require anonymity. Anonymity protects against the risk that a district judge who knows that a particular party preferred trial before a magistrate judge may, consciously or subconsciously, resent the preference. Many judges might instead be grateful – although then the party who did not consent might have an equal and offsetting concern. But anonymity has been built into the rule for many years. Absent problems greater than those caused by limitations of the CM/ECF system, it is better to continue to provide anonymity.

Finally, it may be appropriate to address this specific and narrow issue without undertaking to reopen other questions that might be raised about referrals for trial. One illustration arises from random initial assignments to magistrate judges, subject to reassignment to a district judge if any party objects to the assignment. Another arises when all parties consent and later, perhaps much later, another party is joined. Can that party undo the progress made before the magistrate judge by failing to consent? How far might Article III mandate a right to do so? Courts deal with these and other problems now. Seeking resolution by amending Rule 73 should be approached only when there is a strong prospect of providing good answers to questions that have generated problems that cannot be handled without further rule amendments. It may prove better to address only the immediate need to protect anonymity against the machinations of the CM/ECF program.

TAB 8B

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United States District Court
Southern District of New York

To: Hon. Jesse M. Furman, Chair, Pro Se Committee

From: Maggie Malloy

Re: Fed. R. Civ. P. 73's procedures for filing form for consenting to jurisdiction of a magistrate judge

Date: February 15, 2018

How can Federal Rule of Civil Procedure 73 be revised so that district and magistrate judges are not informed of the parties' positions on consent to jurisdiction of the magistrate judge unless *all* parties have consented?

The statute on the jurisdiction and powers of United States magistrate judges requires that "[r]ules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(1). Presumably to protect the voluntariness of consent, Federal Rule of Civil Procedure 73(b) instructs that the district or magistrate judge must not be informed of the parties' positions on consent unless "all parties have consented to the referral." But the Rule also states that the parties may *separately* file consent forms. (The Rule is quoted below.)

Documents filed with the court are filed using the court's electronic case filing system, and are thus immediately available to the district and magistrate judge assigned to the case. So a party filing a consent form using the ECF system is providing notice to the district judge and magistrate judge of the party's individual consent even if not all parties have consented, contrary to the intent of the statute and rule. The same is true if the clerk's office scans and dockets a consent form submitted by a pro se litigant.

The clerk's office has long struggled with how to deal with this situation. Parties, especially pro se parties, frequently sign and submit the consent forms with only their own signatures on them.[1] In the past, clerk's office staff have sometimes sent these individually signed consent forms to the district judge, with a memo (a "5(d) memo") stating that only one party signed the form. In one of these cases, the district judge memo-endorsed the 5(d) memo: "Counsel for Defendants must also agree and sign." In other cases, a pro se party's

[1] The Eastern District has modified the AO-provided consent form to instruct litigants not to submit it unless all parties have signed it.

consent form has been scanned and docketed, consistent with the court's policy for pro se submissions. In one of those cases, the judge referenced in an opinion the fact that the pro se plaintiff had signed and filed a consent form, and that the judge's deputy had reached out several times to the defendant to see if the defendant was going to consent.

These cases show not only that judges are being informed about individual parties' positions on consent, contrary to the Rule, but also that the voluntariness of parties' consent may be compromised by this procedure.

This problem could be address by simply deleting the phrase "or separately" from the Rule:

> (b) Consent Procedure.
>
> (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly ~~or separately~~ file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
>
> (2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

The clerk's office would then be authorized to reject consent forms that were filed without the consent of all parties.

The relevant ECF event, Consent to Jurisdiction by US Magistrate Judge, should include a warning to filers (if it doesn't already) that the document should only be docketed if all parties have consented.

UNITED STATES DISTRICT COURT

for the

Southern District of Indiana

_____	)	
Plaintiff	)	
v.	)	Civil Action No.
_____	)	
Defendant	)	

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO MAGISTRATE JUDGE

Notice of magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to the currently assigned magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to magistrate judge's authority. If all parties consent to have the currently assigned United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings, they should sign their names below (electronically or otherwise). Should this case be reassigned to another magistrate judge, any attorney or party of record may object within 30 days of such reassignment. If no objection is filed, the consent will remain in effect. NOTICE: This document is eligible for filing only if executed by all parties. The parties can also express their consent to jurisdiction by a magistrate judge in the Case Management Plan.

Parties' printed names	*Signatures of parties or attorneys*	*Dates*
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

IT IS ORDERED: This case is referred to the currently assigned United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Should this case be reassigned to a magistrate judge other than the magistrate judge assigned the date of this order, any attorney or party of record may object within 30 days of such reassignment. If no objection is filed, the consent will remain in effect.

Date: _____

_____
District Judge's signature

_____
Printed name and title

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TAB 8C

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Addressing Random Initial Assignments

As noted above, preliminary discussions asked whether Rule 73 should include an express provision for withdrawing consent after an initial assignment to a magistrate judge that leaves it to the parties to find a way to withhold consent.

(b) **CONSENT PROCEDURE.**

(1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent [to a referral] under 28 U.S.C. § 636(c)—or to refuse to consent to an automatic referral [by random initial assignment]. ~~To signify their consent, the parties must jointly or separately file a statement consenting to the referral.~~ The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.] A party may refuse to consent to an automatic referral by filing a refusal. Refusal by any party withdraws the action or proceeding from the magistrate judge. A district judge or magistrate judge may not be informed of a [any?] party's [consent or] refusal to consent ~~response to the clerk's notice only if all parties have consented to the referral~~.

* * * * *

Drafting this approach presents several questions.

What is the best way to describe the practice informally referred to as placing magistrate judges "on the wheel"? Is "automatic referral" accurate? Does it add anything to describe the practice as "random initial assignment," or does that impliedly exclude some assignment systems that should be included?

Is it helpful to add an explicit statement that refusal by any party withdraws the action? Is this thought better expressed by other formulas: "cancels," "defeats," "terminates," "ends" "the reference?" Would a positive statement be better: "requires assignment to a district judge"?

As compared to an amendment that addresses only consent, it seems useful to protect the identity of a party that refuses to consent. Although it may seem an abundance of caution, it may be wise to carry forward the prohibition on information about consent by one or more parties.

Late-Added Parties

Proceedings may begin before a magistrate judge with the express or tacit consent of all initial parties, and perhaps proceed for some time before joinder of a later-added party. The Article III rights of the new party cannot be waived by the original parties. Magistrate judges are alert to this problem, and exercise care to determine whether the new party consents to proceeding before the magistrate judge. There may be no need to generate new rule provisions, both because the need for consent will not often be overlooked and because explicit rule text may not do much to remedy

the oversight.

But affirmative or negative approaches might be taken if we were to address the problem of consent by parties joined after consent has been given by all who were parties at the time of the consent. The positive approach would require the late-added party to file a refusal within a defined period to defeat the referral. The negative approach would cancel the referral absent consent by the late-added party. Neither approach would do much to protect anonymity. Anonymity could be protected by requiring renewed consent by all parties upon joinder of a new party, but that would facilitate second-thoughts by a party who consented at the outset but who has lost on a ruling by the magistrate judge. The second-thought risk might even lead to attempts to join a new party for the purpose of refusing to join in a new all-parties consent.

Late-Added Parties Alternative 1

(b) **CONSENT PROCEDURE.**

(1) *In General.*

(A) When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent [to a referral] under 28 U.S.C. § 636(c) — or to refuse to consent to an automatic referral [by random initial assignment]. ~~To signify their consent, the parties must jointly or separately file a statement consenting to the referral.~~ The parties may consent by filing a joint statement signed by all parties. [No party may file a consent signed by fewer than all parties.] A party may refuse to consent to an automatic referral by filing a refusal. A district judge or magistrate judge may not be informed of a [any?] party's [consent or] refusal to consent ~~response to the clerk's notice only if all parties have consented to the referral~~.

(B) A party joined [to the action or proceeding] after it has been referred to a magistrate judge [automatically or by consent of the parties] may file a refusal to consent no later than [30] days after being joined.

Alternative 2

(B) A party joined [to the action or proceeding] after it has been referred to a magistrate judge [automatically or by consent of the parties] may file a consent [no later than [30] days after being joined] [at any time before the referral otherwise ends].

The Committee Note to the Alternative 2 version that requires consent within 30 days would state that the referral is automatically ended if the new party does not consent. It might add an observation about what happens if there is no consent but all parties, including the new party, carry on before the magistrate judge under the original referral. Or the rule text could say that: If a consent is not timely filed, the referral is automatically withdrawn.

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9. Rule 7.1: Disclosure Statements

Several reasons prompt another look at the extent of the disclosures required by Rule 7.1.

Rule 7.1 is narrow:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE: A nongovernmental corporate party must file 2 copies of a disclosure statement that:
  (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or
  (2) states that there is no such corporation.

Subdivision (b) sets the time to file and establishes a duty to supplement if any required information changes.

Rule 7.1 was developed through an all-advisory-committees subcommittee. The purpose of the joint enterprise was to craft Appellate, Bankruptcy, Civil, and Criminal Rules as nearly uniform as differences of context allow. Many additional possible disclosure requirements were considered and put aside as unwieldy.

Other advisory committees have recently explored the value of additional disclosures. Modest changes have been adopted or proposed.

Last June the Standing Committee approved adoption of amendments of Appellate Rule 26.1 that expanded the nongovernmental corporation disclosure requirement to apply "to a nongovernmental corporation that seeks to intervene." That provision could readily find a place in Rule 7.1. The Appellate Rules amendments included two additional disclosure provisions that would be inapposite in the Civil Rules – in a criminal case, identification of "any organizational victim of the alleged criminal activity," and in a bankruptcy case, disclosure of debtors not named in the caption and, for a debtor that is a corporation, the nongovernmental corporation disclosure information.

The Standing Committee also approved publication of amendments of Bankruptcy Rule 8012. Amended Rule 8012(a) would, like Appellate Rule 26.1, extend the nongovernmental corporation disclosure requirements to a would-be intervenor. As with the Appellate Rule, that provision could readily find a place in Rule 7.1. Amended Rule 8012(b) would require disclosures about debtors in terms identical to Appellate Rule 26.1(c). It seems likely that the Bankruptcy Rule will cover the needs of the district courts as well as the bankruptcy courts, but that assumption should be confirmed.

The tradition of uniformity in all parallel rules suggests that Rule 7.1 be amended to include nongovernmental corporations that seek to intervene. The case is not airtight, but it is

strong. It might be argued that there is something different about the civil litigation setting, perhaps that it is better to support consideration of a motion to intervene without knowing whether granting the motion would require recusal. But the counter-argument seems persuasive: an interest that would require recusal from the case also should suffice to require recusal from deciding whether to allow intervention.

It will be easy to draft an amendment of Rule 7.1 that simply incorporates the intervenor provisions of the Appellate and Bankruptcy Rules. The operative language would be copied into the opening lines:

(a) A nongovernmental corporate party and a nongovernmental corporation that seeks to intervene must file 2 copies of a disclosure statement that:

Given the earlier action on the Appellate and Bankruptcy Rules, it might be possible to recommend adoption without publication. The change is not merely technical, however, and it remains possible that reasons could be found for distinguishing the Civil Rules context. And publication will be required if additional amendments come to be proposed.

Two narrowly focused proposals for additional disclosures have been made.

One proposal, 18-CV-W, is submitted by the National Association of Professional Background Screeners. It would "require natural persons who are parties to civil and criminal cases to file a disclosure statement" that includes the party's "full name and full date of birth." This information is characterized as "non-sensitive." The proposal would make the information available "as a search criteria [sic] * * * in the PACER system in the same manner that SSNs are available in the bankruptcy system" following disclosure under Bankruptcy Rule 1007(f). Although initially framed as a proposal to change "Judicial Conference policy," it ends up recommending a new Rule 7.2 to require disclosure.

Bankruptcy Rule 1007(f) requires an individual debtor to submit a verified statement that sets out the debtor's full social security number. The instructions to Official Form 121 explain that the form "must be submitted separately and must not be included in the court's public electronic files." The instructions also recognize, however, that the full number will be available to creditors, the U.S. Trustee or bankruptcy administrator, and the trustee assigned to the debtor's case. The PACER system enables a creditor to search for the number, but only by including the full number in the inquiry – the idea is that a creditor who already has the full number of its debtor can use it to determine whether the bankruptcy proceeding is for the same person.

The professional background screeners wish to have disclosure of full names and birthdates of all criminal defendants and all parties to civil actions, and access through PACER, to improve the quality of employment and tenant background reports. Their submission focuses on the dangers of incomplete information about criminal convictions, without saying whether a prosecution is reported if it ends in acquittal. The risks to confidentiality are addressed by stating that "dates of birth are not a gateway to identity theft," and in any event are often available from

public sources. Access by PACER would be available for search by asking for matches for a full birthdate provided by the person making the inquiry – "we already have that information."

For the rules committees, the first question is whether courts and other parties need this information to advance procedural goals. The Enabling Act does not focus on adopting court rules to serve the interests of commercial data gatherers. Any procedural purpose that might be found, moreover, must be weighed against the sense of privacy that many people have about personal identifying information and the risks of unauthorized access to electronic records, even court records. Defendants, both civil and criminal, may have a heightened sense that the misfortune of being dragged into unwanted litigation does not warrant disclosure. The Association advanced a similar proposal in 2005, 05-CR-008. It was not taken up then. There is no clear reason to take it up now. Even if the Criminal Rules Committee should decide to take it up, the question will remain whether the potential gains from disclosing civil litigation experience to employers and landlords are the same as for criminal defendants.

The other specific proposal, 18-CV-S, was submitted by Judge Thomas S. Zilly. The proposal is to amend Rule 7.1 to require "disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar entity." The concern is that diversity jurisdiction for many noncorporate entities is determined by the citizenship of each owner. And it can be difficult even to know who the owners are, much less to identify their citizenships. One risk is that a federal court will decide a case outside its subject-matter jurisdiction, yielding a judgment that is beyond collateral attack. Another risk is that the lack of jurisdiction will be discovered (or revealed) after substantial progress in the case but while time remains – even on appeal – to order dismissal.

Disclosure for "an LLC, trust, or similar entity" can support informed recusal decisions as well as accurate determinations of subject-matter jurisdiction. Each function can be examined separately.

Rule 8(a)(1) directs that "a pleading that states a claim for relief must contain (1) a short and plain statement of the grounds for the court's jurisdiction * * *." Looking first to an LLC, a plaintiff LLC in a diversity action should plead its own citizenship, and plead what it can about the citizenship of an opposing LLC. It is settled that an LLC acquires the citizenship of every owner. If an owner is itself an LLC, the downstream LLC acquires the citizenship of every owner of the upstream LLC. And if an LLC is found at that level, the search goes endlessly higher. Even at the first level, information about the owners may be difficult for opposing parties to find. Indeed, it may at times be difficult for an LLC to determine its own citizenship. Accurate pleading may be hard. But still it may be fair to demand that an LLC plaintiff learn, plead, and also disclose its citizenship. Disclosure might support a short and plain statement in the complaint that simply names all citizenships, leaving to the disclosure statement the details as to each owner. Leaving for disclosure the details of the citizenship of a defendant LLC or other noncorporate entity seems even more attractive. At the same time, it might be asked whether disclosure is truly needed – whether vigorous insistence on pleading requirements can do the job without duplicating the information by disclosure.

Disclosure of information about LLC ownership can support informed recusal decisions even if citizenship is not disclosed. A disclosure requirement might be drafted in terms that mimic present Rule 7.1 by requiring disclosure of any parent LLC or – what? not a publicly traded LLC, but an LLC that owns 10% or more of the party LLC?

Many other forms of noncorporate entities are involved in the same diversity of citizenship snares as LLCs, and may pose similar recusal issues. Judge Zilly suggests that a rule include "an LLC, trust, or similar entity." Apart from a traditional trust with an active trustee, citizenship questions affect real estate trusts, business trusts, partnerships, limited partnerships, joint ventures, unincorporated associations, and still other forms of collaborative activity. The rules for establishing diversity jurisdiction are settled for many forms, and not clearly settled for some others.

Recusal information likely presents disclosure questions that are more practical than conceptual. How often will it happen that disclosure is needed to reveal recusal problems that surround a noncorporate entity party? These questions were explored in developing the first set of disclosure rules, prompted by the wide variety of disclosure requirements to be found in local circuit and district rules. It proved difficult to identify a useful middle ground between the limited nongovernmental corporate disclosure requirement actually adopted and wide-open disclosure requirements.

In all, the time may have come to take another look at general disclosure requirements. Interest continues in other committees. If the work is to be taken up, it likely will help to create another all-advisory-committees subcommittee to work toward proposals that are as uniform as feasible, given the distinctive character of practice under the separate sets of rules.

It will be useful to engage in preliminary discussion of the gains to be had from expanding Rule 7.1 disclosure requirements. It also may be possible, but perhaps more difficult, to begin asking whether there may be unique aspects that distinguish civil actions from other types of litigation ― disclosure to assist the determination of diversity jurisdiction is an obvious example, but there may be others. Consideration of the potential burdens that expanded disclosure statements may impose on courts and parties also will be welcome.

TAB 9B

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UNITED STATES DISTRICT COURT
Western District of Washington
United States Courthouse
700 Stewart Street, Suite 15229
Seattle, Washington 98101

Thomas S. Zilly
Senior Judge

May 31, 2018

Honorable John D. Bates
United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Re: Citizenship of Non-Corporate Entities for Purposes of Diversity Jurisdiction

Dear Judge Bates:

I write to you as the chair of the Advisory Committee on the Federal Rules of Civil Procedure to request that the Committee consider a revision to Rule 7.1 or a new rule to address the problem of determining the citizenship of a limited liability company ("LLC") or similar entity in a diversity case. This letter is a follow-up to our recent telephone conversation about this subject.

Two cases I am handling will illustrate the problem. In the *Stalwart Capital* case, I had a 10-day jury trial about 2 years ago that resulted in a defense verdict and a substantial award of attorneys' fees. On appeal, after full briefing, the Ninth Circuit remanded for further findings as to whether there was diversity jurisdiction when the case was originally filed. Plaintiff and three of the defendants are limited liability companies, meaning that each party is a citizen of each state in which its owners/members "are citizens." *Johnson v. Columbia Prop. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006). When *Johnson* was decided, every circuit to address the issue had treated an LLC like a partnership for purposes of diversity. This approach is consistent with the Supreme Court's refusal to extend the corporate citizenship rule to non-corporate entities. *See Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990); *see also Americold Realty Trust v. Conagra Foods, Inc.*, 136 S.Ct. 1012 (2016) (holding that citizenship of a real estate investment trust was based on the citizenship of its members, not just the trustee).

In a second case, involving a suit by an LLC against a judgment debtor, a trust, and a trustee, the plaintiff moved for a preliminary injunction, and massive briefs and declarations followed. Although a Rule 7.1 disclosure was filed, it did not address the *Johnson* problem. I requested additional briefing and the matter remains pending.

These cases illustrate the problem in diversity cases when an LLC, trust, or similar entity is a party. I believe some expanded disclosures would help us to avoid unnecessary diversity-based litigation in the federal courts. Attached is a recent article from the *New York Times* (April 30, 2018) relating to the common use of LLCs to hold real property and the difficulty in establishing true ownership.

I ask the Committee to consider a rule that would require disclosure of the names and citizenship of any member or owner of an LLC, trust, or similar entity. We are presently exploring a local rule to address this problem, but I believe other courts will face the same uncertainty in dealing with these issues.

As a former member and chair of the Advisory Committee on the Federal Rules of Bankruptcy Procedure (2004-2007), I understand the importance of your work and the necessary process in developing national rules. I thank you in advance for any consideration of this request.

Kind personal regards,

Thomas S. Zilly

Thomas S. Zilly

Enc.
cc w/enc: Chief Judge Ricardo S. Martinez
U.S. District Court, Western District of Washington

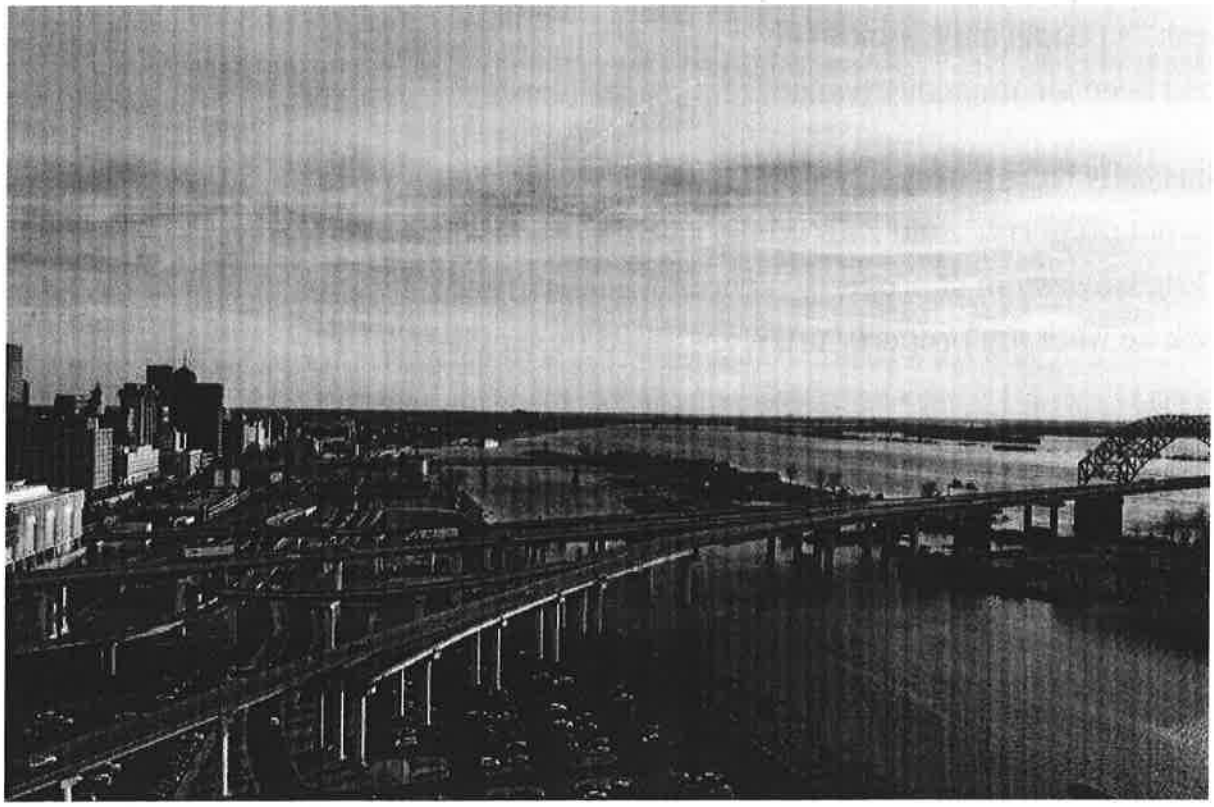
The New York Times

Anonymous Owner, L.L.C.: Why It Has Become So Easy to Hide in the Housing Market

A way to protect property owners from personal liability has also turned out to be handy for enabling problematic behavior, like laundering money or being a bad landlord.

By Emily Badger

April 30, 2018



Parcel surveys of Memphis have revealed that a majority of the most blighted properties belong to L.L.C.s. Many have effectively gone out of business without selling the homes, leaving their ownership in limbo. Robert Rausch for The New York Times

When Sean Hannity, the popular Fox News host, was revealed this month to be a property owner and landlord of considerable scale, it highlighted how opaque the housing market has become.

Owning real estate in limited liability companies, as The Guardian reported that Mr. Hannity does, is a perfectly legal and increasingly popular practice. But the whiff of secrecy — and the umbrage Mr. Hannity has taken after the secret got out — speaks to the growing role of L.L.C.s in the nation's housing market.

L.L.C.s shield property owners from personal liability while obscuring their identities. In some cases, so much anonymity also enables money laundering, and it can mean that tenants struggle to hold landlords accountable, that cities fail to fix blight and that researchers can't answer basic questions about the housing market.

As much as people may want to keep their financial dealings private, the housing market has long been an unusually transparent place.

"We basically have a property system where you're supposed to be able to look up who owns what property," said Dan Immergluck, a professor at Georgia State University. "Our English system of property recording doesn't really give you that privacy. People can look up what my property taxes are any time they want."

L.L.C.s have eroded that expectation. There is little good national data tracking the rise of L.L.C.s. But in 2015, according to the Rental Housing Finance Survey from the Census Bureau and the Department of Housing and Urban Development, about 15 percent of all rental properties were owned by L.L.C.s, limited liability partnerships or limited partnerships. That represented one-third of all rental units, and that can include single-family houses or apartment buildings.

Put another way: 92 percent of rental properties in America back in 1991 were held by individual owners whose names tenants could easily know. By 2015, that number had fallen to 74 percent, driven largely by the growth of L.L.C.s, although the market today includes other kinds of institutional investors as well.

In the single-family market, which includes investors who built rental empires after the housing crash and others who've used empty properties to store wealth, about 9 percent of home sales last year were to L.L.C.s, according to ATTOM Data Solutions, a real estate data company. That's twice the share a decade ago. The rent-to-own company Vision Property Management, for example, has bought homes across 24 states through nearly two dozen L.L.C.s.

In his own research, Mr. Immergluck tried to identify the largest buyers of foreclosed properties in the Atlanta area. But because one unidentified buyer could be behind many L.L.C.s, it's hard to know who is acquiring the most property, or which property owners are behind the most code violations or the most evictions.

That makes it impossible for city officials to aim scarce resources at the most problematic owners. And it makes it hard for researchers to know, for example, if property has become concentrated among fewer owners.

Because the stakes are so high and the spillovers significant, there has always been a public element to private property, said Susan Pace Hamill, a law professor at the University of Alabama who has written about L.L.C.s since the late 1980s.

"Should tenants have a right to know who they're renting from?" she said. "Should cities have a right to know who owns the property? The answer is a resounding yes."

L.L.C.s today hide what should be public information, she argues.

"I am quite disturbed by that," she said. "Having participated in the evolution of L.L.C.s from their early days, I feel like they're being abused."

Wyoming passed the first L.L.C. statute in 1977 at the prodding of oil and gas interests, creating an entity with the liability protections of a corporation without the tax responsibilities of one. Hardly anyone took advantage of the tool, and few states followed until the I.R.S. blessed L.L.C.s a decade later. They then quickly became the entity of choice for all kinds of businesses, and by the mid-1990s, all 50 states had L.L.C. laws.

In Milwaukee, according to research by a Harvard doctoral student, Adam Travis, L.L.C.s have grown to about a quarter of the rental market in the two decades since they became legal in the state.

The original idea was never specifically about real estate, and anonymity wasn't particularly the appeal. But over time, Ms. Hamill said, state laws have made it easier to conceal who's behind L.L.C.s. So they have simultaneously grown more common and less transparent.

L.L.C.s are required to list a registered agent who can receive legal and government notifications, but they're often not required to name the people who financially benefit from the investments.

Luxury condominiums in New York, like these in the Time Warner Center at Columbus Circle, are popular with foreign billionaires, many of whom conceal their identity behind L.L.C.s.
Emon Hassan for The New York Times

The downsides of all of this have become clear, at both high and low ends of the market. In expensive cities like New York and Miami, L.L.C.s have helped foreign investors launder money through luxury condo purchases. In poorer cities like Memphis and Milwaukee, they have enabled investors to walk away from vacant properties and tax bills.

For renters, or tenants mired in rent-to-own contracts, these entities mean they often don't know whom they're dealing with — or who's evicting them.

These consequences worry even real estate lawyers who advise their clients to use L.L.C.s.

"The lawyer in me that represents clients says 'privacy, secrecy, keep my people out of the papers,' " said William Callison, a lawyer in Denver who specializes in L.L.C. and affordable housing law. "The policy guy in me says, 'Well, wait a second.' "

Why? "Because good things happen in the light," he said, "and bad things happen in the dark."

In Memphis, parcel surveys of the city have revealed that a majority of the most blighted properties belong to L.L.C.s. Many have effectively gone out of business without selling the homes, leaving their ownership in limbo. When the city has tried to hold some responsible, there is no one to contact — the duties of those listed as registered agents having expired along with the companies.

"The liability protections we're talking about are liability protections from external forces," said Steve Barlow, a Memphis lawyer who directs Neighborhood Preservation, Inc., a group trying to fight blight there. L.L.C.s are supposed to personally shield owners from, say, a tenant who breaks an ankle on the property. "It shouldn't be a protection from you, yourself abandoning it," he said.

There should be a way, he and Ms. Hamill believe, to keep the liability and tax benefits of L.L.C.s without all the secrecy. Unless or until there is, cities like Memphis are left with properties no one wants to buy and frustration from the public.

"I hear that in community meetings all the time: 'What's being done with this property? Why can't you guys do something with it?' " said Robert Knecht, the director of public works in Memphis. "You have to explain to them our job is to get the owner to court."

But it is no easy thing to get a faceless company to court.

Matthew Goldstein contributed reporting.

Emily Badger writes about cities and urban policy for The Upshot from the San Francisco bureau. She's particularly interested in housing, transportation and inequality — and how they're all connected. She joined the Times in 2016 from The Washington Post. @emilymbadger

A version of this article appears in print on April 30, 2018, on Page B1 of the New York edition with the headline: The Opaque World of Ownership by L.L.C.

18-CV-W
18-CR-E

July 20, 2018

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Chief Counsel
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544

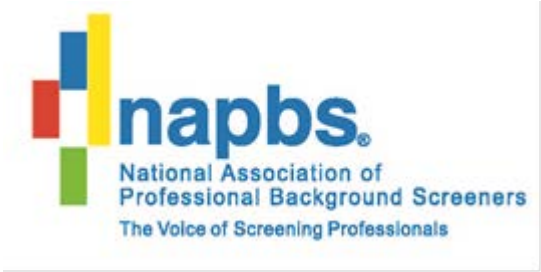
RE: **Proposed Change to PACER**

Dear Ms. Womeldorf:

Pursuant to 28 U.S.C. § 2072, the National Association of Professional Background Screeners ("NAPBS") respectfully submits this proposed change to the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure, and the Public Access to Court Electronic Records ("PACER") federal court record system. As discussed below, in order to ensure more speedy, accurate, and reliable background checks and related services, NAPBS recommends the Committee on Rules of Practice and Procedure propose two changes to Judicial Conference policy: first, to require natural persons who are parties to civil and criminal cases to file a disclosure statement in a manner similar to the disclosure statement required by Rule 1007(f) of the Federal Rules of Bankruptcy Procedure, except that instead of submitting one's social security number ("SSN"), the party would submit his or her full name and full date of birth; and second, to make this non-sensitive personally identifying information available as a search criteria for criminal and civil cases in the PACER system in the same manner that SSNs are available in the bankruptcy system as a search criteria.

The PACER system today does not offer an effective way to ensure that the name searched in the federal criminal records system can be verified with a personal identifier such as a date of birth or Social Security Number. Without an effective identifier present in most federal criminal record cases in PACER, professional background screeners must choose between including the record in a background check report – which may not belong to the individual and will therefore be disputed, slowing the employment placement down significantly for a job candidate, or not reporting it and potentially putting other employees and employers at risk if the record does belong to the applicant. The unavailability of a key identifier in this system impedes the ability of professional background screeners to accurately associate a federal criminal record with a specific individual.

The NAPBS is an international trade association of over 850 member companies. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. NAPBS members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data. NAPBS members also include court-record retrieval services and companies that provide access to public record data to background screeners.



The reports prepared by NAPBS's background screening members are used by employers and landlords every day to ensure that workplaces and residential communities are safe for all who work, reside or visit there. Background reports help ensure the safety of the elderly in nursing homes, patients in hospitals, children at school, and countless others in nearly every facet of daily life. Background reports are also essential to homeland security.

NAPBS's background screening members must comply with the federal Fair Credit Reporting Act ("FCRA") in furnishing background reports to employers and landlords. See, 15 U.S.C. §§ 1681a, et seq. The FCRA imposes accuracy requirements. Id. § 1681e(b). Personal identifiers are key to accuracy; without them, a background screener cannot determine whether a public court record relates to the individual about whom a report is being prepared. If key identifiers like full names and full dates of birth are unavailable, employers and landlords throughout the United States will receive background reports containing "false negatives." For example, a prospective employer will not know whether an applicant was convicted of a serious crime, and the individual may be hired and placed in a position of access to vulnerable third parties or entrusted with access to money and critical assets. The inability to provide accurate and complete background reports increases the risk of harm to American citizens. And federal courts have recognized that businesses have a legitimate public policy interest in managing the risk associated with hiring or leasing to ex-offenders. See, *El v. SEPTA*, 479 F.3d 232, 245 (3rd Cir. 2007) ("If someone with a violent conviction presents a materially higher risk than someone without one, no matter which other factors an employer considers, then [an employer] is justified in not considering people with those convictions."). Indeed, many federal agencies examine public court records maintained by PACER when conducting background checks of potential federal employees, leaving the U.S. government itself vulnerable to the impact of false negatives. (A number of NAPBS members partner with these federal agencies in conducting these background checks.)

By contrast, there is no risk of harm to parties to civil and criminal cases if they are required to file a confidential statement with the court clerk disclosing their full names and full dates of birth. NAPBS members are not asking the courts to disclose this information; we already have that information. Rather, we are asking for PACER to enable users of the system to conduct searches using the name and date of birth as a search criteria. Presently, the bankruptcy-side of PACER permits conducting this type of search with SSNs. And unlike SSNs, dates of birth are not a gateway to identity theft. For many people, dates of birth are already available in the public sphere. Notable public figures will have their dates of birth posted on Wikipedia. The vast majority of state court systems make dates of birth publicly available. And forty-nine out of fifty state data breach notification laws do not treat dates of birth as sensitive personal information subject to breach notification requirements.

If the bankruptcy court system is comfortable mandating that natural persons submit their SSNs to the court clerk, and if PACER has no concerns in permitting the public to run a search of the PACER bankruptcy court system using the SSN, then we would submit the Judicial Conference should have no concerns with requiring the collection of full dates of birth and enabling dates of birth to be a search field when conducting criminal and civil case searches on PACER.

Accordingly, NAPBS respectfully recommends the Committee on Rules of Practice and Procedure consider and implement the following specific rule changes:

- Add a Rule 5.2 to the Federal Rules of Criminal Procedure requiring all defendants who are natural persons to file a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;

- Add a Rule 7.2 to the Federal Rules of Civil Procedure requiring natural persons who are parties to cases to submit a confidential disclosure statement to the clerk of court disclosing their full names and dates of birth;

- Direct the clerks of the United States District Courts to input the full names and dates of birth into the PACER system in the same manner that bankruptcy court clerks input SSNs; and

- Direct the United States Administrative Office of Courts to enable full names and full dates of birth as search criteria when users of the PACER system conduct searches of criminal and civil case records.

When Congress enacted the E-Government Act of 2002, it articulated a number of policy purposes. One of them was "to promote access to high quality Government information…." See, 44 U.S.C. § 3601 Note. Another purpose was "to provide enhanced access to Government information and services in a manner consistent with laws regarding the protection of personal privacy…." Id. What NAPBS proposes advances both purposes.

Thank you for your consideration, and please feel free to reach out with any questions or concerns.

Sincerely,

Melissa Sorenson, Esq.
Executive Director

CC: The Honorable Wm. Terrell Hodges, Chair
Committee on Court Administration and Case Management

The Honorable David G. Campbell, Chair
Committee on Rules of Practice and Procedure

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TAB 10

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10. Final Judgment in Consolidated Cases: Rule 42(a)(2)

Introduction: *Hall v. Hall*, 138 S. Ct. 1118 (2018), ruled that cases consolidated under Rule 42(a) retain their separate identities for purposes of appeal finality, no matter how complete the consolidation. A judgment that disposes of all claims among all parties in what began as a separate action is a final decision that establishes the right to appeal under 28 U.S.C. § 1291. At the same time, Chief Justice Roberts concluded the Court's opinion by observing that "changes with respect to the meaning of final decision 'are to come from rulemaking, . . . not judicial decisions in particular controversies.'" If the Court's interpretation of Rule 42 "were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend provisions accordingly."

As explored below, this suggestion about possible rulemaking may be bolstered by the grounds of decision. The Court relied almost entirely on what it viewed as an unbroken line of decisions that began with the first explicit authorization of consolidation by an 1813 statute. Practical considerations barely figured in the opinion.

The Appellate Rules Committee considered *Hall v. Hall* and made this report to the Standing Committee in June:

> [T]he Committee considered the recent Supreme Court decision in *Hall v. Hall*, 138 S. Ct. 1118 (2018), which held that cases consolidated under Fed. R. Civ. P. 42(a) retain their separate identities at least to the extent that final decision in one is immediately appealable. While this decision might raise efficiency concerns in the courts of appeals, by permitting separate appeals that deal with the same underlying controversy, and might raise trap-for-the-unwary concerns for parties in consolidated cases who do not appeal when there is a final judgment in one of consolidated cases but instead wait until all of the consolidated cases are resolved, the Committee decided that this matter is appropriately handled by the Civil Rules Committee. The Committee expects to keep an eye on the trap-for-the-unwary concern and may consider whether provisions of the Appellate Rules regarding consolidation of appeals present any similar issues.

Agenda Book, Committee on Rules of Practice and Procedure, June 12, 2018, p. 86.

Although the Appellate Rules Committee has nominated the Civil Rules Committee to take the lead, it is appropriate to consult with them during the process of deciding whether to pursue this topic further.

Hall v. Hall in Detail: The litigation in *Hall v. Hall* began as a single action, but spun into two actions. The underlying dispute involved family relationships and money. The first action was brought by a mother, in her own capacity and as trustee of her inter vivos trust, against her son and his law firm. Her "claims – for breach of fiduciary duty, legal malpractice, conversion, fraud, and unjust enrichment – concerned the handling of her affairs by [her son] and his law firm * * *."

When the mother died she was replaced by her daughter as trustee and personal representative. The defendant brother initially counterclaimed against her in both capacities for intentional infliction of emotional distress, as well as for other wrongs that eventually were dropped from the case. But confronting an "obstacle" that his sister was not a party in her individual capacity, the defendant brother filed a separate action against her on the same claims. The district court consolidated the two actions under Rule 42(a), "ordering that [a]ll submissions in the consolidated case shall be filed in' the docket assigned to the trust case." Just before trial began the brother dismissed his counterclaims filed in the original action.

The jury returned a verdict for the brother in his action, but the court granted a new trial and that "case remains pending before the District Court." The jury returned a verdict against the sister in her representative capacity. Judgment was entered on the verdict and the sister appealed.

The Third Circuit, in an opinion written by Judge Jordan for a panel that included Judges Chagares and Hardiman, dismissed the appeal. 679 Fed. Appx. 142 (2017). It characterized the consolidation as made "for all purposes." The sister moved to sever the cases for trial, but the district court did not respond to the motion and tried them together. Separate judgments were entered in the two actions; the court of appeals described them as "final judgments" or "styled as a final judgment." The Third Circuit opinion began with a general view that when two cases are consolidated for all purposes, "a final decision on one set of claims is generally not appealable while the second set remains pending." But "we do not employ a bright line rule and instead consider on a case-by-case basis whether a less-than-complete judgment is appealable." Factors to be considered include "'the overlap among the claims, the relationship of the various parties, and the likelihood of the claims being tried together.'" Consideration also is given to serving justice and judicial economy. For this case, all claims had initially been tried together before a single jury. "That counsels in favor of keeping the claims together on appeal." The record "illustrates some overlap of evidence among the claims." The same witnesses would inevitably testify, and both sets of claims turned on the mother's reactions to her son's conduct. There were likely to be overlapping issues on appeal once the still-pending action was resolved. The "appeal is not properly before us at this time."

The Supreme Court reversed, ruling that each originally separate action retained its separate character, so that entry of final judgment in one of them was an appealable final judgment.

The Court began its explanation by looking to an 1813 statute that "authorized the newly formed federal courts" to "consolidate" "causes of like nature, or relative to the same question," when consolidation appears reasonable. Examining its own decisions ranging from 1852 to 1933, the Court found an unwavering rule that actions filed separately remain separate actions for application of the final judgment rule:

> Several aspects of this body of law support the inference that, prior to Rule 42(a), a judgment completely resolving one of several consolidated cases was an immediately appealable final decision. (138 S. Ct. at 1128)

Turning to Rule 42(a), the Court pointed to the 1938 Committee Note. The Note stated that Rule 42(a) "is based upon" the successor to the 1813 statute, "but in so far as the statute differs from this rule, it is modified." Despite the tantalizing suggestion that Rule 42(a) somehow modified the statute, the Court concluded:

> No sensible draftsman, let alone a Federal Rules Advisory Committee, would take a term that had meant, for more than a century, that separate actions do not merge into one, and silently and abruptly reimagine the same term to mean that they do. (138 S. Ct. at 1130)

The Committee Note "did not identify any specific instance in which Rule 42(a) changed the statute, let alone the dramatic transformation" that would defeat finality upon complete disposition of all claims among all parties to what began as a separate action.

Nor did arguments from the full text of Rule 42(a) prevail. Rule 42(a) says the court may: "(1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid unnecessary cost or delay." Seeking to support dismissal of the appeal, the defendant brother argued that paragraphs (1) and (3) show that "consolidate" has taken on a new meaning, distinct from the orders that fall short of consolidation. "Consolidation" means to transform originally separate actions into a single action. Lesser measures of coordination, such as a joint hearing or trial on some or all matters at issue, or "any other orders," leave the actions separate. Consolidation does not. The Court disagreed. It found in Rule 42(a)(2) authority to consolidate cases for limited purposes, such as motions practice or discovery, not qualifying as a joint hearing or trial under (1).

The Court supplemented this textual history and analysis with one pragmatic concern:

> Forcing an aggrieved party to wait for other cases to conclude would substantially impair his ability to appeal from a final decision fully resolving his own case—a "matter of right." (138 S. Ct. at 1128)

The character of the Court's opinion leaves the way open to consider possible rules amendments without implying any disrespect for its decision. As quoted above, the Court expressly recognized the Committees' freedom to take up these questions of finality. Beyond that, the opinion is framed as a matter of historic textual analysis, with no more than a hint of pragmatic concerns. If pragmatic concerns suggest a different approach to finality in consolidated actions, the Committees should not hesitate to explore possible amendments.

Proceedings consolidated by the Judicial Panel on Multidistrict Litigation for pretrial purposes can be put aside at the outset. Under *Gelboim v. Bank of America Corp.*, 574 U.S. ___, 135 S. Ct. 897, 190 L.Ed.2d 789 (2015), they remain separate actions for application of the final judgment rule. The Multidistrict Litigation Subcommittee is considering various proposals that seek to increase the opportunities for interlocutory appeals in MDL proceedings, and has encountered no contrary arguments to cut back the rule of appealable finality upon complete

disposition of any single action in the MDL proceeding.

At least two pragmatic reasons may weigh against going further now. One is the concern expressed by the Court: At least any party that resisted consolidation of a once-separate action should not be forced to defer – in the worst cases, for years – any opportunity to appeal until final disposition of every other action in the consolidation. The other is the value of clear rules on finality. Ambiguity invites premature appeals and also creates a risk of forfeiture by failing to appeal within the time measured from some event that was not recognized as an appeal-time trigger.

The values of case-specific discretion, on the other hand, are illustrated both by the Third Circuit's decision to dismiss the appeal in *Hall v. Hall* and by the experience of other courts. Some courts anticipated the Supreme Court's decision, while others took different approaches. A summary is provided by the text in 15A Federal Practice & Procedure: Jurisdiction § 3914.7, pp. 603-608, omitting the footnotes and the additional cases described in the 2018 supplement, pp. 529-536:

> Turning first to consolidation, the First Circuit has adopted a rule that actions commenced independently remain independent for purposes of the final judgment rule, no matter how completely they may have been consolidated. Under this approach, complete disposition of all matters involved in any one action establishes finality without regard to Rule 54(b). The Ninth and Tenth Circuits, on the other hand, have adopted a rule that following consolidation an order disposing of less than the entire consolidated proceeding can never be final unless judgment is properly entered under Rule 54(b). Either rule has the virtue of clarity. The rule that consolidated actions remain independent for purposes of finality has the added virtue that it recognizes that the desirability of consolidated trial court proceedings does not automatically extend to appeals. The contrary rule that consolidation always creates a single action within Rule 54(b) has the contrary virtue of recognizing that the relationships that justify consolidation for trial often make consolidation on appeal desirable as well. Most courts have rejected both of these rules, however, in favor of an intermediate position that turns on the purpose and extent of consolidation. If consolidation was intended to be for all purposes, Rule 54(b) applies as if the consolidated proceedings were a single action. If consolidation was for more limited purposes—commonly for trial—the original actions retain an independent identity, and Rule 54(b) does not apply when there is a complete disposition of any of the original actions. This position may be the most workable, particularly if it is coupled with a presumption that Rule 54(b) applies. The presumption that Rule 54(b)applies provides a substantial element of clarity, but protects against the risk that consolidation undertaken for omitted purposes may have unforeseen consequences for appealability. Perhaps astute administration of Rule 54(b) could protect against any untoward consequences and provide the even greater clarity of a requirement that the rule always applies, but reliance on astute administration may not yet be fully justified. Whatever the best answer may

prove to be, it will be important to ensure that it does not lead to confusion over the running of appeal time.

This summary survey suggests that many courts of appeals have, in one way or another, resisted the position ultimately adopted by the Supreme Court. Looking to possible amendments of Rules 42(a) or 54(b) is suggested by the alternating approaches that focus on the purposes of a Rule 42(a) consolidation and on the advantages of using the trial court as "dispatcher" to measure the advantages of immediate appeal against the effects on proceedings that remain in the trial court and potential inefficiencies on appeal.

These initial sketches of amendments of Rules 42(a) and 54(b) are offered only to illustrate possible approaches. They imply nothing about the wisdom of going forward with this subject.

Rule 42(a)(2) approach: At least three variations come to mind in addressing appeal finality in Rule 42(a)(2): consolidation never makes initially separate actions one action, it always makes them one, or the court should address the question in the consolidation order.

Given the decision in *Hall v. Hall*, there may not be much need to confirm the decision by amending Rule 42(a)(2). Separate actions will remain separate for appeal finality. But if it seems useful to provide clear notice to courts and lawyers, amendment is possible. One version might be:

the court may:
(2) consolidate the actions, but the actions remain separate for purposes of [final judgment] appeal;

Many variations are possible, including "for specified purposes or for all purposes, but the actions remain separate for purposes of [final judgment] appeal." Including "final judgment" is an uncertain approach. Section 1292 appeals are an obvious example – an interlocutory order respecting an injunction, or the order leading to a § 1292(b) appeal, may affect only one of the consolidated cases. Parties to other actions in the consolidation might attempt to get a free ride on the appropriate appeal.

The always-one-action approach might look like this:

the court may:
(2) consolidate the actions [for specified purposes or] for all purposes;

The Committee Note would observe that "all purposes" includes final-judgment appeals, and that only entry of a partial final judgment under Rule 54(b) supports a final-judgment appeal before disposition of all claims among all parties. If Rule 54(b) is amended in parallel, the cross-references would be noted. The Note also could suggest that the "any other orders to avoid unnecessary cost or delay" authorized by Rule 42(a)(3) includes an order consolidating actions for all purposes other than, for example, motions or discovery. That suggestion might, however, seem to contradict the contrary implication that might be drawn from the Court's silence on this point in

Hall v. Hall. Explicit amendment of Rule 42(a)(3) might be preferable, or consolidation "for specified purposes" could be included in (2).

The cause of clarity might be advanced by adding a requirement that the court state the nature of the consolidation:

(2) consolidate the actions, stating whether consolidation is for specified purposes or for all purposes;

A rule that asks the court to consider appeal finality at the time of ordering consolidation might ask too much. It may be better to leave the court free to concentrate on the advantages of full consolidation in its own proceedings. Predicting the eventual outcomes that might bear on appeal timing is likely to be difficult. But a rule that does that might look like this:

the court may:
(2) consolidate the actions and determine whether the actions are a single action governed by Rule 54(b).

This open-ended invocation of Rule 54(b) would have an additional effect: the court would remain free to reopen any matter resolved by what had seemed complete disposition of an originally separate action until entry of a partial final judgment under Rule 54(b) or complete disposition of all matters in all the consolidated cases. That may be desirable – further proceedings in closely related cases may show a need to reconsider. But if it seems undesirable, alternative words can be found. One imperfect possibility might be: "and determine whether entry of judgment under Rule 54(b) is required to support an appeal [under 28 U.S.C. § 1291] from an order that disposes of all claims among all parties to an action filed as a separate action."

Rule 54(b) Approach: The advantage of working through Rule 54(b) is that it is the well-established source of authority for entering a partial final judgment. It was adopted and upheld long before the amendment that established express § 2072(c) authority to adopt rules defining finality for purposes of § 1291. Courts and parties should know to look to Rule 54(b).

Rule 54(b) might be amended alone, without amending Rule 42(a). This approach could work well if the choice is to subject all Rule 42(a) consolidations to Rule 54(b), adopting a clear rule contrary to the clear rule in *Hall v. Hall*:

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action—including one that consolidates [originally separate] actions under Rule 42(a)—presents more than one claim for relief * * * or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines * * *

Although it might seem redundant to amend both Rule 42(a) and Rule 54(b), there can be safety in redundancy. If Rule 42(a) is amended to distinguish consolidation for all purposes from

other consolidations, this would become: "including an action consolidated for all purposes under Rule 42(a)."

The history of the final-judgment rule shows a constant tension between clear rules and the recurring urge of courts of appeals to find flexibility to permit appeals that seem important. The Supreme Court has tended to favor clear categorical rules that, for the most part, deny finality. A prominent recent example is provided by *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L.Ed.2d 458 (2009).

To ameliorate the occasional costs of clear finality rules, Rule 54(b) establishes a measure of flexibility that relies primarily on the district court to consider both the desirable time for appeal and other needs for final judgment. The courts of appeals insist on finality and scrutinize determinations whether there are separate claims. They can find an abuse of discretion in a determination that there is no just reason for delay. Relying on the district court as "dispatcher" need not subject the court of appeals to ill-timed appeals.

In the end, it may be worthwhile to seek out the voice of experience in determining whether to develop rules amendments that would bring consolidated actions into Rule 54(b), as some courts of appeals had done before *Hall v. Hall*. Further inquiry may be supported by the Supreme Court's recognition that the Rules Committees are free to take up the matter if its interpretation of Rule 42 "were to give rise to practical problems for district courts and litigants." Practical problems for the courts of appeals may properly be added to the subjects of inquiry.

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TAB 11A

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11. Other Docket Suggestions

Two other items have been assigned to the Civil Rules docket.

A. 18-CV-L: Opinions in Social Security and Immigration Cases

This item, provided by the Committee on Court Administration and Case Management, supplies information about a CACM policy and suggests consideration of similar provisions in Civil Rule 5.2(c).

The policy recommends that courts adopt a local practice to use only the first name and last initial of any nongovernment parties in the opinions for Social Security and immigration cases. The Committee believes that this change in chambers practice "will go a long way toward addressing" the underlying concerns. Rule 5.2(c) limits remote electronic access to court files in these cases, but permits remote access to the docket and an opinion, order, judgment, or other disposition of the court. Opinions, however, "often contain a large amount of personal and medical information." Opinions are widely available through many sources, including court websites. "This results in a self-defeating scenario." Yet "there is a substantial, valid interest in having these opinions publicly available." After extensive consultation with several "stakeholders," including the Department of Justice and the Social Security Administration, the Committee developed the first name and last initial recommendation.

The question is whether to write this recommendation into rule text, or to explore the possibility of other approaches that might be adopted by court rule. Dictating opinion-writing practices by court rule would be a new endeavor. It may be wise to wait a while to see how courts respond to the CACM policy. No work has yet been done to develop possible alternative approaches. If that is to be done, the starting point will be exploration of the work already done by CACM.

Professor Capra has forwarded a proposal before the Second Circuit Local Rules Committee that would respond to the CACM proposal by amending Local Rule 27.1, adding a new subdivision:

> **(j) Motion to Abbreviate Name in Opinion or Summary Order.** A party in a proceeding covered by Federal Rule of Civil Procedure 5.2(c) may file a motion to abbreviate the party's name in an opinion or summary order. The motion must be filed no later than the date appellant's brief is filed.

This draft places responsibility on the party, so that inadvertence may result in the use of full names. Nor does it suggest any standard for acting on the motion. But it does illustrate the prospect of responses outside amending the national rules.

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18-CV-L
18-AP-C

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

May 1, 2018

MEMORANDUM

To: Chief Judges, United States Courts of Appeals
Chief Judges, United States District Courts
Clerks, United States Courts of Appeals
Clerks, United States District Courts

From: Honorable Wm. Terrell Hodges
Chair, Committee on Court Administration and Case Management

RE: PRIVACY CONCERN REGARDING SOCIAL SECURITY AND IMMIGRATION OPINIONS **(INFORMATION)**

On behalf of the Committee on Court Administration and Case Management (CACM), I write to alert you to a privacy concern regarding sensitive personal information made available to the public through opinions in Social Security and immigration cases. For those courts that choose to adopt it, we offer a change to chambers practice, which the Committee believes will go a long way toward addressing this concern.

Nature of the Committee's Concern

About fifteen years ago, with the advent of electronic case files and increased public accessibility to court records, this Committee developed, and the Judicial Conference approved, a privacy policy aimed at protecting personal and sensitive information. The policy provides for remote public access to case files, but requires parties to redact certain personal identifiers.[1] JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16. The policy was subsequently codified

[1] The personal identifiers to be redacted are Social Security numbers, taxpayer identification numbers, names of minor children, financial account numbers, dates of birth, and, in criminal cases, home addresses.

in the Federal Rules of Procedure,[2] and has been largely successful in limiting the availability of personal identifiers.

Under the privacy policy and subsequent federal rules, documents related to Social Security and immigration cases have a unique status. They are not available via remote public access, and instead can only be accessed at the courthouse.[3] These access limits are motivated by the substantial personal and medical information contained in these cases and the difficulty of redacting the sensitive information they contain.[4] The restrictions do not, however, extend to dockets or court-issued opinions. Fed. R. Civ. P. 5.2(c)(2)(B).[5] As a result, the opinions, which (by their very nature) often contain a large amount of personal and medical information, remain widely available to the public through a number of government and commercial sources, including the Federal Digital System (FDsys) document repository administered by the Government Publishing Office (GPO); PACER; court websites[6]; and legal research databases such as Westlaw and LexisNexis. Indeed, unlike most documents accessible through PACER, opinions are often available through public search engines such as Google.

This results in a self-defeating scenario in which Fed. R. Civ. P. 5.2(c)(2)(B) restricts remote public access to Social Security and immigration cases because the information they contain is too sensitive to be broadly available, but then places no limits on public access to the opinions that contain much of the same information and are the likeliest documents to be circulated and scrutinized. Though the Committee believes there is a substantial, valid interest in having these opinions publicly available, widespread dissemination defeats the purpose of not making other documents from these cases available via remote access, which is to limit the release of personal and sensitive information.

Addressing this Concern

For these reasons, the Committee has investigated potential options for better balancing the need to provide public access to Social Security and immigration opinions with the need to protect the highly personal information they contain. In this process, the Committee has consulted with stakeholders including the Office of Privacy and Civil Liberties (OPCL) in the U.S. Department of Justice (DOJ), the Executive Office of Immigration Review (EOIR), the Social Security Administration (SSA), the District Clerks' Advisory Group (DCAG), and the Appellate Clerks' Advisory Group (ACAG).

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[2] *See* Fed. R. App. P. 25(a)(5); Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037.

[3] Specifically, the exception found in Fed. R. Civ. P. 5.2(c) applies to any action "for benefits under the Social Security Act" or "relating to an order of removal, to relief from removal, or to immigration benefits or detention."

[4] An Advisory Committee Note to Civil Rule 5.2 explains that these cases "are entitled to special treatment due to the prevalence of sensitive information and the volume of filings."

[5] The rule states that, in Social Security Act and immigration cases, any person may have remote electronic access to "the docket maintained by the court; and an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record."

[6] Courts must provide website access to all written opinions in a text searchable format, regardless of whether they are to be published. E-Government Act of 2002, Pub. L. No. 107–347, 116 Stat 2899, Sec. 205(a)(5).

Ultimately, the Committee decided that the most efficient means of improving protections over private Social Security and immigration case information is to encourage courts to **consider adopting a local practice of using only the first name and last initial of any non-government parties in the opinions in these cases**.[7] This will ensure that the public maintains access to the opinions (in compliance with Civil Rule 5.2(c)(2)(B) and the E-Government Act of 2002), while still obscuring parties' identities within the opinions.[8] The Committee is aware that docket sheets and other case documents available on PACER would still allow a determined member of the public to access sensitive Social Security and immigration information and identify the associated party. However, taking these proactive measures would eliminate the easy access to this information – including identifiers – that is now provided by public search engines. In addition, the CACM Committee has asked the Standing Committee on Rules of Practice and Procedure to consider whether any changes to Fed. R. Civ. P. 5.2(c) or related rules are needed to protect personal and sensitive information more effectively, while furthering national uniformity.

Thank you for the thoughtful consideration we know you and your colleagues will give to this issue.

If you have any questions or concerns, please feel free to contact Sean Marlaire, Policy Staff, Court Services Office, at 202-502-3522 or by email at Sean_Marlaire@ao.uscourts.gov.

cc: Circuit Executives

[7] The Committee considered whether courts should use only the initials of non-government parties but declined to adopt that approach at the Social Security Administration's urging. The Committee considered and ultimately found persuasive the fact that using only initials would result in confusion and a potentially unmanageable volume of identically titled cases.

[8] The courts may also wish to consider whether, when posting these opinions to their websites, they should obscure the non-government parties' names wherever they might be listed alongside the posted opinion.

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B. 18-CV-V: Time Limits to Decide Motions

18-CV-V is a suggestion submitted to the Chairs and Ranking Members of the Senate and House Judiciary Committees, and to one more Senator. It recounts personal experience with delays in ruling on motions, and suggests that mandamus to compel prompt rulings is not a satisfactory remedy.

The proposal is to adopt court rules that mandate decisions on motions in a specific number of days, perhaps 60 days or 90 days. Exceptions would be allowed only for identifiable exigent circumstances.

Concerns about the time required to reach disposition of court cases are familiar. The time taken to dispose of motions is a familiar part of these concerns. The Committees continue to pay attention. One example is the planned Pilot Project to provide a rigorous analysis of systematic use of tried-and-proved methods of case management that work well in courts that use them. Reporting requirements have been imposed for years, and appear to have some real effect.

It is telling that as familiar as these concerns are, rules have not been adopted to set mandatory times for deciding motions. Competing and often unpredictable demands on court time make docket management a complex and challenging task. Setting priorities for motions could easily distort overall management. Priorities, moreover, invite further and competing priorities. Preference may be sought for some forms of cases, and then proliferate into other preferences. The Judicial Conference long ago adopted a policy opposing docket priorities by rule or statute. This position was reiterated in September 1990: "Establishing civil priorities, and imposing time limits on the judicial decision-making process, are inimical to effective civil case management and unduly hamper exercise of the necessary discretion in the performance of judicial functions." JCUS-SEP 90, p. 19.

This proposal has also been submitted to the Criminal Rules Committee. There are substantial grounds for concern that state prisoners petitioning for habeas corpus encounter long delays in many districts. The Criminal Rules Committee has this topic on its fall agenda. The agenda materials explore the possibility that delay in habeas cases might be addressed by means other than amending the § 2254 Rules. The recommendation to remove this item from the Civil Rules agenda does not reflect on the Criminal Rules Committee work.

This suggestion should be removed from the docket.

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18-CV-V
18-CR-D

Gary E. Peel
9705 (Rear) Fairmont Road
Fairview Heights, Il 62208

July 9, 2018

Sen. Chuck Grasley –	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan,	Chief Judge of the U.S. District Court for the Southern District of Illinois 750 Missouri Ave., East. St. Louis, IL 62201 * * (for adoption of local rules only) * *

Re: Proposed Amendment to the Federal Rules of Civil and Criminal Procedure

To whom it may concern:

I am NOT seeking any intervention, by you, in my legal matter; however, by way of example ,I am enclosing a copy of my **Fifth** Motion for Court Ruling This motion highlights a systemic problem within the federal civil and criminal court systems that I believe warrants your attention by way of one or more rule changes.

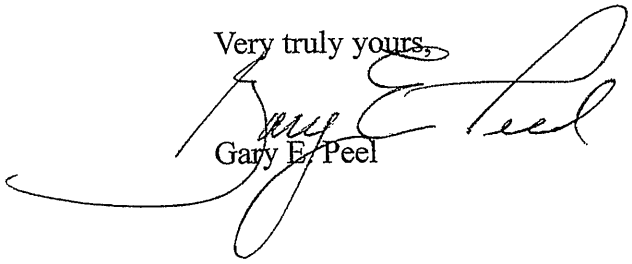
The issue is this: many criminal and civil court motions, particularly those filed by *pro se* litigants pursuant to 28 U.S.C. §§ 2254 and 2255, do not receive *prompt* rulings by U.S. District Court Judges. It is not uncommon for 28 U.S.C. §§ 2254 and 2255 motions to remain "pending" and "under consideration" for a year or more. Efforts to remedy the situation at the District Court level are usually met with orders suggesting that the matter is under advisement; yet, persistent efforts to obtain rulings are to no avail. Additionally, any Motion for Writ of Mandamus filed in the Appellate Court requires payment of filing fees which most criminal defendants do not have. A Mandamus action, to compel the issuance of a ruling, is seldom successful, leaving the defendant with less funds and no remedy. District and appellate court resources are wasted in addressing this recurring problem

I am suggesting new federal civil and/or criminal court rules (or the mandating of local court rules) that mandate district court judges issue decisions/opinions on pending motions within a specified number of days, absent exigent circumstances (such as the death or incapacity of the judge, a pending appellate or Supreme Court case that may control the pending decision, or a pending briefing schedule applicable to the parties).

Mandating decisions within "a reasonable time" or "in due course" will not solve the problem as district court judges routinely use these generic excuses to delay issuing substantive rulings. A specific number of days (60-90?) needs to be mandated (subject only to identifiable exigent circumstances).

Thank you for your attention and consideration.

Very truly yours,



Gary E. Peel

Encl: (1)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

GARY E. PEEL	)	
	)	
Petitioner	)	
	)	
vs	)	Case No. 3:17-cv-01045-SMY
	)	
JOHN M. KOECHNER	)	
	)	
(Chief United States Probation Officer for the Southern District of Illinois)	)	Hon. Staci M. Yandle
	)	
Defendant	)	

FIFTH Motion for Court Ruling

Comes now the Petitioner, Gary E. Peel, *pro se*, and, for the **FIFTH time**, moves this Court to take action and render a ruling on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE," and as grounds therefor states as follows:

1. ***Petitioner is not seeking a "status" regarding this matter.*** Clearly, the matter is "pending," or "under advisement." Instead, the Petitioner is seeking a *dispositive decision/order* on the pending motion for reconsideration.
2. The "Petition for Writ of habeas Corpus" (Doc. #1) was filed on 9-29-17, over nine (9) months ago. A Memorandum and Order (Doc #11) and a "Judgment in a Civil Case" (Doc. #12) were *promptly* entered by this Court on 11-16-17 (only 48 days later).
3. Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE" (Doc. #13) was then filed on 12-8-17, presenting two primary bases for reconsideration, i.e.
    a. This Court applied the wrong standard in determining what constitutes "newly discovered evidence," (regarding Count 1 of the Indictment), and
    b. This Court turned a blind eye to controlling Supreme Court and Seventh Circuit precedent (regarding Counts 3 & 4 of the Indictment).
4. On March 9, 2018 petitioner filed a "Motion for Court Ruling," (Doc. #14) informing this Court that the motion to reconsider (filed 12-8-17) had been pending for more than ninety

(**90**) days without a decision. This Court, on the same day of March 9, 2018, construed the motion as a request for status, terminated the motion, as moot, and indicated that the Court ***"will issue rulings in due course."*** (See Doc. #15.)

5. On April 9, 2018 petitioner filed a "Second Motion for Court Ruling," (Doc. #16) informing this Court that the motion to reconsider had been pending for more than one-hundred twenty (**120**) days without a decision. This Court merely denied the motion on 4-13-18 (Doc.#17) noting that the Court is aware of the pending motion [to reconsider] and ***"will issue a ruling in due course."***
6. ***However, the "standard" established by Rule 4 is NOT one of "due course." It is one of "promptness."*** Rule 4 specifically requires that the Court "**promptly examine**" the Petition. Whatever logic exists for requiring the *prompt* examination of an *initial* habeas filing surely applies as well to motions to reconsider same. As stated by British Prime Minister William E. Gladstone in 1868, "Justice delayed is justice denied."
7. On 5-9-18 petitioner filed a "**Third** Motion for Court Ruling," (Doc. #18) informing this Court that the motion to reconsider had been pending for more than one-hundred fifty (**150**) days (40% of a year) without a decision. This Court has not yet decided that "**Third** Motion for Court Ruling."
8. On 6-8-18 petitioner filed a "**Fourth** Motion for Court Ruling," (Doc. #19) informing this Court that more than one hundred eighty (182) days (half of a year) had then elapsed without a ruling on the motion to reconsider. Similarly, this Court has not decided that "**Fourth** Motion for Court Ruling."
9. An additional month has now elapsed without a ruling on the motion to reconsider. This makes a total of more than **two hundred ten (210)** days (approximating 57% of a year) without a ruling on the motion to reconsider.
10. Three (3) persons associated with Petitioner's bankruptcy and criminal cases have now died. These are Bankruptcy Judge Kenneth Myers, District Judge William Stiehl, and attorney Donald W. Urban (bankruptcy attorney for Petitioner's first wife, Deborah J. Peel). Hopefully, this Court's delay in rendering a decision is not indicative of any desire that the Petitioner join this list so as to render his habeas motion "moot."
11. Petitioner is constitutionally entitled to the following:

a. due process [guaranteed by the Fifth & Fourteenth Amendments], and

b. access to the courts [guaranteed by the First, Fifth & Fourteenth Amendments].

Both constitutional rights are denied when a District Court Judge refuses to render a timely substantive order/decision upon one or more pending motions.

12. An indefinite delay, as here, benefits only the prosecution. It is not this Court's responsibility to assume or promote the role of Petitioner's adversary. Likewise, this Court's delay in rendering a substantive decision should not be incentivized by any retaliatory motivation to deter Petitioner's insistence on securing a prompt decision.. Petitioner hopes that this Court's delayed ruling is neither

    a. indicative of a judicial bias favoring the petitioner's adversary, nor

    b. a punitive act to deter petitioner's efforts to secure a prompt ruling.

13. Petitioner is entitled to either a) an evidentiary hearing on his habeas petition or b) the right to appeal any adverse ruling denying him that evidentiary hearing. This Court's refusal to issue a ruling precludes both avenues of recourse, thereby denying the petitioner both due process and access to the courts.

14. Petitioner seeks a ruling on the merits, not one that is tainted by this Court's assumption of an adversarial role adverse to the Petitioner or this Court's retaliation for Petitioner's multiple efforts to secure a prompt decision.

Wherefore Petitioner moves this Court, for a **FIFTH** time, to act and render a *prompt* dispositive ruling/decision, on Petitioner's "MOTION TO ALTER OR AMEND A JUDGMENT IN A CIVIL CASE [PURSUANT TO F.R.Civ.P. 59(e)] a/k/a MOTION TO RECONSIDER MEMORANDUM AND ORDER *and* JUDGMENT IN A CIVIL CASE."

July 9, 2018

Gary E. Peel, *pro se*
9705 (Rear) Fairmont Road
Fairview Heights, IL 62208
Cell Phone: 618-304-6187

cc: While Petitioner seeks NO intervention in this matter from the following, a copy of this motion is nevertheless being provided to the following to encourage the adoption of a change in the federal rules of civil and/or criminal procedure for the following purposes; to wit,

a) to compel timely decisions on pending district court motions, and
b) to reduce the waste of judicial resources committed to addressing delayed district court rulings.

Sen. Chuck Grasley -	Chairman of the U.S. Senate Committee on the Judiciary 135 Hart Senate Building, Washington, D.C. 20510
Sen. Dianne Feinstein -	Ranking member of the U.S. Senate Committee on the Judiciary 331 Hart Senate Building, Washington, D.C. 20510
Rep. Bob Goodlatte -	Chairman of the House Committee on the Judiciary 2309 Rayburn HOB, Washington, D.C. 20515
Rep. Jerrold Nadler -	Ranking member of the House Committee on the Judiciary 2109 Rayburn HOB, Washington, D.C. 20515
Sen. Richard J. Durbin -	Illinois State Senator, 711 Hart Senate Building, Washington, D.C. 20510
Administrative Office of the U.S. Courts, Standing Advisory Committee on the Federal Rules of Criminal Procedure (F.R. Crim. P)-	One Columbus Circle, NE, Washington, DC 20544
Hon. Michael J. Reagan, Chief Judge of the U.S. District Court for the Southern District of Illinois-	750 Missouri Ave., East. St. Louis, IL 62201 *** (for purposes of adopting local rules only) ***