# ADVISORY COMMITTEE
# ON
# CIVIL RULES

**April 23, 2021**

**AGENDA**
**Meeting of the Advisory Committee on Civil Rules**
**April 23, 2021**

## OPENING BUSINESS



## ACTION ITEMS

## ADVISORY COMMITTEE ON CIVIL RULES

| Chair | Reporter |
|---|---|
| Honorable Robert M. Dow, Jr.<br>United States District Court<br>Everett McKinley Dirksen U.S. Courthouse<br>219 South Dearborn Street<br>Chicago, IL 60604 | Professor Edward H. Cooper<br>University of Michigan Law School<br>312 Hutchins Hall<br>Ann Arbor, MI 48109-1215 |
| | **Associate Reporter** |
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| Members | Position | District/Circuit | Start Date | End Date |
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| Robert M. Dow, Jr.<br>Chair | D | Illinois (Northern) | Member: 2013<br>Chair: 2020 | ----<br>2023 |
| Jennifer C. Boal | M | Massachusetts | 2018 | 2021 |
| Brian M. Boynton* | DOJ | Washington, DC | ---- | Open |
| David J. Burman | ESQ | Washington | 2021 | 2023 |
| Joan N. Ericksen | D | Minnesota | 2015 | 2021 |
| David C. Godbey | D | Texas (Northern) | 2020 | 2023 |
| Kent A. Jordan | C | Third Circuit | 2018 | 2021 |
| Thomas R. Lee | JUST | Utah | 2018 | 2021 |
| Sara Lioi | D | Ohio (Northern) | 2016 | 2022 |
| Brian Morris | D | Montana | 2015 | 2021 |
| Robin L. Rosenberg | D | Florida (Southern) | 2018 | 2021 |
| Joseph M. Sellers | ESQ | Washington, DC | 2018 | 2021 |
| A. Benjamin Spencer | ACAD | Virginia | 2017 | 2023 |
| Ariana J. Tadler | ESQ | New York | 2017 | 2023 |
| Helen E. Witt | ESQ | Illinois | 2018 | 2021 |
| Edward H. Cooper<br>Reporter | ACAD | Michigan | 1992 | Open |
| Richard Marcus<br>Associate Reporter | ACAD | California | 1996 | Open |

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## RULES COMMITTEE LIAISON MEMBERS

| | |
|---|---|
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| Liaison for the Advisory Committee on Bankruptcy Rules | Hon. William J. Kayatta, Jr.<br>*(Standing)* |
| Liaisons for the Advisory Committee on Civil Rules | Peter D. Keisler, Esq.<br>*(Standing)*<br><br>Hon. Catherine P. McEwen<br>*(Bankruptcy)* |
| Liaison for the Advisory Committee on Criminal Rules | Hon. Jesse M. Furman<br>*(Standing)* |
| Liaisons for the Advisory Committee on Evidence Rules | Hon. James C. Dever III<br>*(Criminal)*<br><br>Hon. Carolyn B. Kuhl<br>*(Standing)*<br><br>Hon. Sara Lioi<br>*(Civil)* |

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# TAB 1

**MINUTES**
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**
Meeting of January 5, 2021

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee or Committee) met by videoconference on January 5, 2021. The following members participated in the meeting:

Judge John D. Bates, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Frank Mays Hull
Judge William J. Kayatta, Jr.
Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Patricia A. Millett
Judge Gene E.K. Pratter
Elizabeth J. Shapiro, Esq.*
Kosta Stojilkovic, Esq.
Judge Jennifer G. Zipps

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules –
Judge Jay S. Bybee, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules –
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell,
Associate Reporter

Advisory Committee on Criminal Rules –
Judge Raymond M. Kethledge, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King,
Associate Reporter

Advisory Committee on Civil Rules –
Judge Robert M. Dow, Jr., Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus,
Associate Reporter

Advisory Committee on Evidence Rules –
Judge Patrick J. Schiltz, Chair
Professor Daniel J. Capra, Reporter

Others providing support to the Committee included: Professor Catherine T. Struve, the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Bryan A. Garner, and Professor Joseph Kimble, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy, Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Kevin P. Crenny, Law Clerk to the Standing Committee; Judge John S. Cooke, Director of the Federal Judicial Center (FJC); Dr. Emery G. Lee and Dr. Tim Reagan, Senior Research Associates at the FJC.

* Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue. Andrew Goldsmith and Jonathan Wroblewski were also present on behalf of the DOJ.

## OPENING BUSINESS

Judge Bates called the meeting to order and welcomed everyone. He began by reviewing the technical procedures by which this virtual meeting would operate. He next acknowledged recent changes in the leadership of the Rules Committees. Judge Bates introduced himself, acknowledging that this was his first Standing Committee meeting as Chair, and thanked Judge David Campbell for his wonderful leadership and insight. Judge Bates next recognized new Advisory Committee Chairs: Judge Robert Dow is the new Chair of the Advisory Committee on Civil Rules, Judge Jay Bybee is the new Chair of the Advisory Committee on Appellate Rules, and Judge Patrick Schiltz is the new Chair of the Advisory Committee on Evidence Rules. Judge Bates noted next that Rebecca Womeldorf, Secretary to the Standing Committee, would be leaving the Rules Committee Staff to work as the Reporter of Decisions to the Supreme Court. Judge Bates thanked Ms. Womeldorf for her friendship and years of work with the Rules Committees.

Following one edit, upon motion by a member, seconded by another, and on voice vote: **The Committee approved the minutes of the June 23, 2020 meeting.**

Judge Bates reviewed the status of proposed rules and forms amendments proceeding through each stage of the Rules Enabling Act process and referred members to the tracking chart in the agenda book. The chart includes the rules that went into effect on December 1, 2020. Also included are the rules approved by the Judicial Conference in September 2020 and transmitted to the Supreme Court. These rules are set to go into effect on December 1, 2021, provided the Supreme Court approves them and Congress takes no action to the contrary. Other rules included in the chart are currently out for public comment. Julie Wilson of the Rules Committee Staff explained that a hearing on the proposed Supplemental Rules for Social Security Review Actions currently out for comment is scheduled for January 22, 2021.

## JOINT COMMITTEE BUSINESS

*Emergency Rules Project Pursuant to the CARES Act*

Judge Bates introduced this agenda item, included in the agenda book beginning at page 91, which has been underway since the passage of the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in March 2020. He began by highlighting the fact that Chief Justice Roberts had recognized the role of the Rules Committees in his end of the year address on the state of the federal courts. The Chief Justice complimented their efforts thus far, particularly those members who had worked on the videoconferencing provisions included in the CARES Act. Judge Bates also thanked everyone who has worked on this project for their superb efforts. He noted the particular efforts of Professor Capra in coordinating the project across committees and of both him and Professor Struve in preparing the presentation of the advisory committees' suggestions for today's meeting.

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. At its June 2020 meeting, the

Committee heard preliminary reports and then tasked each advisory committee with: (1) identifying rules that might need to be amended to account for emergency situations; and (2) developing drafts of proposed rules for discussion at its fall 2020 meeting. In the intervening months, each advisory committee – except for the Evidence Rules Committee – developed draft rules for discussion at this Standing Committee meeting. The goal at this meeting was to present the draft rules and to seek initial feedback from the Standing Committee. Comments on details are welcomed, but the focus would primarily be on broader issues. Overarching questions for the members to keep in mind included what degree of uniformity across rules would be desirable and who should have authority to declare an emergency or enact emergency rules. At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action).

Professor Struve began the presentation of the emergency rules proposals. She echoed Judge Bates's thanks to all those who have brought the project to this stage, especially the advisory committee chairs, reporters, relevant subcommittee members, and Professor Capra. She explained the structure by which the day's discussion would proceed. The discussion would be segmented by topic. Professors Struve and Capra would introduce each topic and then advisory committees' reporters would be invited to summarize their committees' views on that topic. The topic would then be opened for general discussion among the Standing Committee members.

Professor Capra thanked the advisory committee members and reporters and described the history of the project. He explained that the Evidence Rules Committee would not be presenting a proposal. Its members determined early in the process that there was no need for an emergency rule because the Evidence Rules are already sufficiently flexible to accommodate emergencies.

*"Who Decides" Issue.* This first topic concerns what actor or actors decide whether an emergency is declared. The advisory committees' subcommittees decided early in the process that a rules emergency should not be tied to a declaration of a presidential emergency. Although the CARES Act relies on a presidential declaration of emergency, and instructed the Rules Committees to consider emergency rules in that context, the advisory committees all agreed that the judiciary would benefit from being able to respond to a broader set of emergencies, and that limiting the emergency rules to only a presidentially declared emergency would not make sense. The advisory committees agreed that the Judicial Conference should have the authority to declare a rules emergency, but they were not in agreement on whether other actors should share this authority. The draft amendment to Appellate Rule 2 grants such authority to "the court" as well, and provides that the chief circuit judge can exercise the same authority unless the court orders otherwise. Draft Bankruptcy Rule 9038 grants the authority first to the Judicial Conference either for all federal courts or for one or more courts, second to the chief circuit judge for one or more courts within the circuit, and third to the chief bankruptcy judge for one or more locations in the district.

Professor Gibson and Judge Dennis Dow summarized the position of the Bankruptcy Rules Committee. Professor Gibson explained that the Advisory Committee thought there could be emergencies of different scope – some might be on a national scale like the COVID-19 pandemic, others might be confined to a circuit, a state, or to one district or part of a district within a state. The Advisory Committee thought it was more efficient for local actors to be able to declare an emergency and to act more quickly to respond to a localized emergency. She noted that the Advisory Committee was not concerned that overeager judges would be too quick to declare an emergency, and pointed out that paragraph (b)(4) of draft Bankruptcy Rule 9038 would allow the Judicial Conference to review and revise any declaration. A majority of the Advisory Committee favored giving actors at all three levels the authority to declare an emergency. Judge Dow explained that his committee thought that in the case of a localized emergency, decisionmaking should be at the local level, where the effects of the situation would be felt. He thought this was similar to the proposal put forward by the Appellate Rules Committee. He emphasized the stakes of the issue – draft Rule 9038 only deals with procedural issues, not substantive rights. Finally, he noted that the bankruptcy draft rule balances the need for rapid response with the opportunity for modification after the fact by the Judicial Conference. Professor Capra added that because the draft rule allows a number of actors to declare an emergency, it had to be drafted differently from the other advisory committees' proposals, which introduced some additional lack of conformity.

Judge Bybee and Professor Hartnett explained the Appellate Rules Committee's proposal. Judge Bybee began by noting that Appellate Rule 2 already allows a court of appeals to "suspend any provision of" the appellate rules "in a particular case." The proposed appellate emergency rule would amend Appellate Rule 2 to allow the courts of appeals to make these kinds of changes across all cases. The Appellate Rules Committee thought it was important to allow the chief judge of a circuit or a court to make these changes. Most of the appellate rules, like the bankruptcy rules, are procedural, limiting any impact on substantive rights when the rules are suspended. Jurisdiction, for example, would never be affected. Further, Judge Bybee explained the Advisory Committee's view that courts of appeals are accustomed to having to deal collegially. This would provide a check on the judgment of a chief judge. He added that the Advisory Committee preserved the backup option of allowing the Judicial Conference authority to exercise the same rule-suspending powers. Professor Hartnett noted the long history of flexibility in the appellate rules. Rule 2 has existed since the Appellate Rules were first promulgated and the circuit courts' authority to suspend their rules predates the Appellate Rules. The nature of a court of appeals is that it speaks with one voice and its procedures are designed to that end. Finally, Professor Hartnett addressed the dignity of the courts of appeals, explaining that there is no right of appeal from these courts. They are courts of last resort and courts with that authority ought to be able to suspend the rules.

Judge Kethledge and Professors Beale and King spoke on behalf of the Criminal Rules Committee. That committee determined that the Judicial Conference was the ideal body to make emergency declarations because it has input from around the country and authority to act. The Criminal Rules Committee has long been the recipient of suggestions that the Criminal Rules be amended to allow for greater use of remote proceedings. The Criminal Rules Committee has historically resisted allowing virtual proceedings. Professor Beale noted the critical differences between the kinds of emergency rules being considered by each advisory committee. The need for gatekeeping is much greater when it comes to criminal proceedings because constitutional issues are implicated most directly by changes to the Criminal Rules. This makes it more important to

exercise restraint when suspending any rules. The Judicial Conference is better positioned to act in this manner. The Criminal Rules Committee believed there was no reason to think the Judicial Conference would suffer from a lack of information or that the Judicial Conference and its Executive Committee could not act with appropriate speed. Given the nature of the emergency rules and the values they protect, the Advisory Committee believed it was preferable to have a single gatekeeper deciding when to declare an emergency. Professor King added that the Advisory Committee had considered the concerns – expressed by other committees – that an emergency might be localized, but that their proposal accounted for this possibility. It requires the Judicial Conference to consider moving proceedings to another district or another courthouse before emergency rules can be enacted. Because there is always an obligation to move proceedings and to remain under the normal rules, there is less reason to think that a local decisionmaker is needed or that the Judicial Conference is not well situated to make the necessary decisions.

Judge Robert Dow and Professors Cooper and Marcus spoke on behalf of the Civil Rules Committee. Professor Cooper explained that their committee arrived at the same conclusion as the Criminal Rules Committee. The Civil Rules already allow broad discretion to the trial courts and they seem to be functioning well during the pandemic. Professor Marcus added that confusion could result if two courts or districts located near one another were both affected by the same emergency but chose to respond in different ways. The Judicial Conference would be able to coordinate efforts across districts and could better achieve consistency.

The discussion was then opened to the members of the Standing Committee. Judge Bates spoke first. Moving away from the particular proposals, he reminded the members of the overall goal of uniformity. To the extent that decisionmaking is dispersed, there would be a potential for undermining this uniformity in a way that is undesirable even in an emergency context. The CARES Act had envisioned emergency rules relating to a presidential emergency and some committees were now looking at very localized actors like a small district. The scale of the departure from what Congress originally suggested was worth keeping in mind. Judge Bates's understanding was that the Judicial Conference, and particularly its Executive Committee, was able to act quickly when necessary. He also suggested that he saw little reason to think that the speed of the emergency declaration would matter more for any one set of rules than for another. Speed is equally important for each type of rules and court proceedings. In response to the Appellate Rules Committee's suggestion that the courts of appeals can and should "speak with one voice," Judge Bates thought this could be an argument for keeping the authority at that level rather than at the district level, but did not think it was an argument against giving the authority to the Judicial Conference.

An attorney member spoke in favor of uniformity with respect to 'who decides.' This member thought that in creating emergency rules for the first time, it was preferable to be cautious and incremental and to create a single gatekeeper rather than a complex multitiered system. This member also thought that the challenges created during the current emergency were greatest in the criminal context and thought that there was something to be said for choosing the gatekeeper that makes the most sense for that set of rules.

Another attorney member agreed that uniformity in 'who decides' makes sense. If the reasons for decentralization are increased nimbleness and ability to accommodate geographical

differences, and the reasons for centralization are the substantive issues raised by the Criminal Rules Committee, then substantive issues should win out. This is particularly so if the Judicial Conference can act with sufficient nimbleness and precision.

One judge member noted that, by definition, an emergency creates an atmosphere of unease. Having the authority to declare an emergency reside in one place – with the Judicial Conference – suggests authority and promotes trust. It makes sense to focus on a single identifiable body that is designed to be sensitive to lots of issues. A member agreed that substantive protections are most important. This member thought that the authority to declare an emergency should be tailored to the kind of nationwide issue – like the pandemic – that Congress had in mind when it suggested emergency rules. Local issues, like floods, hurricanes, or power outages, have been dealt with in the past without an emergency rule and have not prompted Congressional action.

Another judge member also spoke in favor of uniformity and argued that the benefits of uniformity outweigh those of localization.

Another judge member noted that the consideration of emergency rules happens infrequently and that we should consider the types of emergencies that are possible. This member suggested that a situation where the country's communications infrastructure is damaged might make it infeasible to communicate nationally and might make local control desirable.

One judge member expressed that she was impressed with the drafts and had originally been comfortable with different decisionmakers for different sets of rules, but was now thinking that uniformity was more desirable in light of the scope of the proposed changes. As an alternative means of balancing the values at stake, this member suggested that perhaps the Judicial Conference could be the default decisionmaker but that others could be permitted to determine that the Judicial Conference is unreachable and – in those situations – to act on their own.

Professor Coquillette echoed Judge Bates's view that the Executive Committee of the Judicial Conference can act very quickly and has done so in the past.

A judge member asked about the extent to which the bankruptcy rules are already sufficiently flexible to allow judges to toll and extend deadlines in particular cases. Professor Gibson responded that there is already a rule that allows flexibility with regard to some deadlines (Bankruptcy Rule 9006(b)), but that, because there are limits on the authority granted and some deadlines are exempt, the subcommittee thought an emergency rule would be helpful. This same committee member then explained his view that although the Bankruptcy Rules Committee's reasons for allowing emergency declarations at the bankruptcy court level made sense, the other committees' arguments to the contrary were also compelling. This member also suggested that there was an appearance benefit favoring an Article III over an Article I decisionmaker that might tilt the balance in favor of giving the Judicial Conference sole authority.

Another judge member supported having a different decisionmaker for the appellate rules, but found today's arguments in favor of uniformity compelling. This member thought that the courts of appeals were very different from trial courts – there are fewer substantive rights at stake and they are sufficiently nimble. Circuit-wide orders have been used in the past in order to

immediately protect rights when, for example, major weather events necessitate the extension of filing deadlines.

An attorney member thought that perceptions of what constitutes an emergency may vary throughout the country and was initially inclined to favor some devolution of power to regional courts. However, he was persuaded by the flexibility of the existing rules and the need for uniformity and now favored keeping the decisionmaking power in the Judicial Conference, and thought it was important that a uniform federal authority be identifiable in emergencies.

*Definition of a Rules Emergency.* Professor Capra introduced questions concerning what ought to qualify as a "rules emergency." There was at least some uniformity across advisory committees on this issue. The advisory committees agreed there must be "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court" which "substantially impair[s] the court's ability to perform its functions in compliance with the[] rules." One early issue was whether there should be a requirement that the parties, as well as the courts, are unable to operate under the normal rules. This possibility was rejected because the courts, and particularly the Judicial Conference, would be unlikely to have information about the parties' access. Further, a problem for the parties is necessarily a problem for the courts so – to the extent the information is available – it makes no difference. The remaining point of inconsistency across committees is that the Criminal Rules Committee, and no other committee, included a requirement (in draft Criminal Rule 62(a)(2)) that before the Judicial Conference declares a Criminal Rules emergency it must determine that "no feasible alternative measures would eliminate the impairment within a reasonable time."

Judge Kethledge explained this additional requirement. First, he explained that the "extraordinary circumstances" finding under paragraph (a)(1) of the proposed criminal rule – the finding the other committees also require – is a substantive impairment requirement. The additional requirement in paragraph (a)(2) is an exhaustion requirement. These are not redundant. Judge Kethledge emphasized that the committees have thought about different kinds of proceedings and have focused on different things. Procedurally, the Criminal Rules are the only rules the CARES Act directly amended. The Criminal Rules Committee gave intensive consideration to how the rules ought to be abrogated in light of this kind of emergency. They thought it was important that the rules not be abrogated unless doing so proves absolutely necessary. The Criminal Rules protect core substantive interests with a long history in the law. Given how carefully these rules have been crafted in the first place, all feasible alternatives should be explored before any rules are suspended. There might be ways of adapting that cannot be foreseen right now but which the Judicial Conference might be able to learn about in the moment from local actors on the ground. Judge Kethledge thought any remaining disuniformity was worth allowing. Professor Beale added that uniformity on this point was not essential – the Criminal Rules Committee was not asking the other advisory committees to adopt the additional exhaustion requirement. She suggested that it might be fine for a Bankruptcy Rules emergency to be declared at the local level while extra protections are afforded the substantive rights at issue in the criminal context. Professor King agreed that the Criminal Rules Committee feels very strongly about including the exhaustion requirement.

Professor Cooper spoke on behalf of the Civil Rules Committee. That committee was comfortable with the "no feasible alternative" requirement being included in a criminal emergency rule but not in the civil rule. It did not think it was necessary for the Civil Rules and, in light of the different rights being protected in the criminal context, was not concerned with the disuniformity. Professor Marcus agreed that Civil and Criminal Rules are very different so having a difference on this point made sense.

Professor Gibson said the Bankruptcy Rules Committee felt similarly to the Civil Rules Committee and had decided against including the "no feasible alternative" language. They were not concerned with the disuniformity.

Judge Bybee observed that the only "friction points" for the courts of appeals in an emergency were the filing of briefs and the holding of oral arguments. Neither of these implicated the kinds of values at stake in the Criminal Rules, and the Appellate Rules Committee was therefore also not concerned by the possibility of allowing the additional requirement in the proposed criminal rule to remain in place.

Judge Bates thought the Criminal Rules Committee made a strong argument but he had two points to add. First, he wanted to be sure that the exhaustion requirement was not redundant. He asked whether it might be said that before it could find a "substantial impairment" the Judicial Conference would necessarily have to have considered alternatives? Second, if the Judicial Conference were put in the position of declaring a rules emergency across all the rules sets, was there anything to be said for having the same standard for all the rules? If the rule were to state that declaring a Criminal Rules emergency required consideration of feasible alternatives, might this imply that there was no obligation to consider alternatives outside of the criminal context? What would be the implications of leaving the requirement out for the other sets of rules?

A judge member reminded the Committee of the existing authority of the courts of appeal under Appellate Rule 2 to suspend the Appellate Rules in particular cases and asked whether the proposed amendment to Appellate Rule 2 could be seen as constraining this existing authority to a narrower set of circumstances. This member noted that courts of appeal have been able to respond to emergencies in the past and would not want to see their existing power limited.

An attorney member suggested adding "or set of cases" to Appellate Rule 2(a) in order to avoid constraining the current authority of the courts of appeals. This would make it clear that the courts of appeal could issue suspensions of rules across cases without declaring an emergency. Professor Hartnett thought the Appellate Rules Committee would be receptive to such a change because they did not want the existing authority of the courts of appeals to be constrained. Professor Capra asked whether the issuance of orders under such an authority might start to look like local rulemaking. Professor Hartnett responded that the language "a set of cases" would imply that orders suspending rules cannot be applied to all cases. Professor Struve asked for clarification on the suggestion that subdivision (a) be modified in a way that would apply even outside of emergency situations.

A judge member thought the higher standard for declaring a Criminal Rules emergency was appropriate. Although the inclusion of the higher standard in only one of four emergency rules

would imply that alternatives did not need to be considered in other contexts, this member did not think the drawbacks of this implication outweighed the benefits of the heightened standard for a Criminal Rules emergency.

Another judge member asked whether this language was added in response to any particular situation that had come to the Criminal Rules Committee's attention. Professor King explained that the Criminal Rules' Emergency Rules Subcommittee had held a miniconference and consulted with a broad group of actors. The input received through these avenues influenced the Criminal Rules Committee's thinking. One circumstance that distinguished its approach was the possibility of a hurricane or other major catastrophe rendering all the courthouses in a district not useable. Other advisory committees would consider this a substantial impairment but history had shown – in Puerto Rico and Louisiana – that criminal proceedings could be moved to a different courthouse in another area. Judge Kethledge added that the Emergency Rules Subcommittee had canvassed chief judges around the country. In response to Judge Bates's questions, Judge Kethledge thought that the required determinations were not redundant because paragraph (a)(1) of draft Criminal Rule 62 only looked for an impairment and did not imply any evaluation of alternatives. In a situation like the aftermath of Hurricane Katrina, court proceedings were moved pursuant to 28 U.S.C. § 141. If an option like this is available, courts would be obligated to use it to hold criminal proceedings under the existing rules while an emergency might be declared under the Appellate, Bankruptcy, and Civil rules.

An attorney member said that he had been somewhat confused by the language because it seemed that the "substantial impairment" finding would take into account the possibility of moving court functions. However, this member now thought that a court moving its functions would be "substantially impaired" because relocated proceedings do not constitute normal court operations. The member suggested that it might be worth adding an adverb to modify "eliminate" in paragraph (a)(2) – possibly "sufficiently." This would indicate that the alternative must be sufficiently effective to mitigate the disruption of court operations.

Ms. Shapiro expressed the DOJ's support for Judge Kethledge's reasoning and for including the additional requirement for the Criminal Rules.

Judge Bates suggested that while the Criminal Rules Committee's reasoning was compelling, it might be worth reevaluating the value of uniformity. He also wanted to be sure that, just as the Criminal Rules Committee had considered dropping the requirement, the other advisory committees had considered adopting it.

*Open-ended Appellate Rule Structure.* Professor Capra explained that the proposed appellate emergency rule sets almost no limit on the range of Appellate Rules that are subject to suspension in a rules emergency. Nor does it state what the substitute rule (if any) must be when a rule is suspended. The appellate emergency rule proposal does not specify what provisions need to be included in an emergency rules declaration. It imposes no particular time limits on a rules emergency declaration. These and other limitations are found in the other three emergency rules.

Judge Bybee reiterated that the two "friction points" for the courts of appeal operating under emergency situations are filing deadlines and oral argument scheduling. Given the flexibility

already available under the current Appellate Rules, the Appellate Rules Committee did not think it made sense to have a more detailed rule for adjusting the timing of these events during emergencies. The Advisory Committee would prefer having no emergency rule to adding more constraints to their proposal because without an emergency rule the courts of appeal can just rely on the flexibility they already have.

Professor Hartnett added that the current Appellate Rule 2 can be thought of as the Appellate Rules' equivalent to Civil Rule 1, which states that the Civil Rules should be interpreted to preserve justice and efficiency. Professor Hartnett understood that the proposed amendment to Appellate Rule 2 was particularly open-ended and did not identify alternative rules but noted that rule-suspension provisions during the pandemic have often not provided alternatives. For example, an order waiving a paper-filing requirement does not have to include all the details of online filing. Professor Hartnett also suggested that subdivision (a) – the current Appellate Rule 2 – would carry over into an appellate rules emergency and would then authorize courts to create whatever alternatives they might need to operate. In addition, the Appellate Rules Committee did not set timing deadlines for emergency declarations, opting instead for the open-ended instruction that the emergency-declarer "must end the suspension" of rules "when the rules emergency no longer exists." Finally, he noted that he was not aware of anyone having suggested that Rule 2 had been abused historically.

Judge Bates suggested that the courts of appeals' normal modification of deadlines and oral argument timing was not quite comparable to the suspension of rules during an emergency. The ability to alter deadlines and scheduling is not unique to the courts of appeal. The distinguishing feature of the courts of appeals might be that there is not much at stake when deadlines and schedules are changed. He said it did not seem to him that this was what the committees were concerned with here. Judge Bates also asked whether there is a downside to not setting out replacement rules. If nothing is set out, it will be left to someone – the chief circuit judge, a panel, the circuit as a whole – to describe specifics.

Judge Bates then pointed out that subdivision (a) says the court "may suspend and order proceedings as it directs" while subdivision (b), the emergency rule, only says the court "may suspend" and does not mention ordering proceedings. He asked whether paragraph (b) needs something about the authority to order proceedings, or whether the omission was intentional. Professor Hartnett explained that the Appellate Rules Committee had assumed that the authority in paragraph (a) was implicit in (b), but he agreed that it should probably be made explicit.

A judge member made a similar drafting note. In paragraph (b)(2) the suspension of rules within a circuit is allowed, but sometimes the rule only needs to be suspended in part of a circuit. The member suggested that perhaps the rule should refer to "all or part of that circuit."

Another judge member did not think it was a problem for the courts of appeals to have a different structure to their emergency rules, but this member thought that a sunset provision – maybe ninety days – would be an appropriate and important safeguard. Professor Capra added that if the Judicial Conference was, ultimately, the only authority declaring emergencies across all the rule sets, it would be particularly odd for there to be a time limit on the other three types of rules emergencies but not on an appellate rules emergency.

An attorney member had a question about language in paragraph (b)(2) that identifies "time limits imposed by statute and described in Rule 26(b)(1)-(2)" as those that cannot be set aside in an emergency and whether this referred to time limits both "imposed by statute" *and* "described in Rule 26" and about the extent to which these categories overlapped. Professors Hartnett and Struve indicated that they were not aware of any time limits in the Appellate Rules imposed by statute but not covered in Rule 26(b), but recommended keeping the references to both because some requirements covered in Rule 26(b) are not set by statute.

Judge Bybee thought it made sense to add "and order proceedings" to subdivision (b) for consistency with subdivision (a), and he did not have any objection to a ninety-day time limit for an emergency declaration. He agreed with Professor Capra's point that this would be a particularly good idea if the Judicial Conference were in the position of declaring rules emergencies across rules sets. He also agreed with the proposal to add "or set of cases" and expressed his view that the Appellate Rules Committee would likely be amenable to these suggestions.

Some relatively brief comments rounded out this discussion. One judge member noted that if a ninety-day sunset provision is introduced there should be an option to extend the emergency past the ninety days. Another judge member thought it would be helpful for paragraph (b)(2) to reference both deadlines imposed by statute and Rule 26(b) because it was helpful to the reader to include both, noting that, in this judge's court, there exists a practice of including sunset provisions when issuing emergency-type orders. Another judge member suggested that paragraph (b)(3) be amended to limit the Judicial Conference's review authority to review of decisions under subdivision (b) as opposed to all of Rule 2, which would include subdivision (a). Judge Bybee pointed out that the draft committee note addressed some issues that had been raised and that he expected the Advisory Committee would be open to including additional clarifications.

*Authority*. Professor Struve introduced an issue raised in the Appellate Rules Committee meeting, regarding whether rules allowing the Judicial Conference or other actors to declare an emergency might run afoul of the Rules Enabling Act. She framed the issue in this way: a judge presiding over individual cases is generally understood to have authority over her own docket. In the draft emergency rules, the advisory committees give authority to the Judicial Conference. That authority would not be limited to cases on its members' own dockets. Nor does 28 U.S.C. § 331 – which establishes and lays out the powers of the Judicial Conference – give the Judicial Conference the authority to declare emergencies or suspend rules of procedure. Would there be a problem if rules of procedure enacted through the Rules Enabling Act process gave the Judicial Conference such authority?

Professor Struve reported that the general consensus after discussion among the reporters was that there was not an issue under the Rules Enabling Act. One way of thinking about it was that there are a variety of decisionmakers that exist outside of the courts that make determinations that are incorporated by reference to the ways the courts function. For example, a state can declare a legal holiday and have that decision incorporated into a time-counting provision, giving that holiday declaration a legal effect in the rules. In the draft criminal, civil, and bankruptcy rules, the Judicial Conference would choose from a menu of options and could choose to implement some or all of them. There is less structure to the proposed appellate emergency provisions but as

discussed, they already have more flexibility to suspend their rules, and the stakes are somewhat lower.

Professor Capra thought the issue was simple. He pointed out that making a declaration that an existing rule comes into effect is different from making a rule. The rule is preexisting, and triggering it is not rulemaking. Professor Hartnett looked at the question differently. He thought the concern was not that the federal rules cannot incorporate other law by reference, but rather the source of the authority for another body to act in the first place: Where does the Judicial Conference get the authority to declare the emergency? The other way to think about it is that perhaps the rule promulgated under the Rules Enabling Act can itself be the source of the Judicial Conference's authority, but this requires thinking through the implications. Can a rule promulgated under the Rules Enabling Act create authority for a body that did not have such authority already?

Professor Coquillette did not think this presented a practical problem. He added that Congress instructed the Rules Committees to make rules that solve this problem, and he did not think it was likely that anyone would challenge it.

A judge member asked whether paragraph (b)(3) of the draft amendment should refer to a "declaration" under paragraph (b)(1) rather than a "determination," because the word "determination" would seem to suggest that the Judicial Conference can review and revise the rules modifications put in place as well as the emergency declaration. It did not seem to this member that the Judicial Conference should necessarily be reviewing the modifications.

Professor Marcus thought it was very peculiar to suggest that there was an authority problem when Congress had instructed the Rules Committees to do something like this and when Congress would be reviewing the rule before it went into effect.

Professor Cooper thought that it was a very good idea for the Judicial Conference to be the actor empowered to act and that there was therefore likely a way to find authority under either the Rules Enabling Act or 28 U.S.C. § 331.

Professor Beale thought that the Rules Enabling Act provides the necessary authority if such authority did not exist otherwise. If there is a statutory gap – and, in her opinion, one does not appear to exist – she thought that the Rules Enabling Act's supersession could bridge that gap. If the Judicial Conference is the logical place to lodge the power to declare an emergency and if the Rules Committees, the Judicial Conference, the Supreme Court, and Congress affirm that by approving the emergency rules – that ought to be enough to alleviate any lingering concerns.

Professor Gibson noted that although the section of the Rules Enabling Act that applies specifically to Bankruptcy Rules, 28 U.S.C. § 2075, does not include a supersession clause, she nevertheless agreed that it provided sufficient authority.

Professor Cooper said that the Civil Rules had embraced things prescribed by the Judicial Conference in the past. For example, electronic filing was originally permitted according to standards developed by the Judicial Conference. Local rules numbering and the maintenance of district court records were similar examples.

An attorney member asked if there was a gap between the current rule proposals and the CARES Act's focus on presidentially declared emergencies. Is there anything to be pointed to other than the later ratification process? Professor Capra thought that this was only a problem if the CARES Act were relied on for authority to promulgate the emergency rules. Instead the Rules Enabling Act could be relied on as the statutory authority. Judge Bates clarified that the authority question here is different from the statutory authorization.

*Criminal Rules Provisions.* The next topic for discussion was some of the substantive provisions of draft Criminal Rule 62, particularly subdivisions (c) and (d). Subdivision (c) lays out specific substantive changes for emergency circumstances that were developed based on feedback the committee received from participants in the miniconference. Judge Kethledge and Professors Beale and King invited any thoughts from the Standing Committee on these proposals.

Judge Bates had a question concerning paragraph (c)(3), which would allow the court to conduct a bench trial without the government's consent when it finds that doing so "is necessary to avoid violating the defendant's constitutional rights." He asked why the Criminal Rules Committee had limited this to constitutional rights instead of allowing the same procedure when a statutory right was at stake. Judge Kethledge thought the main reason was to avoid any questions under *Singer v. United States*, 380 U.S. 24 (1965), in which the Supreme Court held that a defendant has no constitutional right to waive trial by jury. Professor Beale noted also that the DOJ was opposed to too much of a deviation from the norm and that the subcommittee had taken these views into account. Originally, the rule would have allowed a bench trial without the government's consent whenever doing so would be "in the interest of justice." The Advisory Committee ultimately determined that this provision should be a narrow one. Judge Kethledge noted that there was division over this provision among advisory committee members and that it had not been put forward with unanimous support.

A judge member questioned the extent to which the situation envisioned by paragraph (c)(3) could ever actually arise. Presumably the constitutional right at issue would be a speedy trial right, and evaluating whether an additional delay would violate that right requires a fairly complicated multi-factor decision. If, under the rule as drafted, a judge has to go through all of that analysis and get it right, subject to an interlocutory appeal by the government, in practice it could be very difficult to ever actually order a bench trial over a government objection. The member was not opposed to the provision though because criminal defendants sitting in jail while proceedings are delayed has been a major problem during the current pandemic. Professor Beale thought that as a practical matter the provision could be used. The member asked whether looking at the statutory speedy trial test rather than the constitutional one might make the provision more likely to actually come into play. Professor King noted that *Singer* concerned the method of trial; it did not involve speedy trial rights. The consensus of the Advisory Committee was to not limit the provision to speedy trial rights because we cannot predict all future emergency circumstances and what constitutional rights they might somehow implicate.

Another judge member expressed the view that this would likely be a null set provision if the government's veto can only be overridden based on constitutional concerns, and that it was not worth writing a rule for a circumstance that would not happen.

A member asked for clarification on whether the rules and statutes normally allow a bench trial without the government's consent. Professor Capra and others confirmed that they do not. This member then asked whether this was a substantive change. Judge Kethledge thought there might be a question there.

An attorney member thought the emergency setting could pit the defendant and government against one another in a new way. In an emergency, the choice between a jury and a bench trial also might implicate a very long incarceration. Judge Kethledge agreed these are serious concerns. Professor King said there had been mixed reports regarding whether the government had been withholding consent to bench trials in situations like these.

Professor Coquillette noted that the Supreme Court routinely approves the Standing Committee's recommendations but that the bench trial provision was the kind of thing that had historically attracted more attention from the Court. Judge Bates agreed. On the other hand, Judge Bates thought members of Congress might want statutory speedy trial rights protected as well as constitutional rights. Accordingly, he thought it important to be very careful.

A judge member appreciated that the proposed rule addressed the issue of extended detention while trials are delayed. This member was not aware of this issue arising but thought there might be a need to think about defendants who want to have a jury trial but are not able to get one for an extended period of time.

Mr. Wroblewski said that the DOJ shared the concerns with delayed trials, especially for detained defendants. It had urged U.S. Attorneys to offer bench trials, and some offices had made blanket offers. Many defendants have not taken this offer. There have been some situations where the government has not consented to a bench trial, but those have been few. While the DOJ does not anticipate that paragraph (c)(3) will have much impact in the end, it is sensitive to concerns about what the Supreme Court will think. It supports the current proposal as a compromise rule.

As a final point on the bench trial issue, a member wondered why this rule was necessary. If constitutional rights are at stake, this member asked, isn't the government always obligated to agree or to drop the case? Frequently the government must choose to prosecute a case in a manner it would not prefer in order to avoid violating a defendant's constitutional rights.

A judge member offered a view on paragraph (c)(1) which, as currently drafted, would establish that "[i]f emergency conditions preclude in-person attendance by the public at a public proceeding, the court must provide reasonable alternative access to that proceeding." This member felt that the word "preclude" was too strong. At times in the past year, public attendance was severely limited but not totally unavailable. It would be better to encourage or require allowing alternative public access when in-person access is seriously limited but not precluded.

Discussion then proceeded to subdivision (d), which addresses remote proceedings. In general, subdivision (d) is more restrictive than the CARES Act's remote proceedings provisions. It carries over some aspects but has additional prerequisites that must be met before proceedings may be held remotely.

Judge Bates asked whether subparagraph (d)(2)(A) should refer to "in-person proceedings" rather than "*an* in-person proceeding." The latter formulation, which is in the current draft, would seem to suggest a case-specific finding, which Judge Bates did not think was the Criminal Rules Committee's intent.

A judge member asked about subparagraph (d)(3)(B), which requires that – in conjunction with other things – a defendant make a written request that proceedings be conducted by videoconference. The member wanted to know what the Criminal Rules Committee had in mind here. Professor King explained that there are two goals behind this requirement. First, it helps guarantee that the gravity of the waiver is well-understood by both the defendant and counsel. Second, it helps to create a record. The Advisory Committee did envision that the required writing would be filed with the court. An additional provision in paragraph (c)(2) provides for obtaining the defendant's signature, written consent, or written waiver under emergency circumstances.

A judge member agreed with Judge Bates about subparagraph (d)(2)(A). This member said that there had been concerns among judges regarding whether one judge in a district holding in-person proceedings undermined findings by other judges that in-person proceedings could not be held. This member also asked about the timing requirement in subparagraph (d)(2)(A) and suggested it be mirrored in subparagraph (d)(3)(A).

Professor Capra asked whether there was inconsistency regarding the use of the word "court," in draft Criminal Rule 62, but he thought it was clear enough in each provision whether the word referred to a single judge or to a court in the sense of a district or courthouse. He observed that the Criminal Rules already use the word "court" in both senses. Professor Beale said this was something each advisory committee should review for consistency and clarity. Professor Garner added that "court" is used to refer to an individual judge throughout the rules and that this was generally not a problem.

*Miscellaneous Emergency Rules Issues.* Professors Cooper and Marcus briefly explained how the Civil Rules Committee's CARES Act Subcommittee had identified the Civil Rules that might warrant emergency changes. It conducted a thorough review of all the rules and identified only a few that were not sufficiently flexible. These were the rules that are in subdivision (c) of draft Civil Rule 87.

A judge member suggested that if the Judicial Conference is going to be the decisionmaker in all instances, it would be more uniform to rephrase Rule 87 in the same way as the others. Currently draft Bankruptcy Rule 9038 and Criminal Rule 62 default to enacting all the emergency provisions unless the emergency-declarer says otherwise, while draft Civil Rule 87 requires that the emergency-declarer affirmatively identify which emergency rules will go into effect. Professor Capra agreed that consistency would be good here.

Professor Capra next raised the issue of what happens if the Judicial Conference is unable to meet and declare an emergency? Should the rules account for such a situation? He said he didn't think such a provision was needed because if events were so dire that the Judicial Conference or its Executive Committee couldn't communicate for a significant amount of time that the Federal

Rules of Practice and Procedure would not be a particularly high priority. There would be bigger problems to deal with. Further, the Executive Committee of the Judicial Conference is a smaller body and that smaller group is the one that would be deciding. The judge member who had raised this issue in the first place found Professor Capra's reasoning was persuasive.

Another judge member thought it was worth considering an emergency in which communications are seriously disrupted. This member suggested that a judge or chief judge who cannot communicate with the Judicial Conference should be able to act. This member thought the fact that the situation was extreme did not mean it was not worth considering.

Finally, Professor Capra raised the issue of the termination of a declared rules emergency. Draft Bankruptcy Rule 9038, Civil Rule 87, and Criminal Rule 62 say that if the emergency situation on the ground ends before the declared rules emergency ends, there is a provision by which the rules emergency may be terminated. The Bankruptcy and Civil Rules Committees' draft rules provide that the rules emergency "may" be terminated; the Criminal Rules Committee's proposal said that it "must" be terminated. Professor Capra suggested that the termination should be permissive, not mandatory because imposing a mandate on the Judicial Conference seems extreme.

One judge member disagreed and thought that the mandatory language was preferable. These emergency rules should be preserved for extreme situations where there are no alternatives. The sunset provisions limit the damage somewhat but still if the emergency is resolved it is important to return to normal court operations. This member was not concerned about the possibility that someone would have a cause of action if the Judicial Conference was required to terminate the emergency but failed to do so. Professor Capra asked whether this would mean the initial emergency-declaring authority should also say "must" instead of "may." This member did not think so, and Professor Capra agreed.

An attorney member agreed that any rules emergency should not last any longer than the actual emergency, but this member thought that it was necessary to allow discretion. The relevant question at the end of an emergency would be how to terminate, not whether to terminate. Suggesting a mandatory obligation at the instant the emergency ends could distort the discussion because, at the end of the day, the Judicial Conference would have to determine the reasonable means of winding down the emergency operations.

A member expressed concern about writing a rule that forces the Judicial Conference to do anything. If – as it seemed – any mandatory language would not be enforceable, then maybe precatory language of some kind would be sufficient.

Judge Bates had one final question concerning proposed draft Bankruptcy Rule 9038. As currently drafted, paragraph (c)(1) provides that certain actions could be taken district-wide "[w]hen an emergency is declared" but paragraph (c)(2) which addresses actions that could be taken in a specific case or proceeding did not include that same phrase. Judge Bates asked whether paragraph (c)(2) should also say "when an emergency is declared." Professor Gibson explained that the style consultants had thought the current phrasing was clear – that yes, paragraph (c)(2)

also requires that an emergency must have been declared, but she and Judge Bates agreed that perhaps it did need to be clarified.

*Other Matters Involving Joint Subcommittees*

Judge Bates briefly addressed two ongoing joint subcommittee projects: the E-filing Deadline Joint Subcommittee, formed to consider a suggestion that the electronic filing deadlines in the federal rules be changed from midnight to an earlier time of day; and the Appeal Finality After Consolidation Joint Civil-Appellate Subcommittee, which is considering whether the Appellate and Civil Rules should be amended to address the effect (on the final-judgment rule) of consolidating separate cases. Both subcommittees have asked the FJC to gather empirical data to assist in determining the need for rules amendments.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Bybee and Professor Hartnett delivered the report of the Appellate Rules Advisory Committee, which last met via videoconference on October 20, 2020. The Advisory Committee presented four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 195.

*Information Items*

*Proposed Amendments Published for Public Comment.* Judge Bybee explained that at the June 2020 Standing Committee meeting the Appellate Rules Committee had received some feedback concerning proposed Rule 42, which would address voluntary dismissals. The committee addressed the concern and would be seeking final approval of this proposed rule change in the spring of 2021. There was no present action to be taken. Professor Hartnett noted that the concerns raised at the Standing Committee related to how the requirement that parties agree to dismissal of an appeal might interact with local rules requiring the defendant's consent before dismissal. Judge Bates, who had raised this concern, stated that he was happy with the adjustments that the Appellate Rules Committee had made to proposed Rule 42.

*Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing).* The Appellate Rules Committee is still considering combining Rules 35 and 40. It was thought that consolidating these rules might eliminate some confusion in the Appellate Rules. This issue remains under careful study.

*Suggestions Related to* In Forma Pauperis *Relief.* Various suggestions relating to *in forma pauperis* relief had been submitted to the Appellate Rules Committee. Judge Bybee explained that it was not clear that the problems identified were problems with the Appellate Rules. The issues are under consideration, but may be put off.

*Relation Forward of Notices of Appeal*. The relation forward of notices of appeal was still under discussion by the committee.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell provided the report of the Bankruptcy Rules Advisory Committee, which last met via videoconference on September 22, 2020. The Advisory Committee presented four action items and two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 241.

*Action Items*

*Retroactive Approval of Official Form 309A–I (Notice of Bankruptcy Case).* Judge Dow explained this action item concerning a series of forms that are used to notify recipients of the time and place of the first meeting of creditors and certain other deadlines. The information on these forms includes the web address of the PACER system. This web address had been changed, so the forms needed to be updated to reflect the new address. The change has already been made pursuant to the Bankruptcy Rules Advisory Committee's authority to make technical changes subject to retroactive approval by the Standing Committee and notice to the Judicial Conference, and the Advisory Committee now sought that retroactive approval. Upon motion, seconded by a member, and on a voice vote: **The Committee decided to retroactively approve the changes to the Official Form 309A–309I.**

*Proposed Amendments for Publication.* An amendment to Rule 3011(Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases), was brought up in connection with a project on unclaimed funds and is intended to reduce the amount of such funds and clerks' offices' liabilities with regard to them. The Bankruptcy Rules Advisory Committee asked for a modification of Rule 3011 in order to achieve a wider circulation of information about unclaimed funds. The modification proposed by the Bankruptcy Rules Committee would add a new subdivision (b) that would require court clerks to provide searchable access on court websites to data about unclaimed funds on deposit with the clerk. The Bankruptcy Rules Committee added a proviso that would allow the clerk to limit access to this information in specific cases for cause shown (e.g., to protect sealed information). The Advisory Committee sought publication of this proposed amendment.

Related Amendments to Bankruptcy Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Form 417A (Notice of Appeal and Statement of Election) were proposed in order to maintain uniformity with recent amendments to the Federal Rules of Appellate Procedure. Rule 8003 would be amended to conform to pending amendments to Appellate Rule 3. The amendments would clarify that the designation in a notice of appeal of a particular interlocutory order does not preclude appellate review of all other orders that merge into that judgment or order. Form 417A, the Bankruptcy Notice of Appeal Form, would be amended to conform to the wording changes in Rule 8003. Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendments to Rule 3011, Rule 8003, and Form 417A.**

*Information Items*

*Changes to Instructions for Official Form 410A (Proof of Claim, Attachment A).* Judge Dow explained that a bankruptcy judge had pointed out a problem with Form 410A to the Bankruptcy Rules Committee. The Form is an attachment to a Proof of Claim Form that is filed in bankruptcy cases for mortgage-related claims. The problem related to how total debt is calculated when the underlying mortgage claim has been reduced to judgment and has merged into that judgment. A question can arise as to what governs the claim at that point in jurisdictions that have judicial foreclosure. Judge Dow said that the Advisory Committee added a paragraph to the instructions to Form 410A clarifying that the "principal balance" in this situation is the amount due on the judgment along with any other charges that may have been added to the claim by applicable law. Judge Dow explained that because only the instructions were changed, and not the form itself, that no Standing Committee action was required.

*Bankruptcy Rules Restyling.* Professor Bartell explained that the style consultants have been doing great work making the rules more comprehensible. Parts one and two of the restyled rules had been published, consideration of parts three and four were proceeding on schedule, and the style consultants had just given the committee a draft of part five. An official draft of part six was scheduled to be ready in February. Professors Garner and Kimble expressed their appreciation to the Bankruptcy Rules Committee.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Robert Dow and Professors Cooper and Marcus provided the report of the Civil Rules Committee, which last met via videoconference on October 16, 2020. The Advisory Committee presented three action items and four information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 297.

*Action Items*

*Proposed Amendment to Rule 7.1 (Disclosure Statement).* The Civil Rules Committee first sought final approval of a proposed amendment to Rule 7.1 which was presented at the Standing Committee's June 2020 meeting and remanded to the Civil Rules Committee for further consideration in light of the feedback provided by the Standing Committee. Proposed paragraph (a)(1) and subdivision (b) have not changed since the June 2020 meeting. These provisions deal with adding nongovernmental corporate intervenors to the requirement for filing disclosure statements. Proposed paragraph (a)(2) has been revised since the June 2020 meeting.

Proposed Rule 7.1(a)(2) seeks to require timely disclosure of information necessary to determine diversity of citizenship for jurisdictional purposes. Often this is not complicated, and citizenship is settled when the case is initially filed in federal court or removed from state court. However, determining citizenship is complicated in a number of cases, especially considering the proliferation of LLCs. The Civil Rules Committee thought it was worth amending Rule 7.1 because the consequences of failing to spot a jurisdictional problem early can be severe. As the committee's report explains, the committee came up with two ways to address the issues raised by

the Standing Committee at the June meeting – one more detailed than the other. The Advisory Committee prefers the more detailed version but presented an alternative version for the Standing Committee's consideration.

Professor Cooper described the alternatives. As published, the rule would have required disclosure of citizenship at the time the action was filed in federal court, with the idea that this would apply equally to cases removed from state court because the time at which the case is removed is the time at which it is first filed in federal court. Public comments suggested that the rule would be clearer if it referred to the time at which an action is "filed in or removed." Proposed subparagraph (a)(2)(A) was revised and now reflects these suggestions. In committee discussion, it was noted that diversity may need to be evaluated at other times as well. Subparagraph (a)(2)(B) was added to account for this and required filing "at another time that may be relevant to determining the court's jurisdiction." Last June, some Standing Committee members were concerned that the language of this subparagraph was too open-ended. The proposal was remanded to the Advisory Committee for further consideration.

After extensive discussion, the Advisory Committee concluded again that it would be worthwhile to draw judges' and practitioners' attention to the complexity of the diversity rules and to the fact that diversity jurisdiction is not permanently fixed at the moment when the case first arrives in federal court. This led to the proposed revision of subparagraph (a)(2)(B)'s language presented at this meeting. The proposal would now require the filing of disclosures when "any subsequent event occurs that could affect the court's jurisdiction." The Advisory Committee recognized that this was still somewhat nonspecific, but felt that the alternative of trying to spell out all the events that could affect diversity jurisdiction as an action progresses was simply not feasible. The Advisory Committee also suggested that the Standing Committee could approve a version that simply omits subparagraphs (a)(2)(A) and (B) (and dropping the word "when" from the end of paragraph (a)(2)), but Professor Cooper explained that the Advisory Committee did not recommend this course of action.

Judge Bates wondered whether there was still ambiguity in the word "when" in paragraph (a)(2). He was concerned that someone could be confused as to whether this refers to the time for filing or the time the citizenship is attributed. Professor Cooper said that, in the Civil Rules, the word "when" is often used to mean "at the time." He said that it was possible to add a few more words if it would help to clarify, but the Advisory Committee believed it was not necessary and was better to avoid unnecessary verbiage. Judge Bates noted that the second alternative proposed would avoid the problem by dropping subparagraphs (A) and (B).

A judge member offered a number of suggested alterations to the text of the proposed amendment. First, this member noted that no matter whether "when" or "at the time" was used, it was unlikely that practitioners would assume that the filing had to be made immediately. It might be helpful to provide a time limit to ensure prompt filing. This particular suggestion was later withdrawn. The member also asked whether the word "or" might be preferable to "and" at the end of subparagraph (A). Professor Cooper explained that "and" was used because the filing under subparagraph (A) would have to be made in every case and would often be sufficient to resolve questions. If something happens after that, having fulfilled the subparagraph (A) requirement in the past does not make the subparagraph (B) filing unnecessary. The member then suggested

moving the word "when" from before the colon to, instead, the start of both of subparagraphs (A) and (B). This same member suggested that the reference to a party that "seeks to intervene" in paragraph (a)(1) ought to be reflected in paragraph (a)(2) which currently refers only to an "intervenor." Professor Cooper did not recall this issue having been raised before the Advisory Committee. For paragraph (2), though, Professor Cooper thought it might make sense to wait for intervention to be granted under some circumstances. Judge Bates noted that, if implemented in paragraph (a)(2), this change should also be made in subdivision (b). The committee member also suggested subparagraph (2)(B)'s reference to "any subsequent event . . . that could affect the court's jurisdiction," might be too broad. If, for example, a case arguably became moot, this would be an event that could affect the court's jurisdiction. But this is not a circumstance where the re-filing of disclosures would be necessary or desirable. Professor Cooper agreed that an amendment to narrow the filing requirement could be added.

Professor Kimble said that although moving the word "when" to both (A) and (B) would not change the meaning, the current draft was consistent with what the style consultants would typically recommend. He said that the style consultants would typically change "at that time" to "when."

Professor Hartnett asked if it would be helpful to break paragraph (a)(2) into two sentences. (". . . a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must . . . .") Professor Cooper thought this was a good idea. Judge Dow wondered whether "intervenor or proposed intervenor" would be an appropriate way to refer to the party seeking to intervene, and he endorsed the suggestion that (a)(2) be split into two sentences.

Another attorney member asked why paragraph (a)(1) referred to "*A* nongovernmental corporate party" but to "*any* nongovernmental corporation that seeks to intervene," rather than using "any" in both places. Professor Cooper thought it should be changed to whichever conforms to the Appellate and Bankruptcy Rules, and Judge Bates agreed. Professor Garner suggested that the style consultants would normally change "any" to "a" and that if other rules were phrased differently, those rules were inconsistent with the style guidelines.

Judge Bates reviewed and summarized the changes under consideration. A judge member pointed out that revisions to the committee note might also be necessary. Judge Bates determined that it was better to circulate the proposed amendment incorporating the changes made during the meeting via email, with an opportunity for discussion, followed by a vote by email. This was done later in the week. There was no call for discussion and, upon a motion that was seconded, the Standing Committee voted unanimously to **recommend for approval the proposed amendment to Rule 7.1.** The agenda book has been updated to reflect the final version of the proposed amendment that the committee approved.

*Proposed Amendment to Rule 15(a)(1).* Judge Dow presented a proposed amendment to Rule 15(a)(1), with a request that it be approved for publication for public comment. The proposed amendment is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period does not commence until the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment would preclude this interpretation by replacing the word "within" with "no later than." **The Committee approved for publication the proposed amendment to Rule 15(a)(1).**

*Proposed Amendment to Rule 72(b)(1).* Judge Dow next presented a proposed amendment to Rule 72(b)(1), with a request that it be published for public comment. The rule currently directs that the clerk "must promptly mail a copy" of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means.

The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be "immediately served" on the parties as provided in Rule 5(b). In determining how to amend the rule to bring it in line with current practice, the Advisory Committee referred to Rule 77(d)(1) which was amended in 2001 to direct that the clerk serve notice of entry of an order or judgment "as provided in Rule 5(b)." In addition, Criminal Rule 59(b)(1) includes a provision analogous to Civil Rule 72(b)(1), directing the magistrate judge to enter a recommendation for disposition of described motions or matters, and concluding: "The clerk must immediately serve copies on all parties." Criminal Rule 49, like Civil Rule 5, contemplates service by electronic means. Professor Kimble asked why the word "promptly" had been changed to "immediately." Professor Cooper said this change was made for conformity with Criminal Rule 59(b)(1). Upon motion, seconded by a member, and on a voice vote: **The Committee approved for publication the proposed amendment to Rule 72(b)(1).**

*Information Items*

*Subcommittee on Multidistrict Litigation.* Judge Dow provided the report of the Multidistrict Litigation (MDL) Subcommittee. The first topic, formerly called "early vetting" is now called "initial census." In three of the largest MDLs going on right now, a form of initial census has occurred over the past year. Judge Dow had spoken with the judges overseeing two of these three cases. Rather than have lengthy fact sheets, the judges in these cases have relied on the basic information on the first few pages of the fact sheets. The judges in these cases have used this basic information to organize the plaintiffs' steering committee, to organize discovery, and to dismiss certain plaintiffs. The subcommittee has been very happy with how this has been developing in the big MDLs. It remains on the study agenda because a rule may be helpful, but it is also possible that these practices may just be circulated as best practices and could belong in the *Manual on Complex Litigation* or spread as a model by discussion at conferences. A rule may not be necessary.

An attorney member wanted to share their view. In this member's experience, courts and the plaintiffs' bar think there is little need for change and the defense bar does think there is a need

for change. This makes rulemaking difficult. On paper, the rules seem to suggest that defendants could have a number of cases that they might want to join together into an MDL. In practice, though, the existence of an MDL can lead to more cases against a defendant because there is less of a hurdle to additional plaintiffs joining – and in fact the plaintiffs' bar wants more plaintiffs. Additionally, MDLs are perceived on both sides as settlement vehicles. A lot of work goes into them, but they nearly always settle. This member understood that the Advisory Committee was not inclined toward allowing interlocutory appeals, but thought that it was worth looking at the initial census option as a way of avoiding the multiplicity problem.

Another attorney member thought there might be an opportunity to craft a flexible rule that would allow the courts to craft an initial census tailored to the particular case. Judge Dow agreed that this was what the Advisory Committee had in mind – something prompting the lawyers and the judge to consider an initial census in every case.

Judge Dow next explained that the subcommittee had also been very focused on interlocutory appeals. The subcommittee had held a conference of judges and lawyers working on MDLs, including a particularly good representation of non–mass tort MDLs. The conference had had a large influence on the subcommittee's thinking and in the recommendation that an interlocutory appeal rule should not be pursued at this time. Some feel that the current interlocutory appeal options (and mandamus) are sufficient. Other interested persons think that even if there are some gaps, there is no need for new rules or rules amendments because the current rules are good enough and any delays caused by interlocutory appeals would not be worth it. As an example of one problem that could arise if interlocutory appeals were permitted, Judge Dow explained that state courts might not be willing to wait around while a federal Court of Appeals takes up a case. At the end of the day, the members of the subcommittee all thought that an interlocutory appeal rule was not worth pursuing at this time. Professor Marcus added that there had also been definitional issues concerning what kinds of cases to which such a rule would apply.

Finally, Judge Dow explained that equity and fairness and the role of the court in the endgame of settlements of large MDLs was the area that the subcommittee would likely be focused on in the near term. There are obvious similarities between MDLs and class actions, and for class actions the rules require that courts approve settlements. This is not the case for MDLs unless they are resolved through a class action mechanism. Questions can arise about whether all parties are treated the same and about what the court's role should be. Professor Cooper drafted a memo on these issues. At the last subcommittee meeting it was resolved that a conference convening stakeholders would be useful to help determine whether action should be taken on this issue.

An attorney member thought that it might be worth considering whether the attorneys with the most clients or client with the largest interest ought to be lead counsel, or at least whether this ought to be a factor in determining lead counsel. One criticism of MDLs is that they are lawyer-driven litigation and hinging lead counsel assignments on characteristics of the clients might ameliorate this somewhat (as opposed to giving prominence to the lawyer who files first or who is best-known in the district).

Another judge member suggested that in preparation for the conference, it might be worth asking the Federal Judicial Center to survey clients who received settlements in MDLs. An

attorney member said he feared the proposal of rewarding the lawyers who aggregated the most clients. This would incentivize lawyers to form coalitions and would undermine the courts' control overall. In securities litigation, there are policy reasons to put institutional shareholders in the lead, but those reasons don't necessarily carry over to MDLs across all kinds of subject areas. This member agreed it was worth investigating what happens with money that ends up in common benefit funds. Lawyers applying to be lead counsel could be questioned regarding what has happened to funds they have won or overseen in the past. The member cautioned these issues might not be appropriately resolved through a civil rule.

*Items Carried Forward or Removed from the Advisory Committee's Agenda.* Judge Dow briefly summarized items on the Advisory Committee's agenda. He explained that the Civil Rules Committee is continuing to consider an amendment to Rule 12(a) that would clarify the time to file where a statute sets time to serve responsive pleadings but that the Advisory Committee had not yet come to an agreement on that issue. The Advisory Committee was also interested in investigating a potential ambiguity lurking in Rule 4(c)(3)'s provision for service by a U.S. Marshal in *in forma pauperis* cases. This investigation had not proceeded recently because the Marshals Service had been preoccupied with pandemic-related security concerns and the committee did not want to bother them at this time. There had been suggestions that the Advisory Committee look into amending Rules 26(b)(5)(A) and 45(e)(2) to revise how parties provide information about materials withheld from discovery due to claims of privilege. The Civil Rules Committee plans to create a new Discovery Subcommittee to look into these issues. An Advisory Committee member submitted a suggestion to amend Rule 9(b), on pleading special matters – this would be discussed at the Advisory Committee's next meeting. Finally, Judge Dow explained that the Advisory Committee had removed from its agenda suggestions to amend Rule 17(d) (regarding the naming of defendants in suits against officers in their official capacity) and Rule 45 (concerning nationwide subpoena service).

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Kethledge presented the report of the Criminal Rules Committee, which met via videoconference on November 2, 2020. The Advisory Committee presented two information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 395.

### *Information Items*

*Rule 6 Subcommittee.* Judge Kethledge reported that the Advisory Committee was continuing to consider suggestions to amend the grand jury secrecy provisions in Rule 6. Since the last meeting, the Advisory Committee has received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances. The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the

authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers). The Advisory Committee anticipates having more to report at the June 2021 meeting.

*Items Removed from the Advisory Committee's Agenda.* A number of items had been removed from the Advisory Committee's agenda. Discussion of these items is in the committee's report.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Schiltz and Professor Capra provided the report of the Evidence Rules Advisory Committee, which last met via videoconference on November 13, 2020. The Advisory Committee presented three information items. The Advisory Committee's report and the draft minutes of its last meeting were included in the agenda book beginning at page 441.

### *Information Items*

*Amendment to Rule 702 (Testimony by Expert Witnesses).* Judge Schiltz explained that the committee was looking at two issues relating to testimony by expert witnesses. The first was what standard a judge should apply when considering whether to allow expert testimony. It is clear that a judge should not allow expert testimony without determining that all requirements of Rule 702 are met by a preponderance of the evidence. The requirements are that the testimony will assist the trier of fact, that it is based on sufficient facts or data, that it is the product of reliable principles and methods, and that the expert reasonably applied those principles and methods to the facts at hand. It is not appropriate for these determinations to be punted to the jury, but judges often do so. For example, in many cases expert testimony is permitted because the judge thinks that a reasonable jury *could* find the methods are reliable. There is unanimous support in the Evidence Rules Committee for moving forward with an amendment to Rule 702 that would clarify that expert testimony should not be permitted unless the judge finds by a preponderance of the evidence that each of the prerequisites are met. This would not be a change in the law, but rather would consolidate information available in two different rules and two Supreme Court opinions.

The second expert testimony issue being considered by the Evidence Rules Committee is the problem of overstatement. Judge Schiltz explained that this refers to the problem of experts overstating the strength of the conclusions that can reasonably be drawn by the application of their methods to the facts. For example, an expert will testify that a fingerprint "was the defendant's" or that a bullet did come from a gun, with no qualification or equivocation. Experts will make these claims with certainty when the science does not support such strong conclusions. The defense bar has been asking for an amendment that would not permit such overstatements. The Evidence Rules Committee was divided on this suggestion from the defense bar. Only the DOJ, however, was opposed to a more modest proposed amendment that would draw attention to the need for every expert conclusion to meet the standard set under Rule 702. Judge Schiltz anticipates that the Advisory Committee will present something related to Rule 702 at the Standing Committee's June 2021 meeting, once he has received input from new members who recently joined the Advisory Committee.

*Proposed Amendment to Rule 106 (Remainder of or Related Writings or Recorded Statements).* The "rule of completeness" requires that if at trial one party introduces part of a writing or recorded statement, the opposing party can introduce other parts of that statement if in fairness those other parts should also be considered. Judge Schiltz explained that there are a couple of problems with this rule in practice. One is that the circuits are split on whether the "completing portion" can be excluded as hearsay. This can arise, for example, when a prosecutor misleadingly introduces only part of a statement and the defendant wants the jury to hear the completing portion. Some courts will exclude the completing portion under the hearsay rule out of a concern that the jury will overweight it. Other courts will allow the completing portion in but will instruct the jury not to consider it for the truth of the matter but only as providing context. Other courts just let it all in with no limit. The Evidence Rules Committee plans to draft an amendment to Rule 106 that would say that a judge cannot exclude the completing portion for hearsay, but that a judge may issue a limiting instruction.

Another problem with Rule 106 is that it only applies to written or recorded statements. If the statement was made orally, the common law governs and there is a lot of inconsistency in how it is applied. This is one of few areas of evidence law where the Evidence Rules are not considered to preempt the field. It is an odd area for that to be the case because generally this issue arises at trial and must be addressed on the fly, with minimal time for a judge to research the common law. The Evidence Rules Committee plans to draft an amendment rule that would apply to oral statements and supersede the common law.

The Evidence Rules Committee agreed to proceed with both changes to Rule 106. The Department of Justice opposed both changes.

*Proposed Amendment to Rule 615 (Excluding Witnesses).* Judge Schiltz explained that Rule 615 is, on its face, quite simple. It says that a judge must exclude witnesses from the courtroom during trial if the opposing side asks the judge to do so. These requests are common. There is confusion, though, over whether the ruling granting such a request only keeps the witness out of the courtroom or whether it also implies that the witness may not learn about what has been said in court – through conversations, reading a transcript, reading a newspaper, etc. Some circuits have said that the order automatically prevents the excluded witness from learning through these other avenues, while other circuits view the order as only effecting the physical exclusion. Because of this confusion, it can be very easy for witnesses to accidentally violate the order and find themselves in contempt of court. The Evidence Rules Committee unanimously agreed to draft an amendment retaining the part of Rule 615 that requires the court to exclude witnesses if any party asks but making clear that courts can also go further to prevent witnesses from learning about in court testimony. This should clarify that any additional restrictions must be made explicit.

A judge member noted that it was worth thinking about the implications of Rule 615 during trials held over videoconference or otherwise remotely. Additionally, this member noted that in bench trials direct testimony can be taken by affidavit and that it might be worth referring to that sort of testimony in the rule as well. Professor Capra thought the rule would help with these situations because it draws attention to methods of hearing about other witnesses' testimony beyond simply sitting in the courtroom while the witness testifies.

## OTHER COMMITTEE BUSINESS

The meeting concluded with a series of reports on other committee business. First Judge Bates addressed the 2020 *Strategic Plan for the Federal Judiciary*. The agenda book contains material concerning the strategic plan, beginning at page 471. Judge Bates explained that the Judicial Conference committees – including this one – were asked to provide input on what strategies and goals reflected in the *Plan* should receive priority in the next two years. Those recommendations would be reviewed at the upcoming meeting of the Executive Committee of the Judicial Conference. Committee members were instructed to send any suggestions to Judge Bates and to Shelly Cox of the Rules Committee Staff.

Julie Wilson delivered a report on the Judiciary's Response to the COVID-19 pandemic. Judge Campbell had discussed this at the Standing Committee's June meeting. The Administrative Office's COVID-19 Task Force was established early last year and continues to meet bi-weekly. The Task Force remains focused on safely expanding face-to-face operations at the AO and in the courts. Notably, the Task Force has formed a Virtual Judiciary Operations Subgroup, which will recommend technical standards along with policies and procedures regarding the operation of remote communications, including with defendants in detention. Another big part of their work will be to standardize virtual operations throughout the judiciary. In the Administrative Office, guidelines, data, and information are being posted regularly on the JNet website, including information about the resumption of jury proceedings. These materials are available to judges and their staff. The only Judicial Conference activity relating to COVID-19 that has occurred since the last meeting was the extension of the CJRA reporting period from September 30 to November 30.

Ms. Wilson also delivered a legislative report. She explained that the Administrative Office had requested supplemental appropriations from Congress to address various needs within the judiciary due to the pandemic. These appropriations were not made. The Administrative Office also submitted 17 legislative proposals. These were not taken up by the recently concluded 116th Congress. One notable law enacted last year was the Due Process Protections Act. This was introduced in the Senate in May 2019 and had been tracked by the Rules Committee Staff. It was passed quickly and unanimously in 2020. The Act statutorily amended Criminal Rule 5 (Initial Appearance) to require that judges issue an oral and written order confirming prosecutors' disclosure obligations under *Brady* and its progeny. The Act required the creation of model orders for each district. Judge Campbell and Judge Kethledge had sent a letter to the leadership of the House Judiciary Committee expressing the Rules Committees' preference for amending the rules through the Rules Enabling Act process, but the Act passed regardless. The 117th Congress was sworn in on January 3, 2021, just a few days before the Committee met. Some legislation that has been of interest to the Rules Committees in the past had already been reintroduced. Representative Andy Biggs reintroduced the Protect the Gig Economy Act. It would expand Civil Rule 23 to require that the prerequisites for a class action be amended to include a requirement that the claim does not concern misclassification of workers as independent contractors as opposed to employees. Representative Biggs also introduced the Injunctive Authority Clarification Act. This would prohibit the issuance of nationwide injunctions. Other familiar pieces of legislation will likely also be introduced in the coming weeks. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

## CONCLUDING REMARKS

Before adjourning the meeting, Judge Bates thanked the Committee members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 22, 2021. The hope is that the meeting will be in person in Washington, D.C. if doing so is safe and feasible at that time.

# TAB 2

**Agenda E-19 (Summary)**
**Rules**
**March 2021**

**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:

Approve the proposed amendment to Civil Rule 7.1 and transmit it 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. 9-10

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

# 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 January 5, 2021. Due to the Coronavirus Disease 2019 (COVID-19) pandemic, the meeting was held by videoconference. All members participated.

Representing the advisory committees were Judge Jay Bybee, Chair, and Professor Edward Hartnett, Reporter, Advisory Committee on Appellate Rules; Judge Dennis Dow, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Laura B. Bartell, Associate Reporter, Advisory Committee on Bankruptcy Rules; Judge Robert M. Dow Jr., Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, Advisory Committee on Civil Rules; Judge Raymond M. Kethledge, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, Advisory Committee on Criminal Rules; and Judge Patrick J. Schiltz, Chair, and Professor Daniel J. Capra, Reporter, Advisory Committee on Evidence Rules.

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

Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC). Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, Andrew Goldsmith, National Coordinator of Criminal Discovery Initiatives, and Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, represented the Department of Justice (DOJ) on behalf of Principal Associate Deputy Attorney General Richard P. Donoghue.

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

**IMPACT OF THE COVID-19 PANDEMIC ON JURY OPERATIONS**

The Committee considered a proposal from the jury subgroup of the judiciary's COVID-19 Task Force addressing the impact of COVID-19 on jury operations in criminal proceedings. In August 2020, the Executive Committee referred the proposal to this Committee, the Committee on Court Administration and Case Management, the Committee on Criminal Law, and the Committee on Defender Services, to consider whether rules amendments or legislation should be pursued that would allow grand juries to meet remotely during the pandemic. The chairs of the four committees discussed the proposal after consulting with their respective committees and, in a letter dated August 28, 2020, advised the Executive Committee that they did not recommend pursuing efforts to authorize remote grand juries. The letter

explained that although the pandemic has impacted the ability of courts around the country to assemble grand juries, courts have found solutions to the problem including using large spaces in courthouses, masks, social distancing, and other protective measures. Such measures protect public health to the greatest extent possible without compromising the secrecy and integrity of grand jury proceedings, and they have allowed investigations and indictments to proceed where needed.

## EMERGENCY RULES

Section 15002(b)(6) of the CARES Act directs that the Judicial Conference and the Supreme Court consider rules amendments to address emergency measures that may be taken by the courts when the President declares a national emergency. A significant portion of the Committee's meeting was dedicated to reviewing the draft rules developed by the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules in response to that directive. The advisory committees began their work by soliciting public comments on challenges encountered during the COVID-19 pandemic in state and federal courts by lawyers, judges, parties, or the public, and on solutions developed to deal with those challenges. The committees were particularly interested in hearing about situations that could not be addressed through the existing rules or in which the rules themselves interfered with practical solutions. The advisory committees also formed subcommittees to begin work on the issue. At its June 2020 meeting, the Committee heard preliminary reports and then tasked each advisory committee with:
(1) identifying rules that might need to be amended to account for emergency situations; and
(2) developing drafts of proposed rules for discussion at each advisory committee's fall 2020 meeting.

In the intervening months, the subcommittees collectively invested hundreds of hours to develop draft emergency rules for consideration at the fall 2020 advisory committee meetings.

At its January 2021 meeting, the Committee was presented with a report describing this process and was asked to provide initial feedback on the draft rules. The report reached several preliminary conclusions; among the most important was that an emergency rule was not needed for all rule sets. Early on, the Evidence Rules Committee concluded that its rules are already flexible enough to accommodate an emergency. And, although both the Appellate and Civil Rules Committees drafted emergency rules for consideration, they have left open the possibility that no emergency rule is needed in their rule sets.

The advisory committees also concluded that the declaration of a rules emergency should not be tied to a presidential declaration. Although § 15002(b)(6) directs the Judicial Conference to consider emergency measures that may be taken by the federal courts "when the President declares a national emergency under the National Emergencies Act," the reality is that the events giving rise to such an emergency declaration may not necessarily impair the functioning of all or even some courts. Conversely, not all events that impair the functioning of some or all courts will warrant the declaration of a national emergency by the President. The advisory committees concluded that the judicial branch itself is best situated to determine whether existing rules of procedure should be suspended. Their initial consensus was that the Judicial Conference in particular (or the Executive Committee, acting on an expedited basis on behalf of the Judicial Conference) is the most appropriate judicial branch entity to make such determinations, in order to promote consistency and uniformity in declaring rules emergencies. In addition, the advisory committees concluded that any emergency rules should only be invoked for emergencies that are likely to be lengthy and serious enough to substantially impair the courts' ability to function under the existing rules.

A guiding principle in the advisory committees' work was uniformity. Considerable effort was devoted to drafting emergency rules that are uniform to the extent reasonably

practicable, given that each advisory committee also sought to develop the best rule possible to promote the policies of its own set of rules. Notably, in the following respects, the proposed draft rules are uniform. First, the term "rules emergency" is used in each rule set to highlight the fact that not every emergency will trigger the emergency rule. Second, the basic definition of a rules emergency is largely uniform among the four rule sets. A rules emergency is found when "extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules." (Draft Criminal Rule 62 contains an additional element discussed below). Third, the draft rules were reviewed in a side-by-side analysis by the Standing Committee's style consultants with a view toward implementing style guidelines and eliminating differences that are purely stylistic.

Much of the Standing Committee's discussion addressed the advisory committees' request for input on substantive differences among the draft rules and whether those differences were justified. For example, in addition to the basic definition of a rules emergency, draft new Criminal Rule 62 (Criminal Rules Emergency) includes the requirement that "no feasible alternative measures would eliminate the impairment within a reasonable time." As another example, all of the draft rules provide that the Judicial Conference can declare a rules emergency and subsequently terminate that declaration; however, the draft amendment to Appellate Rule 2 (Suspension of Rules) also gives that authority to the court of appeals (acting directly or through its chief judge), and draft Bankruptcy Rule 9038 (Bankruptcy Rules Emergency) includes emergency-declaring authority for both the chief bankruptcy judge in a district where an emergency occurs and the chief judge of a court of appeals.

At their spring 2021 meetings, the advisory committees will consider the feedback provided by members of the Standing Committee, and determine whether to recommend that the

Standing Committee at its summer 2021 meeting approve proposed emergency rules for publication for public comment in August 2021. This schedule would put any emergency rules published for comment on track to take effect in December 2023 (if approved at each stage of the Rules Enabling Act process and if Congress takes no contrary action). At this time, it remains to be seen which, if any, of the advisory committees will recommend publication of draft rules.

## FEDERAL RULES OF APPELLATE PROCEDURE

### *Information Items*

The Advisory Committee on Appellate Rules met by videoconference on October 20, 2020. In addition to discussion of the emergency rules project and possible related amendments to existing rules, agenda items included a review of previously-published proposed amendments. In addition, the Advisory Committee reviewed the criteria for granting in forma pauperis status, including potential revisions to Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis). In response to a recent suggestion, the Advisory Committee also discussed a proposed amendment to Rule 4 (Appeal as of Right—When Taken) to deal with premature notices of appeal. The issue was considered by the Advisory Committee ten years ago, but it is reviewing the issue again to determine if conditions have changed to justify an amendment. Finally, the Advisory Committee continued its comprehensive review of Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing) regarding hearings and rehearings en banc and panel rehearings. Several options for amendment are under consideration in an attempt to align the two rules more closely.

## FEDERAL RULES OF BANKRUPTCY PROCEDURE

### *Official Rules and Form Approved for Publication and Comment*

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 3011 and 8003, and Official Form 417A, with a request that they be published for public

comment in August 2021. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 3011 (Unclaimed Funds in Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, and Chapter 13 Individual's Debt Adjustment Cases)

The proposed amendment, which was suggested by the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), redesignates the existing text of Rule 3011 as subdivision (a) and adds a new subdivision (b) that requires the clerk of court to provide searchable access on the court's website to data about funds deposited pursuant to § 347 of the Bankruptcy Code (Unclaimed Property). The rule change would mirror a pending amendment to the *Guide to Judiciary Policy*, Vol. 13, Ch. 10, § 1050.10(c), which would require courts to provide notice of unclaimed funds on their websites (pursuant to that Committee's efforts to reduce the balance of unclaimed funds and limit the potential statutory liability imposed on clerks of court for their record-keeping and disbursement of unclaimed funds). The Bankruptcy Committee suggested an accompanying rules amendment because the *Guide* is not publicly available and Bankruptcy Rules are often the first place an attorney or pro se claimant looks to determine how to locate and request disbursement of unclaimed funds; a rule change would therefore inform the public where to access unclaimed funds data.

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal)

The proposed amendment revises Rule 8003(a) to conform to the pending amendment to Appellate Rule 3. The Appellate Rules amendment (which is on track to take effect on December 1, 2021 if adopted by the Supreme Court and Congress takes no contrary action) revises requirements for the notice of appeal in order to reduce the inadvertent loss of appellate rights. The proposed amendment to Bankruptcy Rule 8003(a) takes a similar approach and will help to keep the Part VIII Bankruptcy Rules parallel to the Appellate Rules.

Official Form 417A (Notice of Appeal and Statement of Election)

Parts 2 and 3 of Official Form 417A would be amended to conform to the wording of the proposed amendment to Rule 8003.

***Retroactive Approval of Technical Conforming Amendments to Official Form 309A - I***

The Rules Committee Staff was notified that the web address for PACER (Public Access to Court Electronic Records) was changed from pacer.gov to pacer.uscourts.gov. Because the PACER address is incorporated in several places on the eleven versions of the "Meeting of Creditors" forms (Official Forms 309A - I), the forms needed to be updated with the new web address.

Although the old PACER address is currently redirecting users to the new address, the Advisory Committee shared the Rules Committee Staff's concern that users will experience broken links in the year or so it would take to update the forms via the normal approval process. Accordingly, the Advisory Committee approved changing the web addresses on the forms using the delegated authority given to it by the Judicial Conference to make non-substantive, technical, or conforming changes to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference. JCUS-MAR 2016, p. 24. The Standing Committee unanimously approved the form changes.

***Information Item***

The Advisory Committee met by videoconference on September 22, 2020. In addition to its recommendations discussed above, discussion items included an update on the restyling of the Bankruptcy Rules. Notably, the 1000 and 2000 series of the restyled Bankruptcy Rules were published for comment in August 2020, and the Advisory Committee will be reviewing the comments on those rules at its spring 2021 meeting.

The Restyling Subcommittee has completed its initial review of restyled versions of the 3000 and 4000 series of rules, and received feedback from the Standing Committee's style consultants on the subcommittee's proposed changes. The subcommittee received an initial draft of the 5000 series of restyled rules from the style consultants at the end of December 2020, and it expects to receive the initial draft of the 6000 series of restyled rules from the consultants by February 2021.

At its upcoming spring 2021 meeting, the Advisory Committee will consider recommending for publication in August 2021 the 3000 and 4000 series of restyled rules, along with the 5000 and 6000 series of restyled rules if those rules are ready. The Advisory Committee plans to continue work on the remaining rules (the 7000, 8000, and 9000 series) with the intent of recommending them for publication in August 2022, so that final approval of all the Restyled Bankruptcy Rules can be considered by the Standing Committee at its summer 2023 meeting, and by the Judicial Conference at its fall 2023 session.

## FEDERAL RULES OF CIVIL PROCEDURE

### *Rule Recommended for Approval and Transmission*

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 as set forth in the Appendix, and transmit it 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.

### *Rules Approved for Publication and Comment*

The Advisory Committee submitted proposed amendments to Rule 15 and Rule 72, with a request that they be published for public comment. The Standing Committee unanimously approved the Advisory Committee's request.

Rule 15(a)(1) (Amendments Before Trial – Amending as a Matter of Course)

The proposed amendment to Rule 15(a)(1) is intended to remove the possibility for a literal reading of the existing rule to create an unintended gap. Paragraph (a)(1) currently

provides, in part, that "[a] party may amend its pleading once as a matter of course *within* (A) 21 days after serving it or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier" (emphasis added).

The difficulty lies in the use of the word "within." A literal reading of "within . . . 21 days after service of a responsive pleading or [pre-answer motion]" would suggest that the Rule 15(a)(1)(B) period *does not commence until* the service of the responsive pleading or pre-answer motion – with the unintended result that there could be a gap period (prior to service of the responsive pleading or pre-answer motion) within which amendment as of right is not permitted. The proposed amendment seeks to preclude this interpretation by replacing the word "within" with "no later than."

Rule 72(b)(1) (Dispositive Motions and Prisoner Petitions – Findings and Recommendations)

Rule 72(b)(1) directs that the clerk "mail" a copy of a magistrate judge's recommended disposition. This requirement is out of step with recent amendments to the rules that recognize service by electronic means. The proposed amendment to Rule 72(b)(1) would replace the requirement that the magistrate judge's findings and recommendations be mailed to the parties with a requirement that a copy be served on the parties as provided in Rule 5(b).

***Information Item***

The Advisory Committee met by videoconference on October 16, 2020. In addition to the action items discussed above, the Advisory Committee spent a majority of the meeting hearing the report of its CARES Act Subcommittee and discussing its draft Rule 87 (Procedure in Emergency). Other agenda items included an update on the Multidistrict Litigation (MDL) Subcommittee's ongoing consideration of suggestions that rules be developed for MDL proceedings.

The MDL Subcommittee reported on the status of its three remaining areas of study:

1. Screening claims in mass tort MDLs – whether by using plaintiff fact sheets and defendant fact sheets or by using a "census" approach that employs a simplified version of a plaintiff fact sheet;

2. Interlocutory appellate review of district court orders in MDL proceedings; and

3. Settlement review, attorney's fees, and common benefit funds.

At the Advisory Committee's meeting, the MDL Subcommittee reported its conclusion that the second area of study – interlocutory appellate review – should be removed from the study agenda. The original suggestion was for a rule that would create a right to immediate review. Such a route would bypass the discretion that 28 U.S.C. § 1292(b) currently provides to the district court (whether to certify that § 1292(b)'s criteria are met) and to the court of appeals (whether to accept the appeal). The idea of creating a right to immediate review was quickly disfavored, with the subcommittee focusing instead on whether some other type of expanded interlocutory review might be worth pursuing. The subcommittee reviewed submissions from proponents and opponents of expanding appellate review. Subcommittee representatives attended multiple conferences addressing the topic, including a June 2020 meeting that included lawyers and judges with extensive experience in MDL proceedings beyond the mass tort context. The subcommittee found insufficient evidence to justify proposing an expansion of appellate review, especially in light of the many difficulties that would be involved in crafting such a proposal.

The Advisory Committee agreed with the subcommittee's recommendation that expanded interlocutory review be removed from the list of topics under consideration; the remaining two topics continue to be studied by the subcommittee. It is still to be determined whether this work will result in any recommendation for amendments to the Civil Rules.

## FEDERAL RULES OF CRIMINAL PROCEDURE

### *Information Item*

The Advisory Committee on Criminal Rules met by videoconference on November 2, 2020. The meeting focused on the emergency rules project and the Advisory Committee's draft Rule 62 (Criminal Rules Emergency). The agenda also included a report from the Rule 6 Subcommittee.

At its May 2020 meeting, the Advisory Committee formed a subcommittee to consider two suggestions to amend the grand jury secrecy provisions in Rule 6 (The Grand Jury), an issue last on the Advisory Committee's agenda in 2012. As previously reported to the Conference in September 2020, the suggestions seek to add additional exceptions to the secrecy provisions in Rule 6(e). A group of historians and archivists seeks, in part, an amendment adding records of "historical importance" to the list of exceptions to the secrecy provisions. Another group comprised of media organizations urges that Rule 6 be amended "to make clear that district courts may exercise their inherent supervisory authority, in appropriate circumstances, to permit the disclosure of grand jury materials to the public." The question of inherent authority has also been raised in recent Supreme Court cases. First, in a statement respecting the denial of certiorari in *McKeever v. Barr*, 140 S. Ct. 597 (2020), Justice Breyer pointed out a conflict among the circuit courts regarding whether the district court retains inherent authority to release grand jury materials in "appropriate cases" outside of the exceptions enumerated in Rule 6(e). *Id.* at 598 (statement of Breyer, J.). He stated that "[w]hether district courts retain authority to release grand jury material outside those situations specifically enumerated in the Rules, or in situations like this, is an important question. It is one I think the Rules Committee both can and should revisit." *Id.* Second, the respondent in *Department of Justice v. House Committee on the*

*Judiciary*, No. 19-1328 (cert. granted July 2, 2020), has relied on the courts' inherent authority as an alternative ground for upholding the lower court's decision.

The Advisory Committee has now received a third suggestion from the DOJ seeking an amendment that would authorize the issuance of temporary orders blocking disclosure of grand jury subpoenas under certain circumstances.

The Rule 6 Subcommittee plans to hold a virtual miniconference in the spring of 2021 to gather a wide range of perspectives based on first-hand experience. Invitees will include historians, archivists, and journalists who wish to have access to grand jury materials, as well as individuals who can represent the interests of those who could be affected by disclosure (e.g., victims, witnesses, and prosecutors). The subcommittee will also invite participants who can speak specifically to the DOJ's proposal that courts be given the authority to order that notification of subpoenas be delayed (e.g., technology companies that favor providing immediate notice to their customers).

## FEDERAL RULES OF EVIDENCE

### *Information Items*

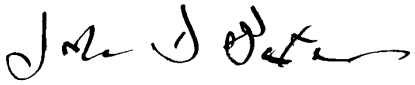
The Advisory Committee on Evidence Rules met by videoconference on November 13, 2020. Discussion items included possible amendments to Rule 106 (Remainder of or Related Writings or Recorded Statements ) to exempt the "completing" portion of a statement from the hearsay rule and to extend the rule of completeness to oral as well as written statements; possible amendments to Rule 615 (Excluding Witnesses) to clarify the application of sequestration orders to out-of-court communications to sequestered witnesses; and possible amendments to Rule 702 (Testimony by Expert Witnesses) to clarify that the admissibility requirements must be found by a preponderance of the evidence, and to prohibit "overstatement" by forensic experts.

## OTHER ITEMS

An additional action item before the Standing Committee was a request by Chief Judge Jeffrey R. Howard, Judiciary Planning Coordinator, that the Committee review the 2020 *Strategic Plan for the Federal Judiciary* and submit suggestions regarding prioritization of strategies and goals. The agenda materials included a copy of the *Plan* for Committee members to review prior to the meeting. After opportunity for discussion, the Standing Committee did not identify any particular strategies or goals to recommend for priority treatment over the next two years. This was communicated to Chief Judge Howard by letter dated January 11, 2021.

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

Respectfully submitted,



John D. Bates, Chair

| | |
|---|---|
| Richard P. Donoghue | William K. Kelley |
| Jesse M. Furman | Carolyn B. Kuhl |
| Daniel C. Girard | Patricia A. Millett |
| Robert J. Giuffra Jr. | Gene E.K. Pratter |
| Frank M. Hull | Kosta Stojilkovic |
| William J. Kayatta Jr. | Jennifer G. Zipps |
| Peter D. Keisler | |

Appendix – Federal Rules of Civil Procedure (proposed amendment and supporting report excerpt)

# TAB 3

**Effective December 1, 2020**

REA History:

- No contrary action by Congress
- Adopted by Supreme Court and transmitted to Congress (Apr 2020)
- Approved by Judicial Conference (Sept 2019) and transmitted to Supreme Court (Oct 2019)

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| AP 35, 40 | Amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes. | |
| BK 2002 | Amendment (1) requires giving notice of the entry of an order confirming a chapter 13 plan; (2) limits the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases; and (3) adds 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 | Subdivision (c) amended 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 rule to proposed amendment to Appellate Rule 26.1. | AP 26.1 |
| BK 8013, 8015, and 8021 | Eliminated or qualified the term "proof of service" when documents are served through the court's electronic-filing system, conforming the rule to the 2019 amendments to AP Rules 5, 21, 26, 32, and 39. | AP 5, 21, 26, 32, and 39 |
| CV 30 | Subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, amended to require that the parties confer about the matters for examination before or promptly after the notice or subpoena is served. The subpoena must notify a nonparty organization of its duty to confer and to designate each person who will testify. | |
| EV 404 | Subdivision (b) amended to expand the prosecutor's notice obligations by: (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose"; (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act; and (3) deleting the requirement that the defendant must request notice. The phrase "crimes, wrongs, or other acts" replaced with the original "other crimes, wrongs, or acts." | |

**Effective (no earlier than) December 1, 2021**

Current Step in REA Process:

- Transmitted to Supreme Court (Oct 2020)

REA History:

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

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

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

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

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

**Effective (no earlier than) December 1, 2022**

Current Step in REA Process:

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

| Rule | Summary of Proposal | Related or Coordinated Amendments |
|---|---|---|
| SBRA Forms (Official Forms 101, 122B, 201, 309E-1, 309E-2, 309F-1, 309F-2, 314, 315, 425A) | The SBRA Forms make necessary changes in response to the Small Business Reorganization Act of 2019. All but the proposed change to Form 122B were approved on an expedited basis with limited public review in 2019 and became effective February 19, 2020, the effective date of the SBRA. They are being published along with the SBRA Rules in order to give the public a full opportunity to comment. If approved by the Advisory Committee, the Standing Committee, and the Judicial Conference, the proposed change to Form 122B will go into effect December 1, 2021. The remaining SBRA forms will remain in effect as approved in 2019, unless the Advisory Committee recommends amendments in response to comments. | |
| CV 12 | The proposed amendment to paragraph (a)(4) would extend the time to respond (after denial of a Rule 12 motion) from 14 to 60 days when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. | |
| CV Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) | Proposed set of uniform procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). | |
| CR 16 | Proposed amendment addresses the lack of timing and the lack of specificity in the current rule with regard to expert witness disclosures, while maintaining reciprocal structure of the current rule. | |

# TAB 4

**Legislation that Directly or Effectively Amends the Federal Rules**
**117th Congress**
**(January 3, 2021 – January 3, 2023)**

| Name | Sponsor/ Co-Sponsor(s) | Affected Rule | Text, Summary, and Committee Report | Actions |
|---|---|---|---|---|
| **Protect the Gig Economy Act of 2021** | **H.R. 41**<br>*Sponsor:*<br>Biggs (R-AZ) | CV 23 | **Bill Text:**<br>https://www.congress.gov/117/bills/hr41/BILLS-117hr41ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill limits the certification of a class action lawsuit by prohibiting in such a lawsuit an allegation that employees were misclassified as independent contractors. | • 1/4/21: Introduced in House; Referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **Injunctive Authority Clarification Act of 2021** | **H.R. 43**<br>*Sponsor:*<br>Biggs (R-AZ) | CV | **Bill Text:**<br>https://www.congress.gov/117/bills/hr43/BILLS-117hr43ih.pdf<br><br>**Summary (authored by CRS):**<br>This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. | • 1/4/21: Introduced in House; Referred to Judiciary Committee<br>• 3/1/21: Referred to the Subcommittee on Courts, Intellectual Property, and the Internet |
| **COVID-19 Bankruptcy Relief Extension Act of 2021** | **S.473**<br>*Sponsor:*<br>Durbin (D-IL)<br><br>*Co-sponsor:*<br>Grassley (R-IA)<br><br>**H.R.1651**<br>*Sponsor:*<br>Nadler (D-NY)<br><br>*Co-sponsor:*<br>Cline (R-VA) | BK | **Bill Text:**<br>https://www.congress.gov/bill/117th-congress/senate-bill/473/text<br><br>**Summary**<br>The bill would amend the CARES Act and the CAA of 2021 to extend certain temporary provisions of those acts (notably, an expanded definition of debtors who can take advantage of Chapter 11, Subchapter V of the Bankruptcy Code) until March 27, 2022. | • 2/25/21: S.473 Introduced to Senate and referred to Judiciary Committee<br>• 3/8/21: HR.1651 introduced to the House and referred to Judiciary Committee<br>• 3/18/21: H.R. 1651 passed the house. |

# TAB 5

**Draft Minutes**

**Civil Rules Advisory Committee**
**October 16, 2020**

The Civil Rules Advisory Committee met by Teams teleconference on October 16, 2020. The meeting was open to the public. Participants included Judge Robert Michael Dow, Jr., Committee Chair, and Committee members Judge Jennifer C. Boal; Hon. Jeffrey B. Clark; Judge Joan N. Ericksen; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A. Seitz, Esq.; Joseph M. Sellers, Esq.; Dean A. Benjamin Spencer; Ariana Tadler, Esq.; and Helen E. Witt, Esq. Incoming Committee members David Burman, Esq., and Judge David Godbey, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge John D. Bates, Chair; Catherine T. Struve, Reporter; Professor Daniel R. Coquillette, Consultant; and Peter D. Keisler, Esq., represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Professor Daniel J. Capra participated as liaison to the CARES Act Subcommittees. Susan Soong, Esq., participated as Clerk Representative. The Department of Justice was further represented by Joshua E. Gardner, Esq. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., Kevin Crenny, Esq., and Bridget M. Healy, Esq., represented the Rules Committee Staff. John S. Cooke, Director, Dr. Emery G. Lee, and Jason Cantone, Esq., represented the Federal Judicial Center.

Members of the public who joined the meeting are identified in the attached Teams attendance list.

Judge Dow opened the meeting by noting that there is a long agenda, and with messages of thanks and welcome.

The Administrative Office staff were thanked for all the work in arranging, training members in, and monitoring the wonders of technology that make a remote meeting possible. Preparation for this first meeting as chair showed that the work of assembling the agenda book is more challenging than would have been imagined.

The next meeting will likely be scheduled for some time during the week of March 22 - 26, 2021. Perhaps it will be possible to resume meeting in person.

In the ranks of comings and goings, Judge Bates counts for both. He is leaving our Committee, but will continue to be involved with the work in his new role as Chair of the Standing Committee. The Chief Justice “kept him for us.”

Virginia Seitz has provided great help as a veteran of many subcommittees. Judge Goldgar has been a friend for long before he or Judge Goldgar became judges, and is “my bankruptcy guru.”

New members are Judge David Godbey, Northern District of Texas, and David Burman, Esq., of Perkins Coie in Seattle. They are engaging with this meeting while pandemic-related delays have forestalled completion of the process that will establish full voting status. They are welcome additions.

The new "rules clerk" is Kevin Crenny. The Committee will make as much use of his talents as it can manage in the competition with other committees.

Professor Capra, Reporter for the Evidence Rules Committee, has taken on new responsibilities as coordinator of the CARES Act Subcommittees established by the other four advisory committees. He has provided invaluable service in coordinating their approaches and moving divergence toward convergence.

Judge Dow reported on the June meeting of the Standing Committee. The CARES Act was a major topic of discussion. The proposal that the new diversity disclosure rule, Rule 7.1(a)(2) be recommended for adoption was remanded for further consideration of the provision that attempts to direct the parties' attention to the need to provide information about citizenships as they exist at the moment that controls the existence of complete diversity. That question is on today's agenda. The proposals to amend Rule 12(a)(4) and to adopt Social Security review rules were approved for publication. Approval marked the success of long and hard work by the Social Security Review Subcommittee.

*Legislative Report*

Julie Wilson reviewed the chart of pending legislation that would affect one or another of the sets of rules. The only new event since the report last April is passage of the Due Process Protections Act, which adds a new subdivision (f) to Criminal Rule 5. The bill awaits the President's signature.

The many other bills summarized on the chart may lapse without further action when this Congress expires and gives way to a new Congress next January.

*April 2020 Minutes*

The draft Minutes for the April 1, 2020 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

*Rule 7.1*

The remand of Rule 7.1 by the Standing Committee was introduced by a summary of the provision that proved troublesome.

Proposed new Rule 7.1(a)(2) requires a statement that, in actions in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must name and identify the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The immediate impetus for the proposal, which reflects current practice in many courts, is to reflect the rule that for diversity purposes the citizenship of an LLC is the citizenship of all of its owners, including citizenships that are attributed to an owner. The proposal reaches beyond LLCs, however, to include every situation in which a nonparty's citizenship is attributed to a party for the determination whether there is complete diversity.

The published proposal called for disclosure of citizenships "at the time the action is filed." Several public comments suggested that defendants often remove state-court actions without giving adequate thought to the complexities of attribution rules, and that the rule should be revised to point to the time of removal. The draft considered at the April meeting looked to disclosure "at the time the action is filed in, or removed to, federal court." Discussion of this draft pointed out that it remained incomplete. The rules that measure the existence of complete diversity for establishing or defeating jurisdiction occasionally look to a time different from the time of initial filing or removal. The draft was revised to reflect this complication.

The proposal taken to the Standing Committee called for disclosure of citizenships attributed to a party:

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

The Standing Committee was concerned that some lawyers are not sophisticated students of the somewhat obscure elaborations of the rules that may require a determination of citizenships at a time different from filing the action or removing it; "at another time that may be relevant" was intended to point lawyers toward the need to be alert to these rules. But this provision might provoke many lawyers to engage in unnecessary research in the vast majority of cases in which diversity is established or defeated at the time of first filing or removal.

A somewhat different concern also was raised. The requirement to disclose citizenships "at the time[s]" described in subparagraphs (A) and (B) might be mistaken as speaking only to the time for making the disclosure, not to the "time" of the citizenships that must be disclosed. Although this mistake should

not be made, thought might be given to adding a redundant but perhaps helpful cross-reference to the provisions of Rule 7.1(b) that govern the time for making a Rule 7.1 disclosure:

> * * * a party or intervenor must, unless the court orders otherwise, file <u>at the time set by Rule 7.1(b)</u> a disclosure statement * * *

Although there should be no mistaking the meaning of the rule without these words, good drafting may at times be improved by adding redundant words for the benefit of those who will not read carefully. This question will be presented to the Committee for further consideration by e-mail exchanges after this meeting concludes if warranted by new rule text.

The simplest way to address the potential confusion that troubled the Standing Committee would be to eliminate any reference to the time of the attributed citizenships that must be considered in measuring complete diversity. A rule that refers only to the time of initial filing, or to the time of initial filing and the time of removal, would be incomplete and could divert attention from the need to consider additional or renewed disclosures when diversity must be measured as of a time different from initial filing or removal. No rule could set out all the diversity rules as they stand now, much less as they may be further elaborated in the future. Nor can an Enabling Act rule modify any part of the rules of subject-matter jurisdiction. And any general formula that adverts to the need to consult the diversity rules is likely to be subject to the same risks as "relevant to determining the court's jurisdiction."

A committee member suggested that it is important to retain rule text that signals the need to consider the rules that in some cases require that jurisdiction be measured by citizenships as they exist at some time other than filing or removal. This proposal read:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at any other time that controls the determination of jurisdiction.

The member who advanced this proposal explained that the "any other relevant time" approach seems misleading on its face. The Committee Note explains it, but we cannot expect that people will read the note. Still, it will help to retain an improved version of the reminder to think about the diversity rules. The Standing Committee was worried about forcing parties to do unnecessary work in researching diversity jurisdiction lore, but most cases are simple and will not prod the parties into research they do not

need.

Discussion began by considering whether this revised formulation of subparagraph (B) would allay the Standing Committee's concerns. It is more direct than "may be relevant to determining." It clearly identifies "time" as part of the diversity calculation, not the procedural matter of the time to make disclosure. But "the easier way" would be to delete subparagraph (B) entirely. "Advocacy would be required" to advance any likely version of subparagraph (B).

The next observation was that it is important to have a diversity disclosure rule. It is not as important to provide a reminder in rule text that the rules for determining complete diversity are not always simple. A rule shorn of subparagraph (B) will capture almost all cases. The same view was expressed by another participant. "Doing something is important. Subparagraph (B) is designed to pick up the rare and complicated cases." It should not be allowed to impede adoption of a disclosure rule that is needed because lawyers do miss the need to consider citizenships attributed to an LLC.

These initial observations were followed by the suggestion that whatever version emerges as the Committee's first choice, it will be important to present both alternatives to the Standing Committee. That is particularly so if the preferred version includes some version of subparagraph (B).

A new question was raised by asking whether the "or" between subparagraphs (A) and (B) should be "and." Disclosures should begin at the time of filing or removal. Subparagraph (B) addresses the possibility that an additional disclosure will be needed as an action progresses through intervention, other changes of parties, and the like. The style convention directs that "or" includes "and," but (B) seems likely to be always an addition, not an alternative. Other committee members supported "and." "or" may seem to send a signal that once a party has made a disclosure, the requirement is satisfied and need not be considered again. Disclosure is a continuing obligation because the rules that control subject-matter jurisdiction demand continuing inquiry. But "or" also was supported by the observation that new circumstances should not require a renewed disclosure of circumstances that have not changed since a first disclosure. For example, a plaintiff who has filed a diversity disclosure and later amends to join a new defendant should not have to file a second disclosure if its citizenships have not changed.

Concerns were expressed about the approach that would discard both subparagraphs (A) and (B). It could force more legal analysis by those who are uncertain about the rules for determining

diversity jurisdiction. Retaining both subparagraphs will alert people to the nuances of subject-matter jurisdiction rules that allow no shortcuts. It is important to draft the best possible version of subparagraph (B) and then undertake to persuade the Standing Committee to accept it. Other committee members agreed that "the more detail the better," and that this "is too important an issue" to avoid spelling it out in detail. At the same time, "it is imperative to have clarity."

This strong consensus of many committee members was found to support going back to the Standing Committee with some version of subparagraph (B). However (B) comes to be drafted, it will be only an incremental change from the version that raised doubts in the Standing Committee. But the care taken in discussing and revising the proposal justify taking it back to the Standing Committee.

Further discussion focused on revising subparagraph (B). "any other time that controls the determination of jurisdiction" was questioned: it is not time but the court that determines jurisdiction. "time of the citizenship that establishes" jurisdiction was suggested as an alternative. Or perhaps "that establishes whether there is jurisdiction.

Alternatives using "relevant" were brought back to the discussion. One formulation called for disclosure of citizenships attributed to a party "whenever relevant to determining the court's jurisdiction, including the time the action is filed in or removed to federal court." Why shy away from "relevant"? This formulation also addresses the "and - or" choice. Parties tend to shy away from revealing the owners of LLCs, and this imposes a clear continuing burden.

A judge suggested that the language should key to events that affect jurisdiction. Further disclosure is required if you create an event that affects jurisdiction. This language could do that:

* * * must file a disclosure statement * * * when:
(A) the action is filed in or removed to federal court, and
(B) any subsequent event occurs that could affect the court's jurisdiction.

With brief further discussion, the Committee agreed unanimously on this version.

Presenting this version to the Standing Committee must take account of their concern with the "relevant to" version of subparagraph (B). They may have similar concerns with the new version, even though the focus on a "subsequent event" sends a clear signal that in most cases there will be no occasion to look

beyond the time the action is filed in federal court or removed to it. It will be important to provide as an alternative, although without recommending it, the second-best approach that discards both subparagraphs (A) and (B).

It remains to be determined whether to report this proposal to the Standing Committee at its January meeting or to wait for its spring meeting. The choice will be made by the Committee Chair in consultation with the Standing Committee Chair.

*Rule 12(a)*

Rule 12(a) establishes the times for serving a responsive pleading. Paragraph 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." This qualification does not appear in either of the next paragraphs, (2) and (3). It is clear, however, that there are federal statutes that set different times than paragraph (2) for some actions brought against the United States or its agencies or officers or employees sued in an official capacity. No statutes have yet been uncovered that set a different time than paragraph (3) for an action against a United States officer or employee sued in an individual capacity.

Although it might be argued that the provision in paragraph (1) that recognizes different statutory times carries over to paragraphs (2) and (3), that is not the way the rule is structured. Nor is it wise to rely on this argument. Reading Rule 12(a) in this way to achieve a sound result would pave the way for disregarding clear drafting in other rules.

It is easy to draft a correction. The provision for federal statutes could be moved into subdivision (a) so that it applies to all of paragraphs (1), (2), and (3):

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

Discussion of this question at the April meeting came to a close balance. The present text is wrong at least as to paragraph (2). The Freedom of Information Act and Government in the Sunshine Act both establish a 30-day time to respond, not the general 60-day period set out in paragraph (2). There is no reason to supersede these statutes. It is better to make rule text as accurate as it can be made.

March 2, 2021 draft

The question is somewhat different as to paragraph (3) because no statutes that set a different time have been found. But such statutes may exist now, or may be enacted in the future. Here too, there is no reason to supersede these statutes, nor to encounter whatever risks that might arise from the rule that a valid rule supersedes an earlier statute while a valid rule is superseded by a later statute. Including paragraph (3) in the general provision will do no harm if there is not, and never will be, an inconsistent statute. And including it is desirable in the event of any inconsistent statute.

The counter consideration is the familiar question whether it is appropriate to address every identifiable rule mishap by corrective amendment. A continuous flow of minor or exotic amendments may seem a flood to bench and bar, and distract attention from more important amendments. This consideration conduces to proposing changes only when there is some evidence that a misadventure in rule text causes problems in the real world.

This topic was brought to the agenda by a lawyer who encountered difficulty in persuading a court clerk to issue a summons providing a 30-day response time in a Freedom of Information Act action. The clerk was ultimately persuaded. The Department of Justice said in April that it is familiar with the statutes, and honors them, but that it often asks for an extension, and particularly seeks an extension in actions that involve both FOIA claims and other claims that are not subject to a 30-day response time. From their perspective, paragraph (2) does not present a problem.

Discussion began with the observation that Rule 15(a)(3) also governs the time to respond to an amended pleading. But this does not seem to conflict with the federal statute question presented by Rule 12(a). Rule 15(a)(3) simply calls for a responsive pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." If more than 14 days remain in the time set by Rule 12(a), including its incorporation of different statutory times, Rule 15(a)(3) makes no difference. If fewer than 14 days remain, Rule 15(a)(3) extends the time.

The Department of Justice renewed the observations made at the April meeting. There is no need to fix this minor break in the rule text. There is a risk that if the change is made, a court might be misled as to its discretion to extend the time to respond to a FOIA claim in cases that combine FOIA claims with other claims that are subject to the 60-day response time. The Committee Note to an amended rule could say that the amendment merely fixes a technical problem and does not affect the court's discretion, but "we welcome the chance for a longer period in resource-constrained cases."

Another committee member agreed with this view.

The contrary view was expressed. If there is a chance that this is tripping people up, why not fix it? It does seem a mistake in the rule text that deserves correction.

This view was questioned by suggesting that the problem described by the Department of Justice is a bigger one than the inconvenience described by the lawyer who brought this problem to us. It is nice to make the rules as perfect as can be, but "I don't like to create problems for the Department of Justice to fix what may be a rare problem for plaintiffs."

A proponent of amending Rule 12(a) suggested that the question is close. But the problem described by the Department of Justice does not seem real. The Department position was renewed in reply. "Inherently, it's a prediction. We have no experience with the proposed rule." But a number of career Department lawyers are concerned. "Hybrid" cases do arise with both a shorter statutory period and the longer Rule 12(a)(2) period. This is a "predictive point."

The proposed amendment failed of adoption by an equally divided vote of 6 committee members for, and 6 against. The proposal will be carried forward for further consideration at the March meeting.

*CARES Act Subcommittee Report*

Judge Jordan presented the report of the CARES Act Subcommittee that was appointed to take up the invitation in § 15002(b)(6) of the CARES Act to "consider rules amendments * * * that address emergency measures that may be taken by the Federal Courts when the President declares a national emergency * * *." He began by expressing admiration and thanks for the hard, constant, and imaginative work of Subcommittee members Boal, Lioi, and Sellers, and of the Administrative Office staff and the reporters. Judge Bates and Judge Campbell provided useful insights. Professor Capra was closely involved but was respectful of the Subcommittee's role in working through differences with the approaches taken by the parallel subcommittees for the Appellate, Bankruptcy, and Criminal Rules Committees.

The first question is whether we need a general emergency rules provision in the Civil Rules. The CARES Act directs us to consider rules amendments, but does not say that any must be proposed.

The time frame for this work is set for all advisory committees. Draft emergency rules are to be presented to the

Standing Committee in January for general and comparative discussion. The goal is to have each advisory committee propose rules drafts for publication at the spring meeting of the Standing Committee. Subcommittee work will continue during the weeks that lead to the report to the January meeting, taking account of the progress made this fall by the other advisory committees and seeking to resolve differences in common draft provisions that seem to involve more style than substance.

The argument for not proposing a general emergency rules provision is that the measures of flexibility and discretion deliberately and pervasively built into the Civil Rules have proved adequate to the challenges presented by the Covid-19 pandemic. Lawyers and courts, working together, have made use of remote means of communication to continue with effective pretrial work. Trials present a greater challenge, but the rules may well accommodate any practically workable approaches that may be adopted. It may suffice to identify a few Civil Rules provisions that present insurmountable obstacles and address them directly without framing a more general rule. This approach, however, will depend on continuing experience with responses to pandemic circumstances and on our ability to understand the lessons presented by experience.

At its most recent meeting, the Subcommittee reached a consensus of equipoise on the question whether a general emergency rule should be proposed, either along the lines of the current draft or in some other form.

Even if the conclusion is that it is better not to adopt a general emergency rule, it will remain important to craft the best general rule we can manage. Important advantages could be gained from publishing a general rule for comment next summer even with a recommendation that it not be adopted. Public comment may provide a broader base of experience that identifies problems that we have not yet considered, and also difficulties created by rules texts that seem to impede suitable responses to the problems.

Drafting a general emergency rule has proceeded through a series of stages. The first draft was very broad, looking for a declaration of emergency at a level higher than action by a single judge in a particular case, but recognizing great responsibilities for both court and parties. This approach was whittled back. The next steps presented alternatives. One version was to authorize departures from any rule, subject to a list of rules that could not be varied. The alternative version authorized departures only from a specific list of rules.

Those versions were succeeded by the draft Rule 87 in the agenda book. This draft authorizes only a small number of Emergency Rules and provides specific texts for them. An Emergency Rule would

take the place of the general rule for the period covered by a declaration of a rules emergency. Only six Emergency Rules are provided, and two of them are presented in overstrike form with a suggestion that they should be considered but then dropped from the set. The three Emergency Rules for service of process begin with the full text of the present rule and add alternative means of service that are available by court order. Emergency Rule 6(b)(2) would allow the court to extend the time for making post-judgment motions, but presents difficult issues of integration with Appellate Rule 4(a)(4) that will require close work with the Appellate Rules Committee. The remaining two address "open court" provisions in Rules 43(a) and 77(b), but ongoing experience with the Covid-19 pandemic suggests that the present rule texts have not impeded courts from responding with all appropriate accommodations.

This draft was informed by general experience of committee and subcommittee members, by reports from many sources that include court opinions, and by responses to a general survey published by the Administrative Office.

The subcommittees for other advisory committees are taking different approaches. The current Appellate Rule 2 draft is essentially wide open, authorizing departure from any Appellate Rule. The current draft Criminal Rule 62 is quite different, listing the only rules that can be modified, prescribing the greatest modifications that can be permitted, and allowing lesser modifications. It is "very careful, very locked down, very specific."

The report continued with the observation that there are good reasons why different sets of rules should take different approaches to an emergency rule. Common provisions are likely to emerge, for equally good reasons. But the Appellate Rules operate in a setting that may support broad freedom to adjust practice on a nearly case-by-case basis. The Criminal Rules, on the other hand, operate in a setting and internal tradition that impose grave restraints arising from constitution, statute, received practice, and the overwhelming importance of conviction for each defendant that comes before the court. The Bankruptcy Rules involve some functions that are nearly administrative, while other functions are full-blown adversary proceedings that frequently rely on the Civil Rules.

These differences among the contexts of the different sets of rules will be an important influence in shaping the elements of uniformity and divergence in the corresponding emergency rules.

Obviously common questions ask how to define an emergency and who is responsible for declaring an emergency. In the end it may seem that some variations are desirable, but the subcommittees have

worked hard to converge on common provisions.

Definitions of an emergency began with the formula in the CARES Act invitation to rulemaking. An emergency would emerge when the President declares a national emergency under the National Emergencies Act. This formula was quickly discarded. One problem is that national emergencies are declared with some frequency, and some of them endure for many years. Most of them have no connection to circumstances that may interfere with judicial functions. This definition of an emergency would create no effective constraint on the power to declare an emergency.

Another shortcoming of the national emergency approach is that it does not respond to the prospect that many emergencies may arise that severely impair court operations in a particular part of the country. Severe weather events, local epidemics, a courthouse bombing, civil unrest, disruptions of travel or electronic communications, and still other events are familiar.

Recognizing the need to adapt to local or regional emergencies might lead only to depending on emergency declarations by state or local officials or legislatures. But that course, in common with the national emergency approach, would leave courts at the mercy of the executive or perhaps legislative branches. It is better to rely on judicial authority to address judicial needs.

Different judicial authorities have been considered. Reliance might be placed on judges acting in individual cases; a district court acting as a court or through its chief judge; a circuit court acting as a court, through its chief judge, or through a circuit council; or the Judicial Conference of the United States. Draft Rule 87 and draft Criminal Rule 62 have settled on the Judicial Conference as the sole body with authority to declare an emergency and to establish its contours. The Bankruptcy Rules draft adds other actors, and the Appellate Rules draft does not involve the Judicial Conference except to authorize it to overrule a local circuit emergency declaration.

The definition of an emergency began by speaking of a "judicial emergency." That term, however, is used in other contexts that do not resemble the kinds of emergencies that may justify departures from general rules texts. The several committees have adopted instead the "rules emergency" term.

The rules emergency concept is functional. Draft Rule 87(a) reads:

> (a) RULES EMERGENCY. The Judicial Conference of the United States may declare a rules emergency when extraordinary circumstances relating to

> public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

This formula was accepted from a Criminal Rule 62 draft. Criminal Rule 62 goes on to add a further element:

> and (2) no feasible alternative measures would eliminate the impairment within a reasonable time.

The Criminal Rules Subcommittee report says clearly that this element refers only to alternative measures that are in compliance with the Criminal Rules. The Civil Rules Subcommittee believes that alternatives must be considered as an inherent part of determining whether the court can perform its functions in compliance with the rules. This added emphasis does not seem necessary — the Judicial Conference can be trusted to proceed carefully — and may be confusing because it seems to add something different but actually does not.

A declaration of a rules emergency must designate the court or courts affected by the emergency. This feature is common to all of the sets of rules, recognizing the prospect of local or regional or national emergencies. Rule 87(b)(2) allows a declaration to authorize only one of the Emergency Rules specifically defined in Rule 87(c). The declaration must be limited to a stated period of no more than 90 days. It "may be renewed through additional declarations * * * for successive periods of no more than 90 days * * * ." This renewal provision departs slightly from Criminal Rule 62(b)(3)(A), which allows the Judicial Conference to "issue additional declarations if emergency conditions change or persist." This variance is an example of the style issues that should be worked out among the subcommittees before committee reports are prepared for the January Standing Committee meeting. (The provisions of Criminal Rule 62(c) appear to authorize specific actions in the discretion of the court in a specific case. At least two paragraphs in Rule 62(d) require authorization by the chief judge of the district, or if the chief judge is not available the most senior active judge of the district or the chief judge or circuit justice of the circuit. These additional gatekeepers do not fit into the structure of the current Civil Rule 87 draft, which prescribes specific Emergency Rule texts that can be implemented in any case by order of a court that is included in the declaration of emergency.)

After this introduction, the first question was whether the three Emergency Rule 4 provisions were created in response to reports of real world difficulties in serving process. And have the other subcommittees considered similar problems?

Judge Jordan responded that the Rule 4 provisions, and also the Rule 6(b)(2) provision for extending the time for post-judgment motions, did not emerge from empirical concerns. Instead they emerged from a survey of all the rules that looked for absolute requirements or limits that cannot be applied flexibly or varied as a matter of discretion. Committee member Sellers drew up a long list of possible barriers in the rules, but for now it appears that few of them cannot be managed in ways that surmount or bypass the barriers.

Professor Capra added that the Evidence Rules Committee decided early on that there is no need for an emergency provision in the Evidence Rules. Civil Rule 43(a) and the corresponding Criminal Rule allow for remote testimony. The Evidence Rules support that approach. And there are no other Evidence Rules issues. The subcommittees for the other four advisory committees began with quite different approaches, influenced by the structure, character, and traditions of the different rules sets. But they have continually moved closer together. At present, the proposed revision of Appellate Rule 2 is quite open-ended. The Bankruptcy rule focuses on the opportunity to extend the time limits for acting under the rules. The Criminal Rules draft is developed in more detail than the others, looking to such matters as the number of alternate jurors, substitution of a summons for an arrest warrant, bail hearings, and the like. "It's a very careful rule." Some of the abundant differences are matters of style that will be resolved readily, at least for such simple matters as the rule caption.

Other differences may lie at the margin of substance and style — an example is that Criminal Rule 62(a) defines a rules emergency in the abstract, and then relies on Rule 62(b) to authorize a declaration of emergency. Civil Rule 87(a), on the other hand, combines these elements by providing that the Judicial Conference may declare a rules emergency "when" the elements of the definition are satisfied.

The subcommittees have discussed a length a provision for a "soft landing" when an emergency ends while an action begun under authority of an emergency departure from the general rule has not been completed. Civil Rule 87 may not need this provision, set out in the current draft as subdivision (d), if the only Emergency Rules that survive govern service of process. The provision may be more important if Emergency Rule 6(b)(2) is adopted in some form, addressing extension of the time for post-judgment motions and affecting the time to appeal, but the provision might be incorporated in the Emergency Rule text rather than carry forward as a separate subdivision.

The Bankruptcy Rule draft authorizes declaration of an

emergency by the Judicial Conference, the chief judge of the circuit, or the chief bankruptcy judge. Whether or not the alternatives to the Judicial Conference make sense for Bankruptcy Rules, they do not seem necessary for the Civil Rules.

Discussion progressed to the question whether to propose any general emergency rule. It was noted that after considering the long list of rules that might be so inflexible as to create significant problems in a time of emergency, the Subcommittee concluded that almost all seem flexible enough, particularly when combined with the sweeping provisions for pretrial orders in Rule 16. But the Subcommittee surely does not have complete information about experience in practice around the country. Publishing a general rule proposal will be a good way to attract information about rules that in fact have presented worrisome problems.

This comment concluded by noting that if some version of Emergency Rule 6(b)(2) is adopted, it will be important to provide a means of protecting against the possibility that the end of the emergency might defeat both the right to prevail on the post-judgment motion and any opportunity to appeal.

The Committee was reminded that a decision to recommend against adoption of the best Rule 87 draft that can be crafted need not mean abandoning the effort to protect against the problems identified in the Emergency Rules spelled out in Rule 87(c). The Rule 4 alternatives easily could be achieved by adopting them as amendments of the corresponding present rules provisions, and doing so on the same time table as proposed for Rule 87. This possibility may indeed be a reason for recommending against adoption of Rule 87. The post-judgment motions provision of Rule 87(c)(4) would be more difficult to achieve as a stand-alone provision so long as it does not seem wise to add some flexibility outside of emergency circumstances. A revision limited to emergency circumstances would have to provide some definition of the qualifying circumstances, and if the word “emergency” is used there would be an obvious risk of confusion with any general emergency rule provision adopted in rules other than the Civil Rules.

Publication, even with a negative recommendation, was supported by pointing out that “the situation is still evolving.” Review of current experience seems to show that the Civil Rules are so flexible as to adapt well to a nationwide emergency. But it may be too early to rely on what we think we know about present experience. Much might be learned in the public comment process.

This view was supplemented by a report that one participant has sought out the experience of court clerks around the country. No problems with Rule 4 or 6(b)(2) have been reported, and the view is that the Civil Rules are working well.

Professor Capra reported that all of the other subcommittees are moving forward toward recommending publication of a general emergency rule, although that prospect is somewhat uncertain for the Appellate Rules Committee. That will likely become clear after their meeting next week.

Judge Jordan agreed that "there are excellent arguments for putting it out there." The experience and reactions of practitioners can teach us. But so far, the Civil Rules seem to be working quite well. In response to a question, he agreed that state courts may provide valuable experience as well. The Subcommittee has not had time for a systematic survey of state experience, but has considered the scraps of information that have become available. Justice Lee noted that Utah has not found a need to amend their civil rules, and added that good sources of information will be the National Center for State Courts and the Conference of Chief Justices. This discussion was extended, repeating the hope that publication will provide the benefit of wider comments that may spur the committee's imagination.

Some doubt was expressed. There could be some value in publishing a general emergency rule that the Committee recommends not be adopted. But we must be sure to reassure judges and lawyers that flexibility is available under the general rules as they are. We are doing well so far.

Attention turned to the fit of Rule 87(d) with the rest of the rule. It says that a "proceeding" not authorized by rule but commenced under an emergency rule may be completed under the emergency rule when compliance with the rule would be infeasible or work an injustice. Does service of process under any of the three Emergency Rules 4 amount to a "proceeding"? Perhaps "procedure" would be a better word. More generally, is this "soft landing" provision necessary? Other subcommittees have similar provisions, at least for the time being. But if Emergency Rule 6(b)(2) survives through Rule 87(c)(4), it may be the only rule that needs this survival provision. If so, subdivision (d) might be folded into draft Rule 87(c)(4). But additional emergency rules may be added to the list in the present draft. Subdivision (d) will remain as a separate provision for the time being.

Discussion of Emergency Rule 6(b)(2) turned to the problem of integration with Appellate Rule 4(a)(4)(A). What happens if a court acts under the emergency rule to extend the time to file a post-judgment motion? Does a motion filed under an extension qualify as a motion filed within the time allowed by Rules 50, 52, 59, or 60 for purposes of Rule 4(a)(4)(A)? It was recognized that this question must be addressed in tandem with the Appellate Rules Committee. The Appellate Rules Committee Reporter, Professor Hartnett, said that the question would be discussed at the upcoming

meeting of that committee. The subcommittees will work together to ensure an appropriate integration of the rules.

A question was raised as to the fit of the three Emergency Rules that take the place of the corresponding general provisions in Rule 4 with the Bankruptcy Rules. Rule 4 applies to adversary proceedings. The tentative answer was that there should not be a problem. The Emergency rule takes the place of the general rule. It should be absorbed into bankruptcy practice, remembering that the additional means of service authorized by the Emergency Rules are available only "if ordered by the court."

The discussion of draft Rule 87 concluded with recognition that the subcommittee will continue to pursue further development in coordination with the other emergency rules subcommittees, including attempts to achieve still greater uniformity. At the same time, it was recognized that there may be advantages in presenting different approaches to the Standing Committee in January. Consideration of drafts that actually differ on some points may provide a stronger basis for deliberation than a more abstract description of drafting history and possible variations that remain worthy of consideration.

*MDL Subcommittee Report*

Judge Dow, chair of the MDL Subcommittee, delivered the Subcommittee Report.

Three issues remain on the Subcommittee agenda: "Early vetting"; adding new provisions to expand opportunities for interlocutory appeals; and adopting explicit rules provisions for judicial involvement in settlement, perhaps conjoined with provisions for appointing lead counsel that define lead counsel functions, responsibilities, and compensation.

Early "vetting" "Early vetting" has encompassed a variety of proposals that rest on the perception that MDL consolidations tend to attract a worrisome fraction of cases that would not be brought as stand-alone actions because there is no reasonable prospect of success. The means of addressing this concern have evolved continually in practice, largely as a result of cooperation among plaintiffs and defendants with approval and adoption by MDL courts. The means that have been adopted may indeed help to cull out cases that lack merit, but they serve other purposes and are not always used to achieve early dismissals of individual actions.

The major means of eliciting information about individual cases involved into a practice of requiring "plaintiff fact sheets." This practice was widely, almost universally, adopted in the MDLS that aggregated the greatest number of cases, particularly

in mass tort actions growing out of pharmaceutical products and drugs. The form of the fact sheets was negotiated at length on a case-by-case basis. It commonly took months to settle on the form, and the form often called for a great deal of information. Defendant fact sheets evolved in parallel.

More recently, a new approach called an "initial census" has been tested. The initial census forms have tended to require less detail than plaintiff fact sheets. They may be used to manage cases by structuring initial disclosures, providing information that helps in creating a leadership structure, identifying different categories of claims, guiding first-wave discovery, and still more. This practice is evolving and can spread from the initial few MDLs that have embraced it to others as it proves successful and as MDL practitioners carry it from one proceeding to another.

Judge Rosenberg described the initial census procedure she has adopted for the Zantac MDL. The consolidated actions were transferred to her in February, 2020. The first initial census order was entered on April 2. It provides for a 2-page initial census form, to be followed by a 4 -page "census-plus" form. All of the forms are uploaded to a registry operated by a third-party provider. The forms must be filed for all filed cases, and also for claims by all clients of any attorney who applies for a leadership position even though an action has not been filed. The 2-page forms identify the category of the claims — personal injury, consumer, medical monitoring. They identify the plaintiff, the kind of product each plaintiff took, what type of physical injury is alleged. The 4-page forms expand the information to identify what drug was used when, where it was purchased, and what documentation is available to support the allegations. Defendants simultaneously provide census data. When the data provided by the defendants matches with the information provided by a plaintiff in the registry, that helps. It also helps if, for example, the plaintiff alleges purchase of a product at a time when the product was not available. There are now more than 600 filed actions, but tens of thousands more claims are in the registry. It is much easier to manage the 600 actions than it would be to manage a proceeding that attracted actual filings of tens of thousands more cases. The registry provides another attraction for plaintiffs by tolling the statute of limitations.

The initial census process, aided by Professor Jaime Dodge as special master, is working well. It has been developed with the collaboration of counsel and many agreed orders. The census information "is a pillar of managing this MDL." Information about the types of claims helped in designating a leadership team that represents different claim types and provides a balance of expertise.

Judge Dow noted that other judges as well have reported positive experiences with initial census procedures. There is a real prospect that the work of the subcommittee through years of participating in many meetings with MDL lawyer and judges has helped focus attention and to promote progress in "early vetting" practices.

Judge Rosenberg added that both sides in the Zantac MDL wanted early vetting. There has been only one discovery dispute. The initial census and registry have helped. "There is so much voluntary exchange of information."

A committee member asked whether it would be useful to attempt to draft a court rule addressing initial census practices in MDL proceedings, or whether it would be better to rely on judge training, manuals, JPML guidance, and other devices to encourage continued development? It was agreed that it is too early to make this choice. It is important that there be a robust forum for judges and practitioners to keep up with ongoing developments, with widespread sharing of information. The question whether a formal court rule would be helpful will remain on the agenda.

Interlocutory Appeals Judge Dow noted that the question whether greater opportunities for interlocutory appeals should be made available in MDL proceedings has occupied most of the Subcommittee's attention for the last year. The Subcommittee had heard a lot about the topic from those involved in mass tort and pharma MDLs, but not much from judges and lawyers involved in the wide variety of other MDLs. A day-long meeting to hear from those involved in these other types of MDLs was arranged by Professor Dodge and her Emory institute last June. It involved many lawyers the Subcommittee had not heard from earlier, and both more MDL judges and appellate judges.

A few of the judges thought it might be helpful to do "some tinkering at the margins" because the specific criteria for discretionary interlocutory appeals under 28 U.S.C. § 1292(b) may be too narrow to meet the needs of MDL proceedings. A larger group thought there is no need to change — § 1292(b), Rule 54(b) partial final judgments, and at times mandamus provide sufficient opportunities for review. Even Rule 23(f) may help at times, although it is limited to orders that grant or deny class-action certification. Still others thought that the proposed cure is worse than the disease. Interlocutory appeals impose often lengthy delays, reduce the opportunities for coordination with parallel state litigation as state courts become impatient with the delay, and confuse continuing proceedings in the MDL court.

After considering these arguments, the Subcommittee decided to forgo any effort to expand interlocutory appeal opportunities by an

Enabling Act rule. Subcommittee members had disparate views at the outset, but converged on this outcome. If this recommendation is accepted, the proponents of expanded appeal opportunities will be wise to attempt maximum use of current appeal opportunities. If those efforts establish an empirical basis for new rules, the topic can be taken up again.

Discussion concluded with the observation of a subcommittee member that hard work had been done. "It was a comprehensive lot of work. We looked at all the issues."

Supervising Leadership and Reviewing Settlement The third subject that remains at the front of the Subcommittee agenda is framed by a very preliminary sketch of a rule that would spell out the authority routinely exercised by MDL courts in structuring leadership responsibilities and compensation, and also address the authority exercised by some MDL courts in reviewing and commenting on settlement terms that are negotiated by lead counsel to be offered to plaintiffs who are not their clients. The Subcommittee is only beginning to consider this topic. The draft rule was created as a means of identifying issues and focusing discussion. There is no sense whatever whether study of these issues will lead to any proposal to recommend a new rule.

The extrinsic challenges to this undertaking are formidable. Almost no one among experienced MDL practitioners wants it, either those who typically represent plaintiffs or those who typically represent defendants. Most experienced MDL judges do not want it, and fear that any rule would impede the desirable evolution of practice that has emerged from continuing efforts of counsel, courts, and the JPML. The only support comes from a few MDL judges and many academics who believe there is a serious need to provide protections for individuals caught up in MDL proceedings that as a practical matter function in much the same ways as class actions without providing the protections that Rule 23 provides for class members. On their view, the theoretical distinction between a class judgment or settlement that binds all class members and MDL proceedings that require individual disposition or settlement of each individual action is a distinction without practical meaning.

Equally formidable intrinsic challenges face any attempt to draft a useful rule. Rule 23 provides a model for some of the questions, but by no means all. Current practices reveal a number of issues of professional responsibility that are in large part confided to state law and that require sensitive judgment. And apart from that, there is a risk of improper interference with attorney-client relationships. The task would be to frame a rule that does not stifle desirable practices but instead is authorizing and liberating. The Subcommittee has only begun to consider the challenges.

The Subcommittee is considering the possibility that, as with its past work, important information and insights can be gained from arranging another conference of judges and lawyers experienced with these issues.

A committee member agreed that it will be desirable to gather more information, and noted that "it is gentle to say that some attorney-client relationships in MDLs are more real than others. Some who nominally have a lawyer are not getting thoughtful advice."

The discussion concluded with the Subcommittee's agreement that it should arrange to gather more information. All committee members should help in identifying people who can provide a wide range of views and experience at a meeting.

*Appeal Finality After Consolidation Subcommittee Report*

Judge Rosenberg delivered the report of the Joint Civil-Appellate Subcommittee on Appeal Finality after Consolidation.

The Subcommittee was formed to consider the potential impact of the appeal finality ruling in *Hall v. Hall*, 138 S.Ct. 1118 (2018). The Court ruled that when originally independent actions are consolidated under Rule 42(a), complete disposition of all claims among all parties to what began as an independent action is a final judgment for purposes of appeal. The appeal must be timely taken or the opportunity for review is lost. This rule had been followed by some circuits, but a large majority of circuits followed one or another of three different approaches. The Court relied on a consolidation statute enacted in 1813 that, long before Rule 42 was adopted in 1938, established this rule as part of the definition of what "consolidation" is. At the same time, the Court noted that the determination whether this definition of finality causes problems is better made in the Rules Enabling process that in § 2072(c) establishes authority to adopt rules that define when a ruling is final for the purposes of appeal under § 1291.

The Subcommittee has engaged the Federal Judicial Center and Dr. Emery Lee to engage in docket research to identify the nature of current Rule 42 consolidation practices and to look for related appeal finality issues. The search included all civil actions filed in 2015, 2016, and 2017. Not all of those actions have concluded, but those years produced approximately equal numbers of actions that terminated before *Hall v. Hall* was decided and actions terminated after it was decided. That could provide a good basis for comparing the effects of the new rule with the effects of the prior rules.

Excluding MDL consolidations, the search found 20,730

originally independent actions that became consolidated into 5,953 "lead" actions. A sample of 400 lead actions was prepared that included 385 that were suitable for study. Forty-eight percent of the lead actions were resolved by settlement, and another nineteen percent were voluntarily dismissed. The dispositions of those that remained included nine in which an originally independent action was finally concluded before final disposition of the whole consolidated action. Appeals were taken in six of these. Study of these cases did not reveal any appeal problems arising from the new finality rule.

The Subcommittee met in August. It recognized that the absence of any identified appeal problems is not definitive. As a simple example, a party may have wished to appeal only to discover that appeal time had lapsed before the effects of the new rule were recognized. But it would be costly to expand the sample drawn from the 2015-2017 period, and still more costly to launch a study of later years.

The Subcommittee has launched informal inquiries to see what can be learned from clerks' offices in a few circuits with representatives in the committee.

The rule in *Hall v. Hall* is clear. It should be easy to follow, at least when it becomes clear in district court proceedings that all elements of an originally independent action have been resolved before final resolution of other parts of the consolidation. But one difficulty may be that lawyers who have no regular appellate practice may not know of it, or fail to remember it in time. Other problems may be quite independent of appeal time problems, and almost impossible to observe. The need to take an immediate appeal may deprive the appellant of allies on appeal as to issues that affect other parties whose cases have not been completely resolved, interfere with efficient management of the parts that remain in the district court, and face the court of appeals with the prospect of two or even more appeals in the same case.

The Subcommittee will continue its work, recognizing that there is no immediate need to consider rules changes. If changes are undertaken, the most likely approach will consider both Rule 42(a) and Rule 54(b). It will work to ensure that the liaison from the Bankruptcy Rules Committee is kept in touch with this work, given the impact any rules amendments will have on bankruptcy practice.

*Information Items*

Judge Dow noted that the meeting was switching to consider information items. The information items include some familiar

topics that might have advanced further had it not been for pandemic circumstances in general and the need to devote special efforts to the CARES Act emergency rule work.

*Rule 4(c)(3)*

Rule 4(c)(3) may be ambiguous on the question whether the plaintiff in an in forma pauperis or seaman's action must move for an order for service of process by the marshal or whether the court most make the order without a motion. This topic was added to the agenda on a suggestion in the January, 2019 Standing Committee meeting.

It is easy to draft around the ambiguity. The rule could clearly adopt one of at least three options: The plaintiff must move for an order; the court must make the order without a motion; or there is no need for an order — the marshal must make service whenever i.f.p. status is accorded or a seaman is a plaintiff.

Choice among the alternatives is not so easy. Making service is a burden on the Marshals Service, particularly in districts that include large sparsely populated areas. When counsel is appointed, it appears that counsel frequently prefer to make service. Efforts have been undertaken to learn more from the Marshals Service, but the current pandemic has impeded those efforts. Better information may yet be available

One additional reason to carry this subject forward is the work of the CARES Act Subcommittee. One of the possibilities being studied by the Subcommittee is a general revision of Rule 4 that would expand opportunities to make service by mail or commercial carrier. An amended rule could be drafted in a way that authorizes electronic service in circumstances that include sufficient assurances of actual receipt. If such rules come to be adopted, it may be possible for service to be made as a routine function of the clerk's office, acting under the authority of § 1915(d).

Judge Dow noted that the Northern District of Illinois has an informal arrangement with the United States Attorney to accept service in certain i.f.p. cases.

This topic will be carried forward.

*Rule 17(d)*

An outside proposal suggested that Rule 17(d) be amended to require using the official title rather than the name of a public official who sues, or is sued, in an official capacity:

A public officer who sues or is sued in an official

capacity ~~may~~ must be designated by official title rather than by name, but the court may order that the officer's name be added.

Two primary reasons were offered to support this proposal. The first is that it will avoid the need for an automatic substitution of the successor in office when the originally named officer leaves the office. The second is that retaining a single caption will make it easier to track the progress of a case by name without having to adjust for what may be a long chain of successive officers.

This proposal was discussed at the April meeting, leaving the matter uncertain. The advantages seem worthy. But there are potential disadvantages.

One range of difficulties arises from the uncertainty as to just when an "official title" represents an office that can be sued independently of the incumbent. Rule 17(d) applies to plaintiff and defendant officers, whether federal, state, or local. Many of them have titles. Whether the title represents something more than an adjective for the job may be uncertain. An official might have the capacity to claim benefits for a public entity, or to take remedial action when ordered by the court, but not have a status that carries over to a successor. Allowing a plaintiff to choose between official title and name may avoid complicated disputes. In addition, special problems arise when a public officer is sued as a substitute for suing a state under the fiction of *Ex parte Young* that the action is not one against the state. The Committee Note to the 1961 amendments of Rule 25 suggests a confident view that these problems are not significant, but it may be better to avoid the arguments that might be made when suit is effectively brought against an office described by an officer's title.

The earlier discussion suggested that few practical problems arise from automatic substitution under Rule 25. The process is usually seamless. If so, there is little reason to revise a practice that has endured for many years.

Discussion began with comments for the Department of Justice opposing the proposal. "The real world is more complicated than a job title." Consider a range in one familiar setting: there may be an Attorney General who has been confirmed in office by the Senate. Or there may be an Acting Attorney General, also officially approved in that post. Or there may be inferior officials who perform the duties of those offices but are not entitled to be called "acting." "There is no off-the-shelf alternative."

A different suggestion was that substituting "must" may confuse unsophisticated litigants, particularly pro se plaintiffs, who believe that the rule not only describes naming practices but

also requires the plaintiff to sue a defendant that the plaintiff otherwise would not choose to sue.

The question was put: do members of the committee believe that further efforts should be made to gather more information? And where might we look for it?

The answer was that there is little reason to look further. This topic will be removed from the agenda.

*Rule 5(d)(3)(B)*

Rule 5(d) was amended in 2018 to govern electronic filing. It distinguishes between parties that are represented by an attorney and unrepresented parties. The prospect that unrepresented parties should have reasonably free access to electronic filing was discussed at some length. It was recognized that when done properly, electronic filing is a benefit to the party that files, to all other parties, and to the court. But the committee — and other advisory committees that worked on parallel proposals at the same time — was concerned that unsophisticated pro se filers could create significant problems. The outcome was to allow electronic filing only if allowed by court order or by local rule.

The Covid-19 pandemic created many circumstances that made physical filing still more difficult. The problems included the need to risk exposure to the virus in making a filing. Some courts responded by expanding the opportunities for electronic filing. The question is whether this experience provides reasons to reconsider Rule 5(d)(3).

Susan Soong surveyed the district court clerks within the 9th Circuit to gather their experiences. The common element was the belief that Rule 5(d)(3) is flexible enough to enable a district to establish the practices that best fit its circumstances. The Northern District of California has adopted a local rule that presumes electronic filing is permissible. Other courts rely instead on e-mail filing, a process that requires more work in the clerk's office and lacks the safeguards that protect direct electronic filing. In all, it seems desirable to take more time to gather information on experience around the country.

The Committee agreed to carry this topic forward on the agenda.

*In Forma Pauperis Disclosures*

Last October the Committee considered a lengthy set of proposals to establish uniform standards for in forma pauperis status and adopt other new measures. One part of the proposals

challenged on several fronts the information required by common i.f.p. application forms, including the forms offered as models by the Administrative Office. The Committee concluded that these proposals should be removed from the agenda, as matters better studied in the first instance by the Administrative Office forms committee and perhaps the Committee on Court Administration and Case Management. The only qualification was that the Committee should continue to follow deliberations in the Appellate Rules Committee. Appellate Rules Form 4 calls for extensive disclosures and is being studied by the Appellate Rules Committee.

The topic has returned with a direct challenge to the many items of information that Appellate Form 4 requires be disclosed as to a party's spouse. The party must disclose such items as a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; the spouse's employment history; the spouse's cash and money in bank accounts or in "any other financial institution"; the spouse's other assets; and persons who owe money to the spouse and how much. The challenge asserts that requiring these disclosures violates the constitutional rights of the spouse and also the party.

No action is called for now. The topic will carry forward to consider the deliberations of the Appellate Rules Committee.

*Rule 6(a)(4)(A): End of the Last Day*

The several committees have a subcommittee that is studying the provisions that, like Rule 6(a)(4)(A), set the end of the last day for electronic filing "at midnight in the court's time zone."

The project was inspired by court rules in Delaware and in the District of Delaware that set earlier times. One possibility would be to set the time for electronic filing at the close of the clerk's physical office.

Further work by the subcommittee is on hold pending completion of an elaborate study undertaken by the Federal Judicial Center to learn a great deal about actual filing patterns. Among the questions are the frequency of last-day electronic filings after regular office hours, whether differences can be identified among the types of actions and firms that file after regular office hours, and what practices have developed with "drop boxes" outside clerks' offices. Attorneys' experiences and evaluations also are being sought.

Subcommittee work is expected to resume when the FJC provides enough information to support further deliberations.

*Rule 9(b): Pleading Conditions of Mind*

This topic came to the agenda as a suggestion by Dean Spencer, a Committee member, based on a law review article he wrote that proposes amending Rule 9(b)'s second sentence: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The amendment would change this to read: "may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred."

Dean Spencer provided an overview of the article, A. Benjamin Spencer, *Pleading Conditions of the Mind under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 Cardozo L. Rev. 2015 (2020). As the title suggests, the article addresses the interpretation of Rule 9(b) adopted in Ashcroft v. Iqbal, 556 U.S. 662, 686-687 (2009). The plaintiff alleged discriminatory intent in placing him in administrative maximum security confinement, relying on the provision that intent can be alleged generally. The Court ruled that a simple allegation of discriminatory intent is a mere conclusion that fails under the pleading standards established by the decision for Rule 8(a)(2). "Generally" is used in Rule 9(b) only to distinguish allegations of intent from the first sentence: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

The Court's interpretation seems to defy the ordinary meaning of generally. It "is not defensible in language or history." But lower courts are implementing the Court's interpretation, many of them "with zeal." A plaintiff must allege facts from which malice, intent, knowledge, or another condition of mind can be inferred. The effect places undesirable obstacles in the way of many plaintiffs, who cannot plead sufficient facts without access to discovery.

The Court's interpretation also ignores the meaning described by the 1938 Committee Note. The Committee Note invokes a British statute. The statute in its own terms and in its consistent interpretation has allowed a simple allegation of intent or the like as a fact. The proposed revision of Rule 9(b) draws substantially from the language of the British statute.

Brief comments followed. The *Iqbal* standard has been found helpful in bankruptcy practice, which involves many attempts to spin nonpayment claims into fraud claims to avoid discharge.

Skepticism was expressed about the proposed language on the ground that it seems to fall below the general *Twombly-Iqbal* pleading standard. Perhaps new language should be found that establishes an "in-between" standard.

This item was added to the agenda to prepare the way for discussion and possible action at the spring meeting. The Committee

agreed that it should be carried forward for close study.

*Rule 26(b)(5)(A): Privilege Logs*

Two outside suggestions, 20-CV-R, and 20-CV-DD which draws on the first, describe practical difficulties in compiling privilege logs and suggest that amendments are in order. The vast and continually growing expansion of electronic discovery has generated pressures that add great expense while yielding unsatisfactory logs that in turn generate unnecessary litigation.

Professor Marcus presented the topic. Rule 26(b)(5)(A) was adopted in 1993 to address the problem of over-reliance on general claims of privilege that did not even inform other parties whether anything was actually being withheld from discovery. The topic was considered in 2008, without finding any way to improve the rule text.

The central question is whether it is possible to do something that is more helpful than the present rule? No one wants to go back to practice as it was before 1993. Leading judges have observed that privilege logs are expensive but are largely worthless. The constant laments about cost, however, may be overblown. A party responding to a discovery request must search all the information that is responsive and relevant. Then the information must be screened if anything is to be withheld as privileged or protected as work product. How much extra does it cost to compile a log of the items that have been determined to be privileged or protected?

Another element bears on the question whether an amendment should be proposed. As with so many other discovery issues, lawyers generally work out the problems. That may work better than anything that could be captured in rule text.

In short, three questions should be addressed: How big is the problem? Are people in fact working out the problems that do arise? Even if the problems are worked out, is there something to be learned by studying the process that can be captured in new rule text that reduces the number of problems and eases the way to resolving the problems that remain?

A judge started the conversation by observing that he does not see much of these problems, but important information is likely to be better known to litigators and magistrate judges.

A committee member said that privilege logs are a huge practical problem. With electronic discovery there are privilege logs with millions of lines. We may be able to do something that helps.

Another committee member agreed that this is a hot topic. Privilege disputes are a bane for plaintiffs, defendants, and judges. Back in 2009 there was a sudden enthusiasm for logging documents by categories, but the experiment failed in practice. More information was needed to evaluate the claims of privilege or protection than could be gleaned from categorical descriptions. "Where is this a problem? Where not?" Electronic discovery may facilitate review, but it is necessary to know what has been withheld in order to challenge the assertion of privilege or other protection. Thousands of log pages may reveal nothing. Courts do not want to do in camera reviews.

Two more member lawyers agreed that there are many concerns with privilege logs. Further study is indicated.

A judge said that a lot of time is spent with privilege logs. Some are useful. Some are not. They are time consuming. The question should be studied further.

Judge Dow closed the discussion by agreeing that further study will be done, and by thanking Lawyers for Civil Justice and Jonathan Redgrave for raising these matters for attention.

*Rule 45: Nationwide Subpoenas*

This question arises from federal statutes that authorize nationwide service of subpoenas. Among the statutes, it seems likely that more actions arise under the False Claims Act than any of the others.

Nationwide service seems designed to include nationwide compliance. A majority of the decisions agree. The False Claims Act provision was added in 1978 on a recommendation by the Department of Justice. The problem described by the Department was that a False Claims Act action often depends on the testimony of many witnesses located all around the country, outside the state where the court is located. They need to be brought to the trial.

The question is whether the 2013 amendments of Rule 45 inadvertently created an uncertainty as to enforcing these nationwide statutory subpoenas. One feature of the amendments was to eliminate the "3-ring circus" that required issuance of a discovery or trial subpoena from the court where the witness is to be served, even though the action is pending in a different federal court. Rule 45 now provides nationwide service of subpoenas issued by the court where the action is pending. The problem, however, arises from the provisions of Rule 45(c) that seem to limit the place of compliance far short of statutory nationwide compliance provisions. These provisions were carried forward from the earlier rule, with modest changes. Neither the former rule nor the current

rule address compliance with statutory nationwide subpoenas.

There was no intent to supersede the statutes. Before 2013, former Rule 45(b)(2)(D) authorized service of a subpoena "at any place * * * that the court authorizes on motion and for good cause, if a federal statute so provides." It addressed only service, not the place for compliance. It was omitted because Rule 45(b)(2) now provides that "[a] subpoena may be served at any place within the United States." The new rule, indeed, does not carry forward the former provision that seemed to limit statutory authority by requiring a motion and good cause.

The question is whether Rule 45(c) should be amended to clarify a question that has never been directly addressed by the rule. No one has suggested that Rule 45(c) should limit the reach of statutes that provide for nationwide compliance. Need that be stated in explicit new rule text?

The Department of Justice stated that no problems have been encountered in False Claims Act case, and advised that there is no need to amend Rule 45.

This item was removed from the agenda.

*Sealing Court Records*

Professor Marcus introduced 20-CV-T, a proposal by Professor Eugene Volokh for a new Rule 5.3 to govern filing documents under seal. This proposal is joined by the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation. The draft rule that accompanies the proposal begins with a presumption that all documents filed in a case shall be open to the public. It adds "an especially strong presumption" as to several categories of filings, including those "that are relevant or material to judicial decisionmaking or prospective judicial decision1making."

The concern that underlies this proposal is that too many documents are sealed in federal courts, and that initially justified seals are maintained for too long after the reasons for sealing have vanished.

The proposal recognizes that all federal courts understand the common-law and First Amendment constraints that limit sealing practices. It notes that a large majority of federal courts have local district rules that address sealing. But it urges that mistakes are made, even with agreement on general principles.

One effect of a national rule would be to jeopardize all parts of current local rules that are not consistent with, or that duplicate, the national rule.

The proposed rule would allow any member of the public to move to unseal at any time. It provides that all sealed documents will be deemed unsealed 60 days after final disposition of a case, unless the seal is renewed. A motion to renew must be filed 30 days before the expected unsealing date. Several other demanding requirements are included. One requirement is that the court not rule on a motion to seal until at least 7 days after the motion is posted on the court's website "or on a centralized website maintained by several courts."

The question is whether this topic should be retained on the agenda for further work. The FJC did a detailed study of sealed dockets — a matter distinct from, but related to sealed documents — in 2007. The only problem it found was frequent failure to unseal warrants after the need for protection expired.

The first comment was that sealing comes up with actions to enforce arbitration awards. Confidentiality is one of the key reasons for resorting to arbitration. A general rule addressing sealing could have a real and undesirable impact on arbitration practices.

Another member noted that the 2007 FJC study resulted in a booklet on sealed cases. That is a different problem from sealed documents within a case. One phenomenon is that discovery documents commonly are not filed when produced, but are filed later. If they were governed by a confidentiality order before filing,should there be a presumption that the protection carries over after filing? The District of Minnesota has a local rule. The rule works, but involves a lot of effort. The proposed rule "would drive a lot of parties out of court." It is useful to work through these problems at the district court level. And it should be remembered that often a document is filed by a party that does not have an interest in confidentiality, posing problems for another party or nonparty that does have an interest.

Another judge supported the proposal. "What we do is important to many people. We should be as transparent as possible." The public should know who the parties to an action are. It would be useful to explore a rule establishing a presumption of openness.

The Department of Justice understands the open government aspects of sealing. But account must be taken of the False Claims Act, which directs that a qui tam action be filed under seal. Any rule must be drafted to take statutory issues into account.

These problems arise as well at the appellate level. There are particular problems in complex cases where all parties share an interest in confidentiality. There may be difficulties, however, with "shifting burdens around."

The Appellate Rules Committee studied sealing a few years ago. It found considerable differences among the circuits. The Seventh Circuit has a strong policy of openness. Other circuits do not. And many circuits have strong views about their own approaches. In the end the Appellate Rules Committee decided that its Chair, Judge Sutton, should write a letter to the chief circuit judges describing three categories of approaches. Several circuits treat materials that were sealed below as presumptively sealed on appeal. The Seventh Circuit applies an opposite presumption, unsealing all materials in the appellate record unless a party requests omission of the material from the record as not germane to the appeal or moves the court of appeals to seal. The D.C. Circuit and the Federal Circuit require the parties to jointly identify parts of the record that need not be sealed on appeal, and to present that agreement to the court below.

Discussion concluded on the question whether there are divergences in district court practice that should be addressed by a new Civil Rule? Some help may be found in studying local district rules. Perhaps the Rules Law Clerk can be enlisted in this task.

*Rule 15(a)(1)(B)*

Rule 15(a)(1)(B) provides an illustration of a drafting mishap that is easily fixed. The question whether to undertake the fix divides into two parts: How much real-world trouble is likely to be generated by the mishap? And what should be the threshold for adding yet another amendment to the steady flow of amendments that compete for the attention of bench and bar?

Rule 15(a)(1):

> (1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:
> (A) 21 days after serving it, or
> (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

The culprit is "within." It works well for (A) – the 21-day period begins with service of the pleading. But taken literally, it creates an odd gap that opens the period, closes it, and then reopens it. An amendment within 21 days after serving a pleading to which a responsive pleading is required is allowed by (A). But (B) starts a new period of 21 days after service of a responsive pleading or one of the enumerated Rule 12 motions. Service of the responsive pleading or motion may be made after 21 days from service of the original pleading, whether as a matter of laxity,

party agreement, order, or a 60- or even 90-day period set by Rule 12(a). Counting 21 days from service of the responsive pleading or motion begins on service; anything before that is not "within" 21 days "after" service. The right to amend once as a matter of course, having expired, is revived. But in between, literal reading of the rule would require leave of court under Rule 15(a)(2).

The result mandated by literal reading makes no sense. The right to amend once as a matter of course should begin with serving the pleading and carry through uninterrupted until 21 days after service of the responsive pleading or Rule 12(b) motion. This reading makes so much sense that it must be asked whether anyone could be misled, unless it be for the purpose of pointless motion practice.

Alas, it appears that several courts have been forced to struggle with this question. How many litigants have wrestled with it, even if only to come to the inevitably correct conclusion, can only be guessed.

The cure is simple. "no later than" can be substituted for "within." That leaves no doubt.

The Committee agreed that the proposed amendment should be advanced with a recommendation to publish when the proposal can be added to a package that includes other proposals. It is not so urgent as to be published alone without any companion proposals.

*Rule 72(b)(1)*

Rule 72(b)(1) provides that a magistrate judge must enter a recommended disposition of a pretrial matter covered by the rule, and that "[t]he clerk must promptly mail a copy to each party."

Mailing a copy is inefficient. Rule 77(d)(1) provides that immediately after entering an order or judgment, "the clerk must serve notice of the entry, as provided by Rule 5(b), on each party * * *." Criminal Rule 59(b)(1), which addresses a magistrate judge's recommendation for disposing of dispositive matters, is similar, directing the clerk to serve copies on all parties.

Rule 72(b)(1) somehow was overlooked when Rule 77(d)(1) was revised. This is another illustration of a rule that can readily be improved.

The Committee approved a proposal to amend Rule 72(b)(1), to be recommended for publication when it can be added to a package that includes other proposals. The amended rule would read:

* * * The clerk must immediately serve a copy on each

party as provided in Rule 5(b).

*Mandatory Initial Discovery Pilot Projects*

The mandatory initial discovery pilot projects in the District of Arizona and the Northern District of Illinois stopped assigning new cases to the pilot in May and June.

Dr. Lee provided a description of progress in the ongoing FJC project to evaluate the projects.

About 20% of the pilot project cases remain pending. The FJC will continue to track them.

The FJC surveys attorneys in pilot project cases after their cases conclude. The response rate in the most recent survey, which was completed during the Covid-19 pandemic, came gratifyingly close to the response rate in the last survey completed before the pandemic.

The preliminary results of the FJC work "are tricky, so do not make too much of them."

There can be disputes about the initial discovery disclosures. One way to identify them is by looking to the Rule 26(f) reports. "We aren't finding many." Other matters are described in the letter in the agenda materials.

Judge Dow expressed pleasure that the Northern District of Illinois had participated in the project, but thought it wise to defer any comments until the FJC provides a final report.

The next meeting will be held, in person at a place yet to be determined, or by an online platform, during the week of March 22-26 next year.

Respectfully submitted

Edward H. Cooper
Reporter

March 2, 2021 draft

# TAB 6

## 6. PROPOSED AMENDMENT TO RULE 12(a)(4) FOR FINAL APPROVAL

The proposal to amend Rule 12(a)(4) was published in August 2020. Rule 12(a)(4) sets the time to file a responsive pleading at 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial, but allows the court to set a different time. The amendment would allow 60 days "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf."

The reasons for expanding the time to respond are summarized in the committee note. They are similar to the reasons that set the initial time to respond at 60 days in Rule 12(a)(3). In addition, these cases often involve official immunity and may become the occasion for a collateral-order appeal. The Solicitor General needs time to decide whether to appeal, and fears that prejudice or confusion would result from requiring a responsive pleading within 14 days, long before expiration of the 60-day appeal time set by Appellate Rule 4(a)(1)(B).

There were only three comments. A summary is attached.

The Federal Courts Committee of the New York City Bar supports the proposed amendment, particularly because the court can set a shorter time to respond if expedition is appropriate.

Two comments oppose the proposal. The American Association for Justice submits that plaintiffs often are involved in actions of the sort that call for significant police reforms, and their heavy burdens should not be increased by adding to delay in bringing the case to issue. The Department of Justice, having made the motion, can prepare to respond promptly after notice of the court's action.

The NAACP Legal Defense Fund also suggests that the proposal will add delay, and exacerbate problems with qualified immunity doctrine. The proposal, further, applies to cases in which there is no immunity defense, and even when there is an immunity defense the duty to file an answer should rarely interfere with the opportunity to appeal. An extension of time can be had if appropriate, and discovery can be stayed pending appeal.

This proposal is ready for a decision whether to recommend adoption.

APPENDIX

*Proposed Amendment to Rule 12(a)(4) as Published for Public Comment*

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

(a) TIME TO SERVE A RESPONSIVE PLEADING.

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

* * * * *

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action, or within 60 days if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf; or

* * * * *

**Committee Note**

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days to serve a responsive pleading after the court denies a motion under Rule 12 or postpones its disposition until trial. The United States often represents the officer or employee in such actions. The same reasons that support the 60-day time to answer in Rule 12(a)(3) apply when the answer is required after denial or deferral of a Rule 12 motion. In addition, denial of the motion may support a collateral-order appeal when the motion raises an official immunity defense. Appellate Rule 4(a)(1)(B)(iv) sets the appeal time at 60 days in these cases, and includes "all instances in which the United States represents that person [sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf] when the

judgment or order is entered or files the appeal for that person." The additional time is needed for the Solicitor General to decide whether to file an appeal and avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.

*Summary of Comments*

There were only three comments clearly directed to the proposal to amend Rule 12(a)(4)(A) that was published in August 2020. Rule 12(a)(4)(A) sets the time to file a responsive pleading at 14 days after notice that the court has denied a Rule 12 motion or postponed its disposition until trial. The amendment would allow 60 days "if the defendant is a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf."

-0011, American Association for Justice: This is "an unfair and unnecessary across the board rule-based extension."

"[T]here have been dozens of highly publicized incidents of police brutality" that "call for significant police reforms at both the state and federal level." "The plaintiff already bears the burden to prove the case. So does it seem right or fair to add to that burden and provide DOJ with additional time"? The initial period for a DOJ response is 60 days. When a motion is filed, suspending the time, "the DOJ knows that the time to respond is coming and can plan for it." It will have all the time the court takes to consider the motion in addition to the 14 days.

"It is already extraordinarily difficult for a plaintiff to successfully bring a claim under *Bivens* and its progeny. If anything, the Advisory Committee should be considering whether DOJ has too much time to consider appeals * * *."

-0018, Federal Courts Committee, New York City Bar: "supports this minor change particularly given that the court retains its authority to set a different time for the responsive pleading — including a shorter time, if expedition is appropriate."

-0020, NAACP Legal Defense Fund: Opposes the proposal. It will add delay to litigation, and exacerbate problems with qualified immunity doctrine. "The proposed rule changes were requested by the DOJ with the express purpose of further sheltering federal defendants from litigation and expanding their already widespread use of immunity doctrine."

The Department's concern with interlocutory appeal opportunities in official immunity cases is characterized as the "primary justification" underlying its request for this rule change. The proposal is overblown as applied to cases with no potential immunity defense. All other defendants would still have to answer within 14 days. Filing an answer would rarely, if ever, interfere with the opportunity to file an interlocutory appeal; in the rare case that does present a problem, the defense can request an extension. And a stay of discovery can be sought pending appeal.

# TAB 7

## 7. PROPOSED SUPPLEMENTAL RULES FOR SOCIAL SECURITY REVIEW ACTIONS UNDER 42 U.S.C. § 405(g) FOR FINAL APPROVAL

The proposed Supplemental Rules were published for comment in August 2020. As compared to many proposals, there were relatively few public comments. Only two witnesses appeared at the online hearing. The comments and testimony are described in the summary appended below.

The time has come to decide whether to recommend the Supplemental Rules for adoption or to abandon the project. Earlier reports and committee discussion have detailed the years of extensive work that brought the rules to this point. The subcommittee held many meetings and actively engaged the advice of claimants' attorneys and advocacy groups as well as the Social Security Administration (SSA). It held meetings with the interested constituencies, judges experienced in social security adjudication, and academics intimately familiar with the wide variety of procedures employed in different district courts to decide these cases. The National Organization of Social Security Claimants' Representatives, which actively participated throughout these efforts, said in its comment that it "greatly appreciates the efforts of the Judicial Conference in making several rounds of revisions to these rules * * * The proposed rules are clearer and more neutral than what were originally considered." All known sources of information and advice have been explored, most recently at the subcommittee meeting on February 24, 2021, as described in the appended notes.

After all of this work, the subcommittee is unanimous on a central element of the question whether to recommend adoption. The proposed Supplemental Rules are well crafted. As described below, the only substantive change recommended after the publication process is deletion of the always-uncomfortable requirement that the complaint include the last four digits of the social security numbers of the person for whom, and the person on whose wage record, benefits are claimed. The SSA has made substantial progress in adopting practices that will enable a plaintiff to provide a reliable designation of the administrative proceeding and record, and the final decision. There is no reason to delay adoption in order to improve the proposed rules.

What remains is the familiar question whether it is wise to adopt special rules for a particular area of substantive law. That question has attended this project from the beginning. The seven participants in the February 24 subcommittee meeting divided along lines made familiar by earlier discussions. Three, including one who felt "on the fence," concluded that the advantages of establishing a good national procedure are outweighed by the danger that yet one more venture into substance-specific rules will make it more difficult to resist future requests by groups whose interests are more nearly private than the public interests advanced by the SSA and the Administrative Conference of the United States. Four, including all three judges who participated, believed

that the Supplemental Rules should be recommended for adoption.

The subcommittee offers both questions for discussion by the full Committee. The character of the Supplemental Rules will be described briefly, both to ensure an occasion for one final study by all Committee members and also to provide a foundation for discussing the question whether the case has been made for adopting this set of substance-specific rules.

The Supplemental Rules are drawn on a simple premise. The overwhelming majority of social security review actions under 42 U.S.C. § 405(g) — and there are a great many of them — are nothing more than appeals on the administrative record. They are best suited for disposition by an appeal procedure similar to the procedure in actions that other statutes bring to the courts of appeals for review on an administrative record. Civil Rules litigation procedure framed to prepare cases for trial are a poor fit. Many district courts, in one way or another, have responded by adopting local practices, some of which are closely similar to the Supplemental Rules, and some of which impose requirements that are cumbersome and widely disfavored by claimants' attorneys and the SSA. Those who try to work within the Civil Rules find the procedures awkward.

In some ways Supplemental Rules 1 and 5 provide the core. Supplemental Rule 1 defines the scope of these rules as governing actions for review under § 405(g) that present "only an individual claim." The full body of the Civil Rules applies as well, "except to the extent that they are inconsistent with these rules." Supplemental Rule 5 defines the procedure suitable to an appeal: "The action is presented for decision on the parties' briefs."

Supplemental Rule 2 provides for a simple complaint. The plaintiff need only identify the final administrative decision, identify the person for whom, and the person on whose wage record, benefits are claimed, and state the type of benefits claimed. This procedure is, if anything, simpler and less fraught with risk than the notice-of-appeal procedure established by Appellate Rule 3. It should be a benefit to counsel, and an especial benefit to pro se claimants. (One comment was enthusiastic about the benefits for pro se claimants.) At the same time, a plaintiff who wishes to alert the Commissioner to particular matters "may include a short and plain statement of the grounds for relief." That practice should prove useful in supporting prompt exploration of voluntary remands.

Supplemental Rule 3 dispenses with the need to serve the summons and complaint under Civil Rule 4. Instead, the court notifies the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the Commissioner and the United States Attorney for the district. This practice has been adopted in some courts, and has worked well. This rule has been vigorously supported on all sides from the beginning of this project.

Supplemental Rule 4 governs the answer and motions. The central feature is simplification of the answer. The Commissioner must file the administrative record and plead any affirmative defenses under Civil Rule 8(c). Beyond that, "Civil Rule 8(b) does not apply." The Commissioner need not respond to any of the allegations in the complaint, whether it is the simplified complaint authorized by Supplemental Rule 2(b)(1), or a more elaborate complaint authorized by Supplemental Rule 2(b)(2). A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Supplemental Rule 3, and the effect of a motion on the time to respond is governed by Civil Rule 12(a)(4).

Supplemental Rules 6, 7, and 8 set the briefing schedule. The subcommittee recommends that they continue with the times set in the published proposal — 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for a reply brief. There was much comment, echoing protests made throughout the process of drafting these rules, that these times are too short. Local practice often sets longer periods. Reality shows that plaintiffs' counsel need more time to review what often is an extensive administrative record, and to juggle the needs of competing cases in what often are small offices that are not staffed for periodic traffic jams. The result is regular motions for extensions of time, regularly granted. The Commissioner too frequently seeks and wins extensions. Nor is it likely that a lengthier briefing schedule will delay the time when the court is actually able to turn attention to the case. Set against these protests is the judgment that it is better to get these cases submitted for decision as expeditiously as possible. The claimants commonly are in severe financial need, and have endured at least a few years in the administrative process. It is better to aim for efficiency, believing that a good number of cases will meet the targets and that motions for extensions will not impose undue burdens on the parties or the court.

The subcommittee recommends a few changes from the published proposal in rule text and committee note.

The major change is in Supplemental Rule 2(b)(1)(A), (B), and (C). These three subparagraphs are changed as a single matter. The SSA has vigorously maintained that the complaint should include the last four digits of the Social Security Numbers of the person for whom, and the person on whose wage record, benefits are claimed. This much identification was said to be necessary because each year produces so many reviewable final decisions denying benefits — upwards of 100,00 per year — that names alone often do not suffice to identify the decision and record that is the actual subject of a particular action. This position has been met with doubt all along, with critics regularly pointing out that when the Commissioner is uncertain all that is needed is a phone call or message to the plaintiff's lawyer. The comments and testimony, however, identified a new and expanding the SSA practice that changes the picture. The SSA is now fixing a 13-character alphanumeric designation, called a Beneficiary Notice Control

Number, to each notice of agency action. The SSA expects to extend this practice to all notices within Fiscal Year 2022. They share the general enthusiasm for protecting privacy and discouraging identity theft through Social Security Numbers, and are acting under the Social Security Number (SSN) Fraud Prevention Act of 2017. This new practice should eliminate any practical difficulty in identifying the final decision and administrative record that underlie any § 405(g) review action.

Omitting the last-four-digits element from subparagraphs (2)(b)(1)(B) and (C) is readily accomplished. Finding text to provide for substitute identifying information in subparagraph (A) was not so easy. The temptation to call for the Beneficiary Notice Control Number was apparent, but rested uneasy because of the risk that administrative nomenclature might change some day. The language chosen is functional: "including any identifying designation provided by the Commissioner with the final decision." It is conceivable that an innocent or obstreperous pro se litigant might think that the claimant's name on the SSA decision is a designation provided by the Commissioner with the final decision, but that unlikely misstep is readily cured. Counsel will know full well what is intended. And, although it does not appear that any added incentive is needed, this rule text will encourage the SSA to adopt practices that make it easy for plaintiffs to point the Commissioner unerringly to the correct decision and record.

The only other change in rule text is in Rule 6. This change, suggested by a comment, clarifies the time for serving the plaintiff's brief after disposition of all motions authorized by Supplemental Rule 4(c). The meaning is the same, but better expressed.

Two additions are made in the committee note, identified by underlining in the version set out below.

Such are the Supplemental Rules that the subcommittee believes are crafted as well as can be, and are calculated to bring uniform adherence to practices that are much better than some present local practices, and at least the equal of the better local practices that helped inspire them.

That leaves the question whether even these good rules will bring advantages that outweigh skepticism about substance-specific rules, skepticism that is both ingrained and justified. Extensive discussion in the Standing Committee in June 2020 concluded with approval to publish the rules for comment, but no definite commitment on the balance between good procedure gained and future pressures to adopt other and ill-advised substance-specific rules. The dilemma is familiar from earlier deliberations within this Committee.

The Rules Enabling Act establishes a process for the Supreme Court to prescribe "general rules of practice and procedure." The Rules must not "abridge, enlarge[,] or modify any substantive

right." It is accepted that all judicial procedure affects substantive rights, and that good procedure makes substantive rights more effective. The challenge is to know when it is proper to make a specific set of substantive rights more effective by prescribing rules specific to that substance.

Enabling Act Rules of procedure specific to particular substantive areas are familiar. Civil Rule 71.1 establishes many procedures distinct from the general Civil Rules, and indeed Rule 71.1(a) provides: "These [Civil] rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions include a similar provision, Rule A(2): "The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules." Supplemental Rule G, governing forfeiture actions in rem, was added in 2006 to meet the need, strongly urged by the Department of Justice, for lengthy provisions that depart from the general Civil Rules. Both the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings include a Rule 12 that recognizes application of the Civil Rules to the extent they are not inconsistent with the special rules. And there are smaller-scale provisions as well. Civil Rule 65(f) ensures that "This rule applies to copyright-impoundment proceedings."

The considerations that bear on the substance-specific rule dilemma were not much illuminated in the public comments and testimony. The presentations of those opposed to adopting the Supplemental Rules focused, not on the abstract concerns of transsubstantivity, but on the reasons to forgo establishing a good and nationally uniform practice. A succinct summary is provided in the February 24 subcommittee meeting notes: the supplemental rules, although clear, balanced, and helpful (especially to pro se litigants), "are not necessary, will disrupt familiar local practices developed to promote efficient litigation under local conditions, will fail to achieve uniformity as local rules work around them, and will impose a second-class procedure on these cases."

The comments and testimony favoring adoption of the Supplemental Rules provided a counterbalance that again focused on advantages they would bring. It is notable that all of the judges that commented favored adoption, including the Federal Magistrate Judges Association and the chief judges of two courts, the Western District of New York and the Western District of Washington, that are two of the three courts that bear the heaviest loads of these cases. Those two courts found reason for their support in experience with local rules that are much like the Supplemental Rules. And, as noted earlier, one comment from a pro bono legal services organization provided detailed reasons to believe that these rules would be a great help to pro se claimants. The New York City Bar, a long-time and regular participant in evaluating rules proposals, also approves the Supplemental Rules.

The Supplemental Rules, moreover, do not favor the particular interests of claimants or the Commissioner. The purpose and effect are to benefit all claimants and the Commissioner by establishing a uniform national procedure that supersedes local practices that are both inconsistent among each other and, too often, not well designed for effective adjudication. One example suffices. The National Organization of Social Security Representatives notes that "joint statements of fact are widely unpopular."

Perhaps it is useful to provide a reminder that a less substance-specific alternative was explored. A set of rules might be drafted for all actions that seek review of administrative action in a district court, or at least all actions that seek review of adjudication on an administrative record. This alternative was rejected in the face of many uncertainties. It seems likely that § 405(g) actions outnumber, indeed far outnumber, the total of all other district-court actions that might be brought within a broader administrative review rule. Review of other agencies would involve many different statutes, different administrative procedures, and different blends of appeal-like and trial-like procedure. It likely would prove difficult even to draw a line between administrative and executive action in such a rule. This alternative does not provide a way to avoid the question.

Finally, there is good reason to believe that adopting these Supplemental Rules will not significantly impair the determination and ability of the Rules Enabling Act process to resist pressures to adopt other and less well justified substance-specific rules. Pressures from private interest groups, and from private public interest groups, are regularly encountered and managed. The general wariness about substance-specific rules will continue to bolster the defenses. More difficult pressures come at intervals from Congress and demand special attention and response, but adopting Supplemental Rules for § 405(g) cases should not make it more difficult to respond carefully and appropriately.

# APPENDIX

*Proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) Showing Post-Publication Changes*

**Rule 1. Review of Social Security Decisions Under 42 U.S.C. § 405(g)**

(a) APPLICABILITY OF THESE RULES. These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim.

(b) FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules.

**Rule 2. Complaint**

(a) COMMENCING ACTION. An action for review under these rules is commenced by filing a complaint with the court.

(b) CONTENTS.

(1) The complaint must state:

(A) that the action is brought under § 405(g), identifying the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;

(B) the name~~,~~ and the county of residence~~, and the last four digits of the social security number~~ of the person for whom benefits are claimed;

(C) the name ~~and last four digits of the social security number~~ of the person on whose wage record benefits are claimed; and

(D) the type of benefits claimed.

(2) The complaint may include a short and plain statement of the grounds for relief.

**Rule 3. Service**

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district ~~[~~where the action is filed~~]~~. ~~[~~If the complaint was not filed electronically, the court must notify the plaintiff of the transmission.~~]~~ The plaintiff need not serve a summons and complaint under Civil Rule 4.

**Rule 4. Answer; Motions; Time**

(a) SERVING THE ANSWER. An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 3.

(b) THE ANSWER. An answer may be limited to a certified copy of the administrative record, and to any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

(c) MOTIONS UNDER CIVIL RULE 12. A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Rule 3.

(d) TIME TO ANSWER AFTER A MOTION UNDER RULE 4(c). Unless the court sets a different time, serving a motion under Rule 4(c) alters the time to answer as provided by Civil Rule 12(a)(4).

**Rule 5. Presenting the Action for Decision**

The action is presented for decision by the parties' briefs. A brief must support assertions of fact by citations to particular parts of the record.

**Rule 6. Plaintiff's Brief**

The plaintiff must file and serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after ~~the court disposes~~ entry of an order disposing of ~~all motions~~ the last remaining motion filed under Rule 4(c), whichever is later.

**Rule 7. Commissioner's Brief**

The Commissioner must file a brief and serve it on the plaintiff within 30 days after service of the plaintiff's brief.

**Rule 8. Reply Brief**

The plaintiff may file a reply brief and serve it on the Commissioner within 14 days after service of the Commissioner's brief.

**Committee Note**

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record, including a single claim based on the wage record of one person for an award to be shared by more than one person. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to be the

Commissioner. There is not enough experience with such actions to determine whether they should be brought into the simplified procedures contemplated by these rules. But a court can employ these procedures on its own if they seem useful, apart from the Rule 3 provision for service on the Commissioner.

Some actions may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a defendant or a claim for relief beyond review on the administrative record. Such actions fall outside these Supplemental Rules and are governed by the Civil Rules alone.

The Civil Rules continue to apply to actions for review under § 405(g) except to the extent that the Civil Rules are inconsistent with these Supplemental Rules. Supplemental Rules 2, 3, 4, and 5 are the core of the provisions that are inconsistent with, and supersede, the corresponding rules on pleading, service, and presenting the action for decision.

These Supplemental Rules establish a uniform procedure for pleading and serving the complaint; for answering and making motions under Rule 12; and for presenting the action for decision by briefs. These procedures reflect the ways in which a civil action under § 405(g) resembles an appeal or a petition for review of administrative action filed directly in a court of appeals.

Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil action be commenced by filing a complaint with the court. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. Simplified pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the action as one brought under § 405(g). The Social Security Administration can ensure that the plaintiff is able to identify the administrative proceeding and record in a way that enables prompt response by providing an identifying designation with the final decision. The elements of the claim for review are adequately pleaded under Rule 2(b)(1)(B), (C), and (D). Failure to plead all the matters described in Rule 2(b)(1)(B), (C), and (D), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff ~~who wishes~~ to plead more than Rule 2(b)(1) requires ~~to do so~~.

Rule 3 provides a means for giving notice of the action that supersedes Civil Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices for service, so long as it provides a means of electronic access to

the complaint. Notice to the Commissioner is sent to the appropriate regional office. The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4's provisions for the answer build 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." In addition to filing the record, the Commissioner must plead any affirmative defenses under Civil Rule 8(c). Civil 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 or to file a motion under Civil Rule 12 is set at 60 days after notice of the action is given under Rule 3. If a timely motion is made under Civil Rule 12, the time to answer is governed by Civil Rule 12(a)(4) unless the court sets a different time.

Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action for decision on the merits. This procedure displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record. Rule 5 also displaces local rules or practices that are inconsistent with the simplified procedure established by these Supplemental Rules for treating the action as one for review on the administrative record.

All briefs are similar to appellate briefs, citing to the parts of the administrative record that support an assertion that the final decision is not supported by substantial evidence or is contrary to law.

Rules 6, 7, and 8 set the times for serving the briefs: 30 days after the answer is filed or 30 days after the court disposes of all motions filed under Rule 4(c) for the plaintiff's brief, 30 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.

*Videoconference Notes*

**Social Security Disability Review Subcommittee**
**Advisory Committee on Civil Rules**
**February 24, 2021**

The Social Security Disability Review Subcommittee met by videoconference on February 24, 2021. Participants included Judge Sara Lioi, Subcommittee Chair; Judge Robert Michael Dow, Jr., Advisory Committee Chair; Judge Jennifer C. Boal; Joshua E. Gardner, Esq.; Susan Soong, Esq.; Dean A. Benjamin Spencer; and Ariana J. Tadler, Esq. Julie M. Wilson, Esq., represented the Administrative Office, and Dr. Emery Lee represented the Federal Judicial Center.

Judge Lioi opened the meeting by suggesting that the Reporter's set of post-comment questions would provide a useful guide to discussion, but also that it might help to have a quick note of some of the highlights in the summary of public comments and testimony.

The highlights began with the observation that there were not many comments or witnesses, and not many surprises. NOSSCR and the American Association for Justice continued to adhere to the positions they had developed in detail during their active participation in the many meetings and conferences that developed the published proposal. These positions argued that the proposed rules, although clear and balanced — and, because clearly written and streamlined will be very helpful, especially for pro se litigants — are not necessary, will disrupt familiar local practices developed to promote efficient litigation under local conditions, will fail to achieve uniformity as local rules work around them, and will impose a second-class procedure on these cases. These positions were supported by some of the comments and at the hearing.

Other comments were favorable. The SSA continues to offer strong support. The Federal Magistrate Judges Association offered direct support. The chief judges of the Western District of New York and the Western District of Washington, two of the three courts with the highest number of § 405(g) review actions, wrote in support, observing that they had developed local practices similar to the proposed rules. And Public Counsel, an organization devoted to providing pro bono support to disadvantaged litigants, described many ways in which the rules would be a great help to pro se litigants.

Two additional matters raised in the comments and testimony were not included in the list of post-comment questions.

Various suggestions were made about possible provisions for the SSA motions for voluntary remands. The suggestions focused on notice of the motion, and on ensuring that the administrative record is filed with or before the motion. Rather elaborate

provisions for remands, including voluntary remands, were included in some of the earlier rules drafts. They were discarded because of potential complexity stemming from three different statutory forms of remand and for fear of unforeseen consequences.

There also were suggestions, most notably from the SSA, that provisions should be made for motions for attorney fees for services rendered in the judicial review proceeding under § 406(b). Earlier drafts began with an elaborate model that gradually was whittled down, but was discarded in the end because there was a risk that even careful drafting might not avoid taking sides on disputed substantive questions.

No one suggested that these topics be taken up for further consideration.

*Supplemental Rule 1*

Discussion of the questions began with a brief suggestion, accepted on all sides, that the scope provision in Supplemental Rule 1(a) is as good as can be.

The committee note discussion began with comments suggesting an issue that was addressed in earlier note drafts but eventually deleted. A number of statutory provisions in Title 42 specifically provide for review under § 405(g)of actions by the Commissioner. The note included a list of some such statutes, drawn in reliance on advice of the SSA, but the list was deleted for fear it might prove incomplete even in reference to current statutes, and might become incomplete in face of future statutes. The first paragraph of the committee note does state that the Supplemental Rules do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to be the Commissioner. It was concluded that the note should remain as it is.

The first paragraph of the committee note was addressed by a different comment. Supplemental Rule 1(a) defines the scope of the rules as reaching an action "that presents only an individual claim." But the rules should apply to an action that includes two or more people who will benefit from the requested award. Examples include survivors, dependents, and the like. It was agreed to add new language at the end of the second sentence: " * * * actions that seek only review of an individual's claims on a single administrative record, including a single claim based on the wage record of one person for an award to be shared by more than one person."

*Supplemental Rule 2*

The major challenge to Supplemental Rule 2 addresses the requirements in 2(b)(1)(B) and (C) to plead the last four digits of the Social Security Number of the person for whom benefits are claimed and the person on whose wage record benefits are claimed.

The risks to privacy and of identity theft are apparent, even with the restrictions on remote electronic access to court records in Civil Rule 5.2(c)(2), but the SSA has repeatedly insisted that it needs the numbers to ensure that it accurately identifies the claimant and the corresponding administrative record. Comments and testimony, however, reported that the SSA is gradually implementing a program to create a unique 13-character alphanumeric "Beneficiary Notice Control Number" for each notice it sends to a claimant, including the final decision. The statutory purpose, shared by the SSA, is to provide additional protection for Social Security Numbers. It now seems possible to delete the "last four digits" requirements, substituting new language in 2(b)(1)(A).

The trick will be to be sure of the new language. Two possibilities were discussed: "(A) that the action is brought under § 405(g), identifying the final decision to be reviewed {alternative 1: by the Beneficiary Notice Control Number [provided by the Commissioner}; {alternative 2: including any identifying designation provided by the Commissioner with the final decision}."

Direct reliance on "Beneficiary Notice Control Number" likely would work at present, but it would leave the rule text dependent on continued administrative designations. The SSA has undertaken to provide further information about continuing implementation of the BNC# practice within about two weeks, but even strong reassurances of longevity would leave an ongoing uncertainty, including the possibility that future efforts might rely on numbers and symbols without letters.

The alternative of substituting functional language presents a different challenge. The suggested language might be satisfied, on literal reading, by "Archibald Arthur II," taking the claimant's name as it appears in the notice of final decision provided by the Commissioner. But the language calls for "any," not simply "a," designation, and one provided by the Commissioner. Discussion considered the possibility of adding "any identifying alphanumeric designation," but that was found more complicated than necessary. "[F]inal" was added to the proposed text, as shown for Alternative 2, to protect against the risk under present SSA practice that a BNC# used for an earlier administrative notice would be carried over the action for review. The functional approach of Alternative 2 came to be preferred, but can be held open pending final word from the SSA about evolving BNC# practices. The committee note will be revised to reflect these changes, and to explain that the purpose is to make the Commissioner responsible for providing a designation for a final decision that will enable the plaintiff to identify the decision and record in a way that meets the Commissioner's need to accurately identify the claim and proceeding.

A comment suggested a specific style revision for the last sentence of the note paragraph on Supplemental Rule 2. The suggestion was quickly adopted: "permits a plaintiff ~~who wishes~~ to plead more than Rule 2(b)(1) requires ~~to do so~~."

A different comment sought to promote to rule text an observation in the committee note on Supplemental Rule 2. The note suggests that failure to plead all the matters described in 2(b)(1) "should be cured by leave to amend, not dismissal." NOSSCR believes that this protection should be added to rule text. The suggestion was rejected, however, in keeping with the general omission of similar advice throughout the Civil Rules.

*Supplemental Rule 3*

Supplemental Rule 3 was published with two elements set off in brackets to invite comment on whether to include them in final rule text. Comments suggested reasons to retain each.

The first bracketed language appeared with the direction to notify "the United States Attorney for the district [where the action is filed]." The brackets reflected the question whether this redundant reminder serves any purpose. There seems little risk that the court in the Northern District of Illinois would elect to send the Notice of Electronic Filing to the United States Attorney in a different district. At the same time, these words lend a sense of precision, of completion. Such comment as there was favored retaining them. The brackets will be removed.

The second bracketed language was an entire sentence: "[If the complaint was not filed electronically, the court must notify the plaintiff of the transmission.]" This provision was added from concern that a plaintiff who did not file electronically — most likely a pro se plaintiff — might not understand that the action had been set in motion. Again, such comment as there was favored retaining this sentence. Discussion suggested that this seems a useful practice for pro se plaintiffs. Concerns about the consequences if the court fails to notify the plaintiff were allayed by suggestions that failures will be rare, and will be met with adjustments of the sort that regularly redress failures to give required notices. The brackets will be removed.

A separate question asked whether the final sentence — "The plaintiff need not serve a summons and complaint under Civil Rule 4 " — is intended to say that no one need serve the summons and complaint. That is the intent, following the general provision in Rule 4(c)(1) that the plaintiff is responsible for having the summons and complaint served. Discussion agreed that there is no need to change.

Finally, it was noted that in some districts that have already adopted electronic service on the Commissioner and United States Attorney in § 405(g) cases, clerks have taken the position that the defendants cannot have electronic access to the complaint until The Commissioner has appeared in the action. Discussion showed that the SSA is working to address this practice, in part by filing blanket consent to e-service. United States Attorneys are setting up relationships with clerks' offices to cure this problem. It is well on the way to being fixed, and should be fixed if the Supplemental

Rules are adopted. There is no need to address this issue in rule text or committee note.

*Supplemental Rule 4*

Supplemental Rule 4(b) provides that the answer may be limited to the administrative record and any affirmative defenses under Civil Rule 8(c). "Civil Rule 8(b) does not apply." NOSSCR has reiterated its belief that the Commissioner should be required to respond to all allegations in the complaint. It contends that specific responses, or even a general denial, will help the plaintiff frame the plaintiff's brief, and respond to any motion for a voluntary remand. These questions were considered at length in developing this rule. Discussion noted that some districts already allow the administrative record to serve as the answer, and briefing seems to work. This provision will remain.

A separate question was raised by a comment supporting the practice of submitting § 405(g) actions for decision by cross-motions for judgment on the pleadings. The suggestion was that Supplemental Rule 4(c) be limited to provide that not all motions under Civil Rule 12, only those under Rule 12(b)(1)(subject-matter jurisdiction) and (b)(6)(failure to state a claim), must be made within 60 days after notice of the action. That would leave the way free for the cross-motion practice. Discussion raised the question whether the cross-motion practice is inconsistent with Supplemental Rule 5, which directs that the action is submitted for decision on the briefs. The answer may depend in part on the timing of the cross-motions. If they are made simultaneously, the practice looks to be at odds with the sequence established by Supplemental Rules 5 through 8, looking for a sequence of briefing. If instead the practice is for the plaintiff to file a motion supported by a brief, followed after a suitable interval by the Commissioner's cross-motion and brief, the inroad is reduced. There still would be two motions in place of none, more paper than was contemplated by earlier versions of Rule 6 that directed the plaintiff to file a motion for the requested relief, supported by the brief. That provision was dropped as unnecessary. Uncertainty was expressed as to the actual nature of the cross-motion practice, with a note that discussion at an earlier roundtable suggested the motions are sequential. A suggestion that the committee note to Supplemental Rule 5 might be augmented to state that this practice is inconsistent with the supplemental rules was rejected in face of uncertainty as to what the practice actually entails.

*Supplemental Rules 6-8*

Supplemental Rule 6 sets the time for the plaintiff's brief at 30 days after the answer is filed "or 30 days after the court disposes of all motions filed under Rule 4(c), whichever is later." A comment suggested that "disposes of all motions" is obscure — what event gives the necessary clear notice that all motions have been decided? It was agreed to amend the rule text to read "or 30 days after ~~the court disposes~~ entry of an order disposing of ~~all~~

~~motions~~ the last remaining motion filed under Rule 4(c), whichever is later."

The perennial question of the times allowed for briefing lived on through the comments and testimony. As before, many of the comments suggested that the times for plaintiffs and the Commissioner each should be expanded from 30 days to 60 days, and the time for the plaintiff's reply brief should be expanded from 14 days to 21 days. And basically the same reasons were given. The records often are long, and plaintiff's counsel in the district court may not have been involved in the administrative proceedings. Many plaintiffs' lawyers are in solo or small-firm practice and lack the personnel needed to tend to several overlapping deadlines in different proceedings. Courts that have tight time limits similar to the proposed rule regularly encounter, and almost as regularly grant, motions to extend the time. And there is a prospect that many courts will not get to deciding the case any earlier with shorter times to file briefs.

The concerns that prompted the earlier decision to adopt 30-, 30-,and 14-day periods were revived. Such time periods are successfully met in at least some cases. Claims for benefits commonly linger for years in the protracted administrative process; courts should at least attempt to provide prompt resolution of claims that often respond to dire economic necessity. Courts retain authority to grant extensions when need be. It is better to encourage prompt submission of these actions whenever possible.

No changes in the brief schedule will be recommended.

*Recommend Adoption?*

The most important question came on for discussion, as informed by the discussion of more specific comments. Should the subcommittee recommend that the full Committee support adoption of the Supplemental Rules?

The first member to speak was "on the fence." It is not clear that we really need such rules. The Committee and subcommittee have carried the responsibility to develop a strong draft that responds to the request of the Administrative Conference of the United States. "The work is tremendous." The current draft responds well to all of the pre- and post-publication advice from many sources. "If we do go forward," this draft is fine.

The next response, for the Department of Justice, "largely agrees." It is striking that the plaintiffs' bar largely opposes the proposal. The SSA strongly supports it. The Department continues to doubt whether going forward makes sense, but the draft "is well drafted and about as good as it's going to get."

A third comment agreed with the first.

Another comment suggested doubt whether the proposal will achieve true national uniformity in face of the inevitable impulse to supplement it by local rules, but recommended adoption.

The remaining three comments, all by judges, looked the other way. It was suggested that framing these provisions as Supplemental Rules, rather than inserting them into the Civil Rules, makes it easier to recommend them. And they will be a big help to pro se litigants. Beyond that, the response from judges during the comment period provided strong support, both from the Federal Magistrate Judges Association and from the chief judges of two of the districts that have more of these cases than almost any other district. Many judges already recognize that § 405(g) cases are appeals, not ordinary civil actions, and are poorly served by Civil Rules framed around trial procedures. Many sets of local rules adopt procedures similar to the proposed Supplemental Rules, and have worked well. And a third judge suggested that the support of the magistrate judges, who bear the brunt of this work in many districts, and the prospect of helping pro se plaintiffs, “do it for me.” And it seems to be agreed by all that this is a good set of rules if we are to do anything.

A closing comment picked up one of the themes in some of the comments, responding that these rules are not “second-class justice” for disfavored litigants. To the contrary, they provide an easier path for pro se litigants and for the courts, and are a move toward first-class treatment.

The conclusion was that the subcommittee will report these divided reactions to the full Committee. All agree that if substance-specific rules are to be recommended for § 405(g) cases, the proposal is fully worthy of adoption. The question remains whether to recommend any rules.

*Summary of Comments*

These notes summarize the public comments and public hearing transcript for the Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g) published in August 2020. The summary is arranged by topics, dividing many of the comments and the testimony into parts that address common themes.

*Overall Reactions*

-0005, National Organization of Social Security Claimants' Representatives (NOSSCR): Opposes adoption of the rules for several related reasons.

The rules are unnecessary. Claimants' lawyers adjust to the different procedures used in different courts, even those who appear in several districts.

Divergent local practices that accommodate the preferences of particular districts or individual judges are desirable because they achieve prompt and accurate dispositions. Forcing judges to adhere to a national rule could disrupt present good procedure. This is true even though some local practices are not welcome — "joint statements of facts are widely unpopular."

Social Security cases should not "be treated as lesser or different than the other 93% of cases, many of which also involve review of administrative decisions."

The Social Security Administration (SSA) should assign its attorneys in ways that avoid any need to learn disparate local practices. And it should improve its own decision processes and decisions to reduce the number of claimants who are forced to seek judicial review.

(Similar points are made in the testimony of Stacy Braverman Cloyd on behalf of NOSSCR, transcript pp. 7-10, 16-17, 26-27, 28. She added that "these rules are a lot better than previous drafts of them in terms of their equity between the plaintiff and the defendant, so I really appreciate that." Transcript p. 26.)

-0007, Alan B. Morrison, Esq.: From a background in litigating social security appeals in a U.S. Attorney's Office and with Public Citizen Litigation Group, and serving on the ACUS Committee that recommended the idea of special rules, can think of no case "in which Rules like these proposed would not have been helpful to the parties and the courts." "[T]he current Civil Rules do not fit at all well with social security disability cases." Local rules do not make up for the shortcomings, and impose burdens on lawyers who appear in more than one court. The sheer number of these cases is "another reason why a change is worth the effort and any incursion on the principle of transubstantiality."

-0008, Jeffrey Marion, Esq.: District courts need flexibility to manage their cases. They should not be subject to a "one size fits all" approach.

-0009, Anthony Ramos, Esq.: "I oppose the rule changes." (Might include Rule 12 as well?)

-00010: Federal Magistrate Judges Association: "[S]upports the enactment of the proposed set of Supplemental Rules for Social Security Review Actions."

-0011, American Association for Justice (AAJ): These rules "do not warrant upending the principle of transubstantivity." They are arguably more similar to appeals but "[t]here is not enough that is unique." Adoption will make it more difficult to argue against new rules for separate practice areas in the future. And they "will fail to alleviate any of the actual problems with Social Security review cases. The biggest problems are the volume of cases and the high remand rate. Uniform procedural rules are unlikely to address these problems. They seem to exist mainly to save time for SSA attorneys, but SSA can regularly assign attorneys to specific districts, and local rules will continue to defeat uniformity. Courts are doing an excellent job now; flexibility in managing dockets is paramount.

-0012, Hon. Frank P. Geraci, Jr., writing as Chief Judge of the Western District of New York: Social Security filings now account for 53% of the docket in the Western District of New York. It has had success with a local rule that addresses these cases in a framework that overlaps the proposed supplemental rules in many respects. "[W]e support the proposed Supplemental Rules, which we understand as providing a floor, not a ceiling, for deadlines." We have more generous deadlines, and believe they do not conflict.

-0013, Joanna L. Suyes, Esq.: If the goal is to reduce the number of social security cases filed in federal courts and to lighten the load on attorneys and courts, the proposed rules "do not solve those problems." Accurate review and remand at the Appeals Council level would do more. And the Appeals Council conducts own-motion review of cases not appealed by the claimant, but only of decisions favorable to claimants. It should act on its own to review unfavorable decisions, weeding out more incorrectly decided cases.

Nor will uniformity result. Local rules will persist. The Richmond Division of the Eastern District of Virginia operates under three different standing orders. (The uniformity point was repeated in her testimony, transcript pp. 32-33.)

Her testimony included this: "[S]treamlining the process certainly does help, and the rules are clearly written. And that is all — that's going to be very helpful, especially for pro se litigants."

-0015, Hon. Ricardo S. Martinez, writing as Chief Judge of the Western District of Washington: The Western District of Washington handles the third highest volume of social security disability appeals of all federal courts, after the Western District of New York and the Central District of California. "[T]he backlog would be far more voluminous if we had not been using an appellate practice framework similar to the protocols set forth in the proposed Supplemental Rules." The Western District "fully supports the proposed Supplemental Rules, and I enthusiastically endorse innovation in this important area of law."

-0016, Public Counsel: Public Council provides pro bono legal services to low-income communities in several hundred cases every year. About 10% of its clients are appealing denial of social security benefits. "The streamlined rules will greatly benefit all of our clients." Simplified pleading is easier for pro se plaintiffs. Simplified case management processes also will be better, moving to a process "that alleviates the mandatory settlement procedures, joint status reports, and joint briefing currently used in many courtrooms." "[W]e cannot overstate the need for a uniform case management procedure." The clinic serves its clients by creating forms and samples, but "the variety of case management procedures in the Central District [of California] makes this impossible."

-0017, SSA: Strongly supports the proposal. The Administrative Conference found that the general Civil Rules do not provide speedy or efficient review. Procedures vary considerably from courtroom to courtroom. Delays and litigation costs can be increased by "[b]urdensome procedures adopted by some districts or individual judges, such as simultaneous briefing schedules, joint briefing, joint statements of facts, and requirements that the agency file its brief before the plaintiff." The committee note stating that the rules displace summary judgment is heartening.

-0018, New York City Bar, Federal Courts Committee: Agrees that a simplified appeal procedure is desirable. The Committee "has not identified any risks that the Supplemental Rules, as drafted, will modify any substantive rights or favor any special interests. Accordingly, the Federal Courts Committee is persuaded that generic concerns about trans-substantivity do not overcome the benefits of the procedures set forth in the Supplemental Rules and supports their adoption."

-0019, Empire Justice Center: The Center is a New York statewide not-for-profit law firm that represents low-income disability claimants before SSA and in district court. "We endorse the comments submitted by * * * NOSSCR, of which we are members." The problems would be better addressed by SSA itself; "[b]etter decisions would lead to fewer appeals." The current Civil Rules, when combined with local rules like those in the Western District of New York, "are effective and flexible. It is not necessary to have special rules for Social Security cases."

*Rule 1: Review [Scope]*

-0007, Alan B. Morrison, Esq.: The committee note refers to plural claimants, without further explanation. So too there is a question, 2(b)(1)(B) and (C), why the last four digits of the Social Security Number are required for more than one person. The intent should be clarified.

-0017, SSA: The Rule 1(a) definition of scope "describes virtually all of the approximately 18,000 Social Security civil actions filed each year." It reaches Title II — old-age, survivors, and disability insurance benefits — and Title XVI — Supplemental Security Income. (Section 405(g) is incorporated for Title XVI by 42 U.S.C. § 1383(c)(3). One comment has reflected confusion about this point; perhaps further explanation should be added to the committee note.) Rule 1(a) "properly exclude[s] cases brought under other statutes that incorporate section 405(b)'s review procedures, but that relate to determinations made by someone other than the Commissioner." The exclusion of class actions also is appropriate.

*Rule 2: Complaint*

-0004, Hon. Patricia Barksdale: Two comments on Rule 2(b)(1)(B):

Stating the name of the person for whom benefits are claimed could be confusing when the person has died and a substituted person is pursuing the action.

Requiring that the name be stated is inconsistent with Civil Rule 5.2(a)(3), which requires that a paper that contains the name of a person known to be a minor include only the minor's initials. (There is no inconsistency. Rule 5.2(a)(3) applies as the consistent means of providing the "name.")

-0005, NOSSCR: Strongly supports Rule 2(b)(2), which permits, but does not require, the plaintiff to include a short and plain statement of the grounds for relief. And, see Rule 4, argues that the Commissioner should be forced to respond in the answer. (The testimony of Stacy Braverman Cloyd, Esq., for NOSSCR, adds that a more detailed complaint may lead the Commissioner to ask for a voluntary remand, transcript p. 12.)

The observation in the committee note that a failure to include all the elements required by Rule 2(b)(1) should be addressed by amendment, not dismissal, is approved, but with the suggestion that it should be elevated to rule text "or in a footnote." (The same appoint appears in the testimony, transcript pp. 12-13.)

The testimony of Stacy Braverman Cloyd for NOSSCR responded to a question about child plaintiffs by noting that children can indeed receive benefits. She also noted the recommendation that even with adult claimants, some courts allow use of a first name and the initial of the last name in the caption. Transcript, pp. 19-20.

-0007, Alan B. Morrison, Esq.: The sentence at the end of the third full paragraph of the committee note on p. 232 of the published version could be edited: "Rule 2(b)(2), however, permits a plaintiff ~~who wishes~~ to plead more than Rule 2(b)(1) requires ~~to do so~~."

-0017, SSA: "[I]mproved clarity in the plaintiff's initial filing will assist the agency in promptly generating a record of the administrative proceeding." (Footnote 9 responds to a drafting suggestion by Dean Morrison that is not summarized above for the reasons described in this footnote.)

-0019, Empire Justice Center: There may be cases where it is important to plead details that will alert the Commissioner to details that may lead to a voluntary remand earlier in the process.

*Last Four Digits*

A point made repeatedly during many prepublication meetings is made also in the comments and testimony. Requiring the plaintiff to provide the last four digits of relevant Social Security Numbers creates an unacceptable risk of identity theft, particularly when the complaint is filed electronically. The SSA argument that it needs this information to ensure accurate identification of the administrative decision and record is not persuasive. The current development of identification by Beneficiary Notice Control numbers provides a better means of identification.

-0005, NOSSCR: "SSA could either put a BCN [sic] on each Appeals Council denial or other place where it informs claimants about their right to appeal." But the plaintiff should be permitted to include the last four digits if the plaintiff wants to. (Similar points are made in the testimony of Stacy Braverman Cloyd for NOSSCR, transcript pp. 10-12, adding that SSA can always ask the plaintiff for the Social Security Number off the record. Later, she noted the BCN practice, and expressed uncertainty as to how far this practice has developed. Transcript pp. 23-26.)

-0011, AAJ: Given modern technology, "The last four digits are 'in fact the most important to protect.'" Other means to identify the SSA proceeding can be used, including the BNC.

-0013, Joanna L. Suyes, Esq.: The last four digits of social security numbers should not be required. Using the BNC is safer. She repeated this observation in her testimony, transcript pp. 335.

-0016, Public Counsel: "The risk of identity theft is too great." These cases are not usually visible via PACER, but "we have seen mistakes in this regard."

*Rule 3: Service*

-0005, NOSSCR: Draws on experience in districts that already allow electronic notice to effect service of the summons and complaint to elaborate on the committee note statement that a Notice of Electronic filing "suffices for service, so long as it provides a means of electronic access to the complaint." Some district clerks have taken the position that they cannot allow electronic access before the Commissioner had made an appearance. This problem has been cured by a standing order in one court. A means should be found to ensure that all district clerks allow access without further ado. (This point was made again in the testimony of Stacy Braverman Cloyd, Esq., for NOSSCR, transcript pp. 13-14.)

-0007, Alan B. Morrison, Esq.: "where the action is filed," shown in brackets, may not be necessary, but it is helpful "and it is only five words."

-0011, AAJ:It is vital to include the bracketed language requiring the court to notify the plaintiff of transmission of the notice of electronic filing when the complaint is not filed electronically.

-0014, Cheryl L. Siler, Esq., Aderant: Rule 3 should plainly state that transmission of the Notice of Electronic Filing is how notice of an action is given. That is important for Rule 4(a), which requires the Commissioner to serve an answer on the plaintiff "after notice of the action is given under Rule 3."

-0015, Hon. Ricardo S. Martinez: The Western District of Washington has, since 2015, conducted an e-service pilot project similar to proposed Supplemental Rule 3, designed to operate within the framework of the Civil Rules.

-0016, Public Counsel: "The most important change will be relieving our clients of the burden of serving the summons and complaint in their cases." Many clients have never mailed a letter or visited a post office, and find it burdensome to pay for certified mail. Many homeless people do not have someone to assist them with service.

-0017, SSA: Supports. If it is necessary to do anything to reconcile district court clerks, SSA will work to establish a blanket consent for this service by SSA and the Attorney General.

Testimony, Joanna L.Suyes,Esq., transcript p. 37: Supports the bracketed language "related to the importance of providing notice to the plaintiff of transmission of the complaint."

*Rule 4: Answer and Motions*

-0004, Hon. Patricia Barksdale: This comment refers to proposed rule "8(b)," but may mean 4(b). The rule "may be confusing when a claimant raises only a constitutional issue and the commissioner waives administrative-review-process exhaustion." (This may mean to ask about actions against the Commissioner that do not seek review of a final decision based on the administrative record. If that is the question, it addresses an action that, under Rule 1(a), is not within the Supplemental Rules.)

-0005, NOSSCR: Rule 4(b) "is not acceptable." The Commissioner should be required to plead to all allegations in the complaint, to provide "plaintiffs enough information about SSA's position on issues raised in the complaint to write thorough and concise briefs." A general denial could simplify the answer process.

Using the administrative record as part of the answer may mean that SSA moves for a voluntary remand before answering and without providing the record. A requirement should be added to ensure that the record is filed with the motion if it is not already on file. (These same points are repeated in a January 22, 2020 [sic] Testimony Outline of Stacy Braverman Cloyd, Esq., for NOSSCR, and in her testimony, transcript pp. 14-15. In response to a question, she suggested a possible supplemental rule "that filing the transcript is deemed a general denial to all allegations except those specifically admitted and a waiver of all affirmative defenses." Transcript pp. 21-22. She added that pro se litigants may plead in non-standard forms, but responding to them is not likely to be a significant amount of work in contrast to the overall workload. Later, responding to a question, she made essentially the same points, transcript. pp. 25-26, 28-29.)

-0012, Hon. Frank P. Geraci, Jr.: A local practice has developed in the Western District of New York, without court mandate, to resolve Social Security appeals by cross-motions for judgment on the pleadings under Civil Rule 12(c). A similar practice appears to exist in other districts in New York, and in at least one other district. Supplemental Rule 4(c) seems inconsistent with this practice because it requires that any motion under Rule 12 be made within 60 days after notice of the action is given. If the Commissioner answers on the 60th day, a Rule 12(c) motion could not be made. Rule 4(c) should be revised so it applies only to motions to dismiss under Rule 12(b)(1) or (6).

-0017, SSA: "In the vast majority of cases, an answer from the Commissioner is unnecessary, and the parties are able to proceed to briefing as soon as the administrative record is filed." At least 25 districts now allow the record to serve as the answer.

-0019, Empire Justice Center: Filing an answer in addition to the record "would require the agency to review the claim for possible remand at an earlier stage."

*Brief Schedules*

Many comments suggest that the times set by Rules 6, 7, and 8 for filing briefs are too short. They will inevitably lead to motions for extensions, which will be granted. It is common to suggest that the periods should be 60 days for the plaintiff's brief, 60 days for the Commissioner's brief, and 21 days for a reply brief.

-0004, Hon. Patricia Barksdale: 60 days in Rules 6 and 7.

-0005, NOSSCR: The briefs "are dispositive in the vast majority of Social Security cases." The times should be 60, 60, and 21 days. The plaintiff will have a special need for 60 days if the Commissioner is not required to plead in response to the complaint. (These comments are repeated in the testimony of Stacy Braverman Cloyd for NOSSCR, transcript pp. 15-16.)

-0008, Jeffrey Marion, Esq.: Most plaintiffs' attorneys in these cases practice solo or in small firms. They often face a time crunch. And many district judges give low docket priority to these cases. Briefs should be due within 60 days.

-0011, AAJ: Whether claimants' representatives thought these briefing schedules would work depends on where they practice. But generally they feel that longer periods would reduce wasted time on motions for extensions, and that the result would be much like current practice. It is difficult to review enormous records in 30 days. Again, 60/60/21 is recommended.

-0013, Joanna L. Suyes, Esq.: The Eastern District of Virginia now gives plaintiffs 30 days to file briefs, but allows 60 days for the Commissioner's brief. Shortening it to 30 days will result in motions to extend time — 30 days "is, frankly, not enough time for either side to prepare an adequate brief after receiving a certified administrative record which sometimes runs thousands of pages." Her testimony was similar, transcript pp. 33-34.

-0014, Cheryl L. Siler, Esq., Aderant: Suggests an edit to clarify: "within 30 days after the answer is filed or 30 days after ~~the court disposes~~ entry of the order disposing of ~~all motions~~ the last remaining motion filed under Rule 4(c), whichever is later." ("remaining" is added because the last motion filed may be disposed of before an earlier filed motion.)

-0016, Public Counsel: Pro se litigants need more time. It should be 60 days for the plaintiff's brief.

-0017, SSA: "We join other commenters in urging the Committee to extend the default briefing deadlines * * * to 60 days. * * * [B]oth plaintiffs' bar and agency attorneys have massive caseloads, and reduced timelines likely will result in more requests for extensions of time, a pointless and inefficient exercise * * *."

*Other*

-0003, Jean Publieee: The general public "has a 12 year old recognition of the english language (or less)." Rules should be written in language that American citizens can understand.

-0004, Hon. Patricia Barksdale: Asks whether "a concerted decision has been made to omit 42 U.S.C. § 1383(c)," which provides for review of overpayment decisions of the Commissioner through § 405(g). (See the SSA comment on Rule 1.)

This comment also suggests that the rules "should address the time to file a motion for an attorney's fee under 42 U.S.C. § 406(b). (An elaborate draft on these fee motion was considered by the subcommittee.)

-0008, Jeffrey Marion, Esq.: In 25 years of practice the government has never served the record within 60 days. The rules should clarify what sanctions are available to a plaintiff.

Stacy Braverman Cloyd, testifying for NOSSCR, responded to a question about the time SSA takes to produce the record by observing that "it often goes above 60 days, and, certainly, since the pandemic, that has been a huge problem." SSA recognizes the problem and is trying to improve, but NOSSCR members think "they are not where they need to be at all as an agency in getting those transcripts in a timely fashion." Transcript pp. 20-21. (A similar observation is made in -0019, the Empire Justice Center: WDNY allows the Commissioner 90 days to file an answer, but even with that "the Commissioner, particularly of late, has been unable to file the CAR in a timely fashion.")

-0013, Joanna L. Suyes, Esq.: Adopting a 30-page limit for briefs would lead to better focused appeals.

-0017, SSA: Urges revival of the earlier effort to develop a rule to establish a uniform procedure for motions for attorney fees under 42 U.S.C. §406(b).This statute governs fees for services in judicial review proceedings. "[I]ndividual courts have cobbled together different rules and practices, including as to timing." The statute does not say what should be submitted to support the petition. The procedure should include a requirement that the attorney attest to having informed the plaintiff of the request — fees are paid by the plaintiff, directly or through withholding from benefit payments. SSA has no direct financial stake, but plays a part resembling that of trustee for claimants.

Stacy Braverman Cloyd, Esq., for NOSSCR, transcript p. 15: The Commissioner should be required to file a notice before seeking a voluntary remand to enable plaintiffs to decide whether to consent and allow them to work out the details of remand.

# TAB 8

## 8. CARES ACT SUBCOMMITTEE: PROPOSED RULE 87 FOR PUBLICATION

Great progress has been made since the October Advisory Committee meeting in developing successive drafts of Rule 87, Civil Rules Emergency. The reporters for the four advisory committees, working under the guidance and encouragement of Professor Capra, undertook to achieve uniformity, eliminating disuniformities wherever the differences between Appellate, Bankruptcy, Civil, and Criminal procedure could support uniformity. The Standing Committee considered the four drafts at length during its January meeting. The Civil CARES Act Subcommittee met in February and again in March to make substantial revisions in Rule 87. Notes of the subcommittee meetings are attached to supplement this report.

The subcommittee recommends that this draft Rule 87 and committee note be approved with a recommendation for publication:

**Rule 87. Civil Rules Emergency.**

(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content.* The declaration must:

(A) designate the court or courts affected;

(B) adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them; and

(C) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Judicial Conference may [modify or][1] terminate a

[1] Regrettably, we likely will have to delete this. The other committees believe the Conference should not have a standardless authority to modify a declaration as emergency circumstances change or as it gains a better understanding of an unchanged emergency. Their view – held adamantly by the Criminal Rules Committee – is that any change, even something as simple as removing one court from the emergency or deleting authority for a single emergency rule, even a few days before the declaration terminates, should be treated as an additional declaration bound by all the terms of the standard in (a). This stance is softened by suggesting there is no real problem because the Conference will adjust its practices to issue additional declarations whenever it would have modified an initial declaration. A less restrictive approach to modification seems suited to the very limited number of Emergency Civil Rules, and their modest character seems to support a more open modification procedure for a period limited by whatever number of days

declaration for one or more courts before the termination date.

(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.

(c) EMERGENCY RULES.

(1) *Emergency Rule 4*: The court may order service on any defendant described in Rule 4(e), (h)(1), (i), or (j)(2) – or on a minor or incompetent person in a judicial district of the United States – by a method that is reasonably calculated to give notice.

(2) *Emergency Rule 6(b)(2)*: A court may apply Rule 6(b)(1)(A) to extend for a period of not more than 30 days the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). A motion authorized by the court and filed within the extended period has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60[2]. If no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

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remain in the original declaration. But rather than further strain the project to push uniformity as far as can be, surrender may be the better course.

[2] This shorter list of rules omits part of the rules list in the first sentence, which is drawn verbatim from Rule 6(b)(2) itself. It does not include Rule 50(d), the reference to each of subdivisions (b), (d), and (e) in Rule 59, and the focus on Rule 60(b). It does track the vocabulary of Appellate Rule 4(a)(4), a virtue for a rule that explicitly relies on Rule 4(a)(4). The differences between the Civil and Appellate Rules should not cause a problem. Rule 50(d) sets the time for a party that has lost on a renewed motion for judgment as a matter of law to move "for a new trial under Rule 59." Appellate Rule 4 specifically refers to a motion for a new trial under Rule 59. Rules 59(b) and (e) are described in Appellate Rule 4(a)(4)(A)(iv) and (v) as a motion "to alter or amend the judgment under Rule 59," and "for a new trial under Rule 59." Rule 59(d) sets the time for the court to act on its own to grant a new trial. The blanket reference to Rule 60 reflects Appellate Rule 4(a)(4)(A)(vi): a motion "for relief under Rule 60 if the motion is filed no more than 28 days after the judgment is entered." That works in Rule 4 because it defuses the problems that arise when a party mistakenly invokes some part of Rule 60 to seek relief that should be sought no later than 28 days after the entry of judgment under Rule 52(b) or Rule 59(a) or (e), or possibly even Rule 50. Civil Rule 6(b)(2) focuses on Rule 60(b) because the time limit in Rule 60(c) addresses only Rule 60(b).

(d) EFFECT OF A TERMINATION. An act not authorized by a rule but authorized under an emergency rule may be completed under the emergency rule after the declaration of emergency terminates when complying with the rule would be infeasible or work an injustice.[3]

**Committee Note**

**Subdivision (a).** This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the Covid-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local — familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

[3] This provision seems unnecessary if only Emergency Rules 4, and even 6, are authorized.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this Rule 87, or a declaration of a rules emergency, do not imply any limitation of the courts' ability to respond to emergency circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

**Subdivision (b).** A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision(c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

**Subdivision (c).** Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rule 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the particular emergency and the identity of the parties, taking account of the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well. Special care must be taken to ensure that the parties understand the effect of an extension on the time for filing a notice of appeal. The interface with Appellate Rule 4(a)(4) is addressed by the provision in Emergency Rule 6(b)(2) that a motion filed within the extended period has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion made under the rules listed in Rule 6(b)(2). It further provides that if no authorized motion is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

**Subdivision (d).** An act may be commenced under an emergency rule but not be completed before the declaration of a rules emergency terminates. The emergency authority should expire when the act may be accomplished under the corresponding civil rule without any real difficulty or unnecessary waste. But the act may be completed as if the declaration had not terminated when compliance with the applicable rule would be infeasible or work an injustice.

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the 2020-[?] COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions

were compelled by these different purposes.

* * * * *

Subdivisions (a) and (b) combine to define a Civil Rules emergency, to recognize the Judicial Conference's sole authority to declare a Civil Rules emergency, and to establish limits that confine a declaration to stated courts, rules, duration, and termination. No declaration may last longer than 90 days, but additional declarations may be made in the same way as an initial declaration.

Discussion in the Standing Committee explored in depth the authority to declare a rules emergency. The four sets of emergency rules all provide for declarations of rules emergencies by the Judicial Conference. It was agreed that a rule adopted under the Rules Enabling Act can recognize this authority. A related question had been raised in one of the advisory committees, asking whether the Judicial Conference has authority to exercise the authority thus recognized. The statute that establishes the Judicial Conference and describes its powers and responsibilities, 28 U.S.C. § 331, does not expressly speak of a power to declare rules emergencies. But the Conference plays so central a role in the Enabling Act process that this power is readily implied. This part of the emergency rules is settled, at least as they work toward recommendations for publication.

The remaining elements of subdivisions (a) and (b) have been hammered out in the process of achieving uniform provisions among the four sets of rules.

The definition of a rules emergency is uniform in its core across all four rules sets. Criminal Rule 62(a) adds a seemingly separate element. Rule 62(a)(1) adopts the common element that "extraordinary circumstances * * * substantially impair the court's ability to perform its functions in compliance with these rules," but paragraph (a)(2) adds: and "no feasible alternative measures would eliminate the impairment within a reasonable time." The "no feasible alternative" paragraph has been explained as an "exhaustion" requirement, designed to ensure that the Judicial Conference has explored all options available under the rules before determining that the extraordinary circumstances substantially impair the court's ability to perform its functions in compliance with these rules. The subcommittee, and this Committee in October, have resisted adding it to Rule 87. If a means to perform the court's functions within a reasonable time can be found within the rules, its ability to perform its functions has not been substantially impaired. Paragraph (2) is redundant. But apparent redundancy incites attempts to find independent meaning, and risks confusion. The other advisory committees have converged on the position that uniformity is not necessary on this element. The Criminal Rules face distinct challenges of history, tradition, often precise requirements that allow little or no deviation, and vitally important individual rights. The Appellate and Bankruptcy

Rules Committees accept the judgment that the "no feasible alternative" provision is important to Criminal Rule 62, but only Rule 62.

Other elements of uniformity may be noted briefly.

Rule 87(b)(1)(B) modifies the approach taken in earlier drafts that had required the declaration of a rules emergency to identify each Civil Emergency Rule authorized by the declaration. The other sets of rules took a converse approach that adopted all of the emergency rules unless specific rules were excluded. That approach is now taken in Rule 87. The list of emergency Civil Rules included in Rule 87(c) is so brief that the choice makes little difference, and it may be easier for the Judicial Conference to conform to identical provisions across all sets of rules.

Rule 87(b)(2) is modified in an important way that ties to the provision in (b)(3) for early termination. Rule 87(b)(3) adopts uniform language to recognize that a declaration of a rules emergency cannot be simply extended or renewed after its stated term. An additional declaration can be made only in the same way as an initial declaration.

Up to now, drafts of Rule 87(b)(2) have included a simple and unrestrained authority to "modify" a declaration. The current draft, made uniform with the drafts of the Appellate, Bankruptcy, and Criminal rules, eliminates any reference to modification. Modification remains available, but only by an "additional declaration[] under this rule." At least one other committee has made vehement objections to any authority that is not expressly anchored in the subdivision (a) definition of a rules emergency and the formal requirements in subdivision (b). It has seemed important to acquiesce in this position in the spirit of uniformity and in recognition that a more open-ended authority to modify a declaration will not be accepted for all sets of emergency rules.

In this setting, only a brief requiem for the authority to modify a declaration seems appropriate. Although it might be wished otherwise, rules emergencies are likely to arise again, both in familiar circumstances and in those quite unforeseeable. Even now, we are being warned of the complex and costly steps the world should take to be prepared for the inevitable next pandemic. It may prove impossible to fully appraise the breadth and impact of the extraordinary circumstances that give rise to a rules emergency. An initial declaration may include too many courts, or not enough. It may not include all the emergency rules that are needed, or it may include those that are not needed. Adjustments will be desirable or imperative. And of course the circumstances may change in unpredictable ways, lessening for some courts but augmenting for others. Further adjustments will be desirable or imperative. An initial declaration can last no more than 90 days; modifications will have a shorter, perhaps much shorter life, and respond to basically similar needs. The departures from the regular rules authorized by Rule 87(c) are inherently modest, and depend on a

court order that is likely to enter only after a specific showing that the regular rule is inappropriate to the circumstances. Allowing modifications within this small realm could simplify, and by simplifying improve, the Judicial Conference's task. Although better abandoned, it was not a bad idea.

Rule 87(c) lists all of the Emergency Rules that may be authorized by a declaration of a Civil Rules emergency. The list remains short, but the Rule 4 class has been expanded a bit and the Rule 6(b)(2) provision has been sharpened.

The approach taken to Emergency Rule 4 provisions remained unchanged through several drafts. The idea was that so few rules were involved that it would work best to adopt emergency rule provisions that incorporated the full text of the relevant Civil Rule provision, adding the modest expansion that allowed the court to order additional means of service. But the list of Rule 4 subdivisions grew, and the growth generated an ever-longer Emergency Rule. In the end, the subcommittee concluded that it is better to sacrifice the context of full text in favor of a single streamlined list of the parts of Rule 4 that can be expanded by a court order that authorizes service "by a method that is reasonably calculated to give notice."

Earlier Emergency Rule 4 provisions authorized the court to order service "by other reliable means that require a signed receipt." The present draft is more open-ended, requiring only a method reasonably calculated to give notice. The "notice" target means actual notice, but that is the plain objective and need not be emphasized by adding "actual" to rule text. The rule works by requiring a court order. A plaintiff seeking authorization of a method of service not authorized by the underlying regular rule must persuade the court that a particular method is justified by difficulties created by the emergency circumstances. The court often will require a showing of what regular methods have been attempted and why they have failed, but some circumstances may make plain the need to attempt alternative methods. Due process should be satisfied when the court determines that the method it has approved has at least as great a chance of accomplishing actual notice as available alternatives. Often it will be important to require a return receipt, but there may be occasions that justify service by a method that does provide for a return receipt.

Methods of service are described in Rule 4(e), (f), (g), (h), (i), and (j). Rule 87(c)(1) authorizes emergency service only for subdivisions (e), (h)(1), (i), (j)(2), and the first sentence of (g). The exclusions all tie to subdivision (f). Subdivision (f) establishes a comprehensive scheme for service "at a place not within any judicial district of the United States." Paragraph (1) recognizes "any internationally agreed means of service." Paragraph (2) applies "if there is no internationally agreed means, or if an international agreement allows but does not specify other means." Paragraph (3) allows "other means not prohibited by international agreement, as the court orders." It has seemed better not to expand

on these alternatives, even in an emergency, given the sensitivity of making service — often perceived as a sovereign judicial act — in another country. These concerns carry over to exclude service on a minor or incompetent outside the United States, which the second sentence of Rule 4(g) refers to designated parts of (f), and to (h)(2), which incorporates almost all of (f). Rule 4(j)(1) incorporates the Foreign Sovereign Immunities Act, and is excluded for similar reasons.

Rule 87(c)(2) establishes Emergency Rule 6(b)(2). Rule 6(b)(2 prohibits any extension of the periods set for post-judgment motions in Rules 50(b) and (d), 52 (b), 59(b), (d), and (e), and 60(b). The periods are 28 days for all of these rules except Rule 60(b), and Appellate Rule 4(a)(4)(A)(vi) establishes special treatment for a Civil Rule 60(b) motion made no later than 28 days after the judgment is entered. The 28-day period was chosen when the Time Project extended the time from a nominal 10 days, made complex by the former rules for excluding some calendar days from the count. The 28-day period dovetails with the common 30-day period for filing a notice of appeal so as to enable a party to decide whether to appeal after it has become clear whether any party will file a post-judgment motion. The Rule 6(b)(2) prohibition on extending the 28-day period rests on the value of prompt appeals and establishing finality and repose.

Rule 6(b)(2) is a flat-out, impermeable barrier. Emergency circumstances, however, may raise obstacles that thwart a decision whether to make any post-judgment motion and the ability to frame a cogent motion. The trial record may not be available. The parties and attorneys may not be able to work together to decide what to do and how to do it. Emergency Rule 6(b)(2) responds in a carefully limited way. The court must act under Rule 6(b)(1)(A), which requires action "before the original time or its extension expires." It may extend the period for not more than 30 days. And it may specify which motions may be made — it might, for example, extend the time to move for a new trial under Rule 59, but not for a renewed motion for judgment as a matter of law under Rule 50(b) in light of experience with the initial Rule 50(a) motion.

The drafting challenge in approaching Emergency Rule 6(b)(2) has been the effect of post-judgment motions on appeal time. Appellate Rule 4(a)(4)(A) provides that when any of these enumerated motions is filed within the time allowed by the Civil Rules, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The first step in integrating Emergency Rule 6(b)(2) with Appellate Rule 4 is relatively direct: "A motion authorized by the court and filed within the extended period has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion" under the designated Civil Rules.

The more difficult step comes with a different prospect. A party may have good reason to need the extended time to reach a responsible determination whether to make any post-judgment motion.

Mature deliberation may, in all good faith, lead to the conclusion that it is better to forgo any motion. The choice may be to appeal, or it may be to accept — or settle out of — the judgment. In that case, there is no motion to have the same effect as a timely motion. This situation is addressed by the final clause of Emergency Rule 6(b)(2): "If no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period." This formulation was developed in careful consultation by the Reporters with the Appellate Rules emergency rule subcommittee. The Appellate Rules subcommittee was satisfied that this provision effectively integrates with Appellate Rule 4, and does not require any revision of Rule 4.

Rule 87(d) remains an uncertain proposition. It is not clear whether, given the narrow range of emergency rules authorized by Rule 87(c), there is any need to provide a "soft landing" for procedures authorized by the court under Emergency Rules 4 or 6(b)(2) but not completed by the end of the declaration of a rules emergency. A court might, for example, authorize service by commercial carrier and require a return receipt. Must the plaintiff fall back on the ordinary methods of service if the emergency declaration terminates before the authorized service is completed? Does it matter whether applicable limitations law requires service by a fast-approaching date? Or the court authorizes a 30-day extension of the time to make a post-judgment motion: surely the extension would not dissolve on termination of the emergency half-way through the extended period, leaving no opportunity for relief either in the trial court or on appeal. Subdivision (d) may not be needed to ensure that result. But it might be.

The choice whether to recommend publication of Rule 87 will be affected by the decisions made in the other advisory committees. It may be better to carry it forward on the understanding that it may be abandoned in the Standing Committee.

The committee note deserves study.

The note on subdivision (a) is deliberately expansive. In part, it simply reflects the proposition that a rules emergency may arise from a wide range of circumstances, some familiar and some unforeseeable. It underscores the point that it is important to consider the impact of an emergency on the parties' abilities to participate in litigation in the ways necessary for the court to perform its functions in compliance with the rules. In addition, it repeatedly emphasizes the need to consider all of the elements of flexibility and discretion that have been embedded in the DNA of the Civil Rules. This advice is directed to the Judicial Conference as an important element in determining whether to declare an emergency and in choosing which emergency rules to adopt. It is also directed to courts and litigants, both to encourage good but unfamiliar practices during periods that may or may not lead to a declaration of a rules emergency, and also to encourage courts and litigants to explore the need for an order under an emergency rule

in light of the opportunities that may yet be found after an emergency is declared.

The note on subdivision (b) summarizes the rule text.

The note on subdivision (c) describes the possibility that some emergencies may justify a standing order that authorizes a specified method of service as a general practice for the district. The specific example is mild — service by a commercial carrier that requires a return receipt. An obvious instance would be an emergency affecting the postal service in ways that do not as much affect commercial carriers.

The note on Emergency Rule 6(b)(2) seeks to explain the rule text in a slightly less formal voice, attempting to advance understanding by repetition. Punctilious care is always necessary in the vicinity of Appellate Rule 4.

The note on subdivision (d) is as provisional as subdivision (d) itself. Assuming subdivision (d) remains, an example might be provided. Again, a simple example could be an order authorizing service by commercial carrier followed by termination of the emergency declaration before service has been completed. If subdivision (d) is abandoned, it might be possible to justify a few words of committee note advice on the completion of a proceeding authorized but not completed before an emergency declaration terminates, most likely as part of the note on termination under subdivision (b). But it is more likely that the note will not address this possibility.

Finally, the subcommittee raises an issue that returns to the earlier discussion of the Emergency Rule 4 recommendation. For several months, permanent revisions of Rule 4 were considered as an alternative to the modest expansions authorized by Emergency Rule 4. They seemed like worthy candidates. But this prospect has been put aside because more ambitious revisions of Rule 4 may prove desirable in the near-term future, or perhaps after a greater delay to come to terms with the most far-reaching possibilities. A continuing series of sequential amendments of the same rule does not seem an attractive prospect. subcommittee study of the means of service that might be authorized in an emergency included the questions raised by modern technology. The prospect that the rules might authorize service of summons and complaint by electronic means has been considered briefly at intervals over the years, but never found ripe. A beginning is included in the proposed Supplemental Rules for Social Security cases discussed earlier in this agenda with a recommendation for adoption. The provision for delivering notice to the Commissioner of Social Security and the United States Attorney by transmitting a Notice of Electronic Filing has been tested by actual practice in a few districts and has been accepted on all sides. But it is a precisely focused provision for special circumstances. Moving beyond that beginning to more general provisions, even narrow general provisions, will require deep knowledge of contemporary and ever-advancing

technology, and of the extent of actual adoption and familiarity with technology. It seems better not to attempt modest amendments of Rule 4 now, when the only immediate reason for considering the questions arises from the wide net cast in framing a proposed emergency rules provision. Time enough, perhaps starting next fall, to consider the possibilities of modest or more ambitious amendments in the near or somewhat extended future. Initial study might suggest the value of laying the groundwork for even aggressive and accordingly long-term work. Changes in the world may press for action sooner than we expect. Artificial "entities" now seem to exist only in the e-ether, without physical embodiment or physical address. It may prove necessary to establish effective means of serving them without waiting for the luxury of deep study over many years.

APPENDIX

*Videoconference Notes*

**CARES Act Subcommittee**
**Advisory Committee on Civil Rules**
**March 4, 2021**

The CARES Act Subcommittee met by videoconference on March 4, 2021. All subcommittee members participated: Hon. Kent A. Jordan, Chair; Hon. Jennifer C. Boal; Hon. Sara Lioi; Joseph M. Sellers, Esq.; and Susan Soong, Esq. Hon. Robert M. Dow, Advisory Committee Chair, also attended. Professors Richard L. Marcus and Edward H. Cooper participated as Reporters. The Rules Committee Staff was represented by Julie Wilson, Esq. Professor Daniel Capra, Reporter for the Evidence Rules Committee, participated as the all-committees coordinator for emergency rules.

Judge Jordan suggested that the meeting might begin with a brief overview of the Rule 4 issues that remain open in the subcommittee.

The Rule 4 choices are presented by the most recent and the next-most-recent drafts of Emergency Rule 4 provisions in Rule 87(c)(1) and related questions whether and when to pursue amendments of Rule 4 itself.

The related questions were resolved as a path to refining the Emergency Rule 4 provisions. The report to the full Committee will simply note two alternatives that have merged into one Rule 4 project that might be taken up soon, postponed for a while, or held off the agenda.

One alternative, followed through several successive Rule 87(c) drafts, framed Emergency Rule 4 provisions in the context of full rule text. The court’s authority to order service “by registered or certified mail or other reliable means that require a return receipt” was added to each. This approach had the advantage of avoiding the need to cross refer from Emergency Rule 4 to Rule 4. But as the list of Rule 4 subdivisions included in Emergency Rule 4 counterparts expanded, the rule became longer and longer. The subcommittee decided that this alternative should be abandoned in favor of the cross-reference approach adopted in the most recent draft.

The subcommittee also decided that it should simply advise the Committee that still more expansive amendments of Rule 4 had been suggested by considering the ways in which Rule 4 service provisions might be expanded to meet emergency circumstances. Limited provisions might be made for electronic service, expanding from the modest beginning made in the proposed Supplemental Rules for Social Security review actions. Even more ambitious provisions could be considered. The major challenges will lie in learning enough about the capacities of evolving technology, and about

general adoption of available technology. No recommendation will be made whether or when such work might be taken up.

These two conclusions combined to resolve another familiar question. The subcommittee will not recommend publication of modest present amendments of Rule 4 that adopt the provisions of the full-text Emergency Rule 4 as an alternative to any Emergency Rule 4 provisions. All potential Rule 4 amendments, modest or daring, should be considered as part of a single project, whenever it may be added to the agenda.

Framing Emergency Rule 4 by cross-reference to specific subdivisions of Rule 4 presented a sequence of questions.

The first questions addressed the authority to be conferred. Several alternatives were considered, leading to a recommendation that the declaration of a rules emergency would establish authority to "order service * * * by a method that is reasonably calculated to give notice." Three variations were rejected. One would have added "actual" — "reasonably calculated to give actual notice." This addition seemed unnecessary; the object of giving notice is inherently to give actual notice. Adding it to the rule might thus seem simply an emphatic redundancy, but there is a risk that it would generate litigation over such arguments as a contention that although actual notice was accomplished, the means ordered by the court were not reasonably calculated to do so.

Two other variations would have added to the rule text formulas drawn from Supreme Court opinions, such as "by a method or methods that are at least as likely to give notice as any reasonably available alternative," or "as any reasonably available and customary alternative." Despite the comfort that might be found in these purposive directions, the risk of generating uncertainty and inviting needless litigation counsels that they not be added.

Finally, words included in brackets in the draft were also omitted: "reasonably calculated to give notice [in the emergency circumstances.]" These words might invite undue relaxation by implying that emergency difficulties warrant unjustified departure from vigorous efforts to accomplish notice.

Attention then turned to which subdivisions of Rule 4 might be suitable for Emergency Rule treatment. The draft simply swept in all the relevant subdivisions, subject to further discussion suggested in the accompanying list of issues to be resolved. Substantial reductions were accepted.

Subdivision 4(f) addresses service abroad. Its three paragraphs embrace the field: (1) internationally agreed means; (2) a list of measures available "if there is no internationally agreed means, or if an international agreement allows but does not specify other means"; and (3) other means not prohibited by international agreement. Adding emergency authority to order service by means not embraced in any of these provisions is likely unnecessary, and also

unwise.

Subdivision (g) has two sentences. The first authorizes service on a minor or an incompetent person in a judicial district of the United States by following state law. The second invokes specific parts of Rule 4(f) for service outside the United States. As with Rule 4(f) itself, it seems unwise to venture further in an emergency rule.

Rule 4(h) presents similar issues. Paragraph (1) covers service on a corporation, partnership, or unincorporated association in a judicial district of the United States. Paragraph (2) invokes Rule 4(f) for service outside a judicial district of the United States. The reasons for excluding Rule 4(f) from emergency rule authority carry over.

Finally, Rule 4(j) authority for serving a government other than the United States has two parts. Paragraph (1) invokes 28 U.S.C. § 1608 for service on a foreign state or its agencies. Paragraph 2 governs service on a state, a municipal corporation, or any other state-created governmental organization. Here too, it does not seem wise to venture beyond the Foreign Sovereign Immunities Act.

With these limits, the subcommittee recommends that Rule 87(c)(1) read:

> (1) Emergency Rule 4: The court may order service on any defendant described in Rule 4(e), (h)(1), (i), or (j)(2), or on a minor or incompetent person in a judicial district of the United States by a method that is reasonably calculated to give notice.

Discussion began by asking how a lawyer intending to invoke emergency rule service would approach the task. The rule does not leave the way open to simply choose a plausible method of service in the hope the court will approve if the defendant gets notice and protests that the chosen means was too risky to accept, or if a defendant fails to respond and later argues that notice was not accomplished. Instead, the lawyer must persuade the court to approve one or more methods proposed by the lawyer. The range of alternative methods is left open for creative proposals, but limited by the need to persuade the court. And, of course, the Judicial Conference must have declared a rules emergency and authorized this specific Emergency Rule 4 provision.

This text omits the “requires a return receipt” element incorporated in the drafts that inserted the emergency authority into the full Rule 4 text. Return receipt or comparable requirements are likely to be included in many emergency service orders, but on balance it seems better to recognize the opportunity to order service by means that may not provide that assurance of receipt.

The open-ended character of this emergency service authority may well generate protests by defendants of the sort just described. Without rule text that describes particular means — such as service by a commercial carrier, return receipt requested — the way will be open to challenge any means the court orders. Always, or almost always, the challenge will not be advanced while the court is considering its order, but after service has been attempted under the order. It seems likely that publication of this draft for comment will draw substantial input from defense interests.

Further discussion suggested that this case-specific model might be supplemented by a more general court order that, for example, service by commercial carrier with a return receipt is authorized for the duration, or for part, of the emergency. An analogue may be found in courts that have adopted standing orders that grant blanket authority for remote depositions under Rule 30(b)(4). Language describing this possibility will be carried forward from earlier committee note drafts.

The draft Emergency Rule 6(b)(2) presented for discussion represents detailed discussion with the Appellate Rules CARES Act Subcommittee. The subcommittee was persuaded that this version establishes a suitable integration with Appellate Rule 4(a)(4)(A) on terms that will not require amendment of Rule 4. They also agreed that it is suitable for the Emergency Civil Rule to adopt language from Rule 4 as the best means of ensuring effective integration.

The basic concern of Emergency Rule 6(b)(2) is that emergency circumstances may justify relaxation of the absolute prohibition against extending the time for post-judgment motions established by Rule 6(b)(2). The trickiest part of the drafting chore has been to accommodate the circumstance of a party who needs more than 28 days to decide whether to make one or more of these motions, and to know how to frame the motion. Allowing an extension for no more than 30 days has seemed a desirable accommodation for emergency circumstances. If a motion is in fact made within the authorized extension, integration with Appellate Rule 4(a)(4)(A) is straightforward. But it also may be that a party that needed more time to decide whether and how to make a motion decides, for good reasons, that it is better to make no motion, and most likely to go straight to an appeal. Ensuring that a timely appeal remains possible required careful drafting.

One change in the proposed draft was discussed and accepted. The draft provides that the court may “apply Rule 6(b)(1)” to extend the period to make a motion. But Rule 6(b)(1) has two subparagraphs. Subparagraph (A) authorizes an extension for good cause on motion, or on the court’s own, “before the original time or its extension expires.” Subparagraph (B) authorizes an extension on motion made after that time on showing excusable neglect. Allowing an order to extend the time on a motion made after the original period has expired seems an unwarranted intrusion on the

purposes of Rule 6(b)(2) itself. Matters should move quickly, either to appeal or repose, once judgment is entered. A party that is thwarted by emergency circumstances from deciding whether or how to make a post-judgment motion should at least be able to present the circumstances to the court by a motion to extend. An emergency so great as to prevent even that motion likely will be so severe as to call for measures beyond foreseeing in drafting an emergency rule.

Emergency Rule 6(b)(2), as framed, meets the central concern that some flexibility should be available in a rules emergency. As drafted, a party that needs to decide whether to appeal retains the advantage of the current rule structure: if no post-judgment motion is made within the prescribed 28-day period, two days remain to decide and, if it is decided to appeal, to file a timely notice of appeal.

**CARES Act Subcommittee**
**Advisory Committee on Civil Rules**
**February 2, 2021**

The CARES Act Subcommittee met by videoconference on February 2, 2021. All subcommittee members participated: Hon. Kent A. Jordan, Chair; Hon. Jennifer C. Boal; Hon. Sara Lioi; Joseph M. Sellers, Esq.; and Susan Soong, Esq. Hon. Robert M. Dow, Advisory Committee Chair, also attended. Professors Richard L. Marcus and Edward H. Cooper participated as Reporters. The Rules Committee Staff was represented by Julie Wilson, Esq., Scott Myers, Esq., and Kevin Crenny, Esq. Professor Daniel Capra, Reporter for the Evidence Rules Committee, participated as the all-committees coordinator for emergency rules.

Judge Jordan opened the meeting by setting the agenda. The first step will be to recall the discussion of emergency rules at the January 5 Standing Committee meeting, to set the scene for the next steps on the draft Civil Rules emergency provision, Rule 87.

Professor Capra assisted in summarizing the tenor of the Standing Committee deliberations. They approve lodging authority to declare a rules emergency in the Judicial Conference; further deliberation by the Civil Rules Committee is not required. They accept the conclusion that there are compelling reasons to adopt different emergency rules provisions in the different sets of rules. Each set of rules has its own history and traditions, has different characteristics, and responds to often distinctly different needs and problems. At the same time, it is important to achieve as much uniformity as possible. Each advisory committee was asked to continue to consider possibilities for increased uniformity.

The committees have coalesced on most of the elements that define a rules emergency. The Criminal Rule 62 draft continues to have two elements not incorporated in draft Rule 87. First, it authorizes the Judicial Conference to declare a rules emergency "only" when it makes the required determinations. Second, it adds an "exhaustion" requirement: "no feasible alternative measures would eliminate the impairment within a reasonable time." These elements have been rejected in developing Rule 87. "Only" seems an inappropriate intensifier. The exhaustion requirement is redundant — if alternative measures enable the court to perform its functions within the rules, the potentially emergency circumstances do not substantially impair its ability to do so. Because it is redundant, it is potentially ambiguous — common methods of interpretation seek an independent meaning for each additional provision; the purpose to emphasize the need to be sure that all possibilities for effective performance within the rules have been exhausted is important, but this restricted meaning may not be apparent.

The Standing Committee suggested that the provision in draft Criminal Rule 62 might be further considered in further work on Rule 87. A draft was submitted for consideration by the

subcommittee. The purpose of the draft was to find an alternative clear expression of the exhaustion idea: A rules emergency can be declared by the Judicial Conference

> when it determines that a court's ability to perform its functions in compliance with these rules is substantially impaired by extraordinary circumstances that relate to public health or safety, or affect physical or electronic access to a court, and that cannot be addressed by other means.

Brief discussion concluded that this alternative is not as attractive as the current version of Rule 87. It was rejected. The non-uniform variations in draft Criminal Rule 62 also were rejected for the same reasons as led to earlier decisions not to adopt them. Rule 87(a) should remain in the form presented to the Standing Committee.

Discussion turned to the several provisions for Emergency Rules 4. The draft presented for discussion added an Emergency Rule 4(i), governing service on the United States or its agencies, officers, or employees. Rule 4(i) was not included in earlier drafts because it currently provides for service by registered or certified mail. But a lawyer suggested to the Administrative Office that alternative means should be added because of difficulties encountered in accomplishing such service during the pandemic. Including court-approved additional methods in Rule 4(i) could expand beyond mail to such alternatives as commercial carriers.

Adding Rule 4(i) to the list of emergency provisions that would allow the court to order service by other means has a downside. If it is framed in the mode used for the other emergency Rule 4 provisions, it adds great length to the rule. The length may be worthwhile. The approach that adopts complete substitute rule text for emergency use avoids the need to shuttle between the underlying rule and the overlay of an emergency rule. But there are at least two alternatives.

One alternative, circulated shortly before the meeting, would collapse all of the Rule 4 provisions into a simple statement that the court can order service by other means, etc., under Rules 4(e)(2)(B), 4(h)(1)(B), and so on through the list. That would be brief, simple, and clear. But it would be clear only on going back to the underlying rule and determining the fit between the emergency rule and the underlying rule.

Another alternative, familiar from repeated discussion, is to propose revising all of these provisions of Rule 4 itself. Each would be expanded to include "or, if ordered by the court, sending a copy of each * * * by registered or certified mail or other reliable means that require a signed receipt." This would be a modest change, in part because it would require a court order. Early use likely would be to authorize service by established commercial carriers. More expansive uses might be found. This

provision might support early experiments with electronic service, most readily if an often-sued defendant decided to establish an address for electronic service. Facilitating a central means of service that targets trained staff might have benefits that outweigh concerns about making it easier to sue. Government offices could be an early example, as suggested by the enthusiastic reception encountered on all sides in discussing the proposal for electronic service in the Supplemental Rules for Social Security review actions published last summer.

An additional advantage in expanding Rule 4 was found in diminishing the occasions when a federal court must look to state law under Rule 4(k)(1)to find alternative methods of service. One possible illustration was offered by a judge who is encountering complaints that pandemic-induced delays in making service have made it possible for diverse defendants to make a “snap removal” before diversity-destroying defendants are served, defeating the plaintiff’s basic right to keep the case in state court.

The advantages of proposing this modest addition to Rule 4 itself were accepted. The idea has been considered for some time in the emergency rule setting, and could be advanced as a proposal to publish at the same time as the emergency rule would be published. No time need be lost, and the goal would be achieved for emergency circumstances as well as generally.

Two concerns remained. One was that it seems a good idea to continue to pursue an emergency rules provision like draft Rule 87, but it looks weak if it includes only one emergency rule, 6(b)(2). Rule 6(b)(2), indeed, still must be brought to terms with the Rule 4(a)(4)(A) provisions governing the effect of post-judgment motions on appeal time.

A second concern was that these modest amendments should not close the book on Rule 4 for the time being. It is generally better to avoid amending the same rule twice in a narrow time frame, although it might be noted that successive amendments revised Rule 4 in 2015, 2016, and 2017. Still, it is wise to heed the regular more general advice to exercise restraint in proposing rules changes. But modern technology brings new problems. One subcommittee member has encountered litigation against parties that are difficult to describe even as entities. They exist only in computers, with no physical being much less a physical presence or address. At least one court has permitted service by Twitter in such circumstances. It may be time to start considering these problems.

There is little prospect of prompt action in addressing electronic service on electronic beings. Issues of preserving and discovering electronic information are much more familiar, but have themselves presented significant challenges in amending the discovery rules. The problems with electronic service are likely to be much greater. Simply identifying the modes of service among such alternatives as e-mail, social media, or other platforms not yet

familiar or not yet created, will require careful work. And what of a disembodied entity that exists only in blockchain? It is difficult to achieve neutrality in dealing with phenomena that elude precise understanding.

One way to combine amendments of Rule 4 itself with an emergency Rule 4 provision may be to craft a more ambitious emergency provision. The core idea would be to allow the court to order service by any means reasonably calculated to give notice. Nothing more specific would be likely — the available alternatives would be shaped by the specific emergency circumstances. If fears arise that negative implications might be drawn that this emergency rule implies limits on whatever general authority courts have now, the Committee Note could explicitly disclaim that meaning. Some concerns remained with providing so open-ended an authority. They will continue to be considered as the draft is developed.

Extended discussion of the Rule 4 alternatives led to a general consensus to develop three alternatives. The first would be the current draft, as it might be modified, adopting full substitute emergency rule texts for several subdivisions of Rule 4. The second would be to strip all of those proposals from Rule 87, recommending publication as amendments of Rule 4 itself. A broader Emergency Rule 4 would be substituted in Rule 87, both for its own sake and to give more heft to Rule 87. The third will be to begin the process of considering long-range amendments of Rule 4 to take account of continual developments in technology that enhance the capacities for electronic notice and also generate potential litigation parties that can be reached only by electronic means.

Continuing support for Emergency Rule 6(b)(2) was briefly noted. The challenge of accomplishing a secure integration with the effect of post-judgment motions on the start of appeal time remains. The Reporters will join the discussion of this topic by the Appellate Rules subcommittee on February 11.

The subcommittee accepted Professor Capra’s suggestion that there is no reason to consider further the possibility of adding to Rule 87 a super-emergency provision for circumstances in which the Judicial Conference is unable to discharge the responsibility of declaring a rules emergency. The original proponent has withdrawn the suggestion. It clings to life after the Standing Committee meeting, but only by a thread. The thread was cut.

The subcommittee also accepted Professor Capra’s suggestion that Rule 87 should continue to say that the Judicial Conference “may,” not “must,” terminate a declaration of a rules emergency. The reasons advanced in the Capra-Struve memorandum to the Standing Committee are compelling. It seems likely that the Criminal Rules Committee, which has adhered to “must,” will change to “may.”

The final question on the agenda was whether to carry forward with the draft Rule 87(b)(1)(B) provision that a declaration of a rules emergency “may authorize only one or more” of the emergency

rules in subdivision (c). This approach makes the Judicial Conference responsible for picking and choosing. The emergency rules proposed for other sets of rules take the opposite approach — a declaration includes all of the emergency rules provisions unless one or more are excluded. The Standing Committee suggested that it would be good to adopt a uniform approach, sparing the Judicial Conference the need to act differently for a Civil Rules emergency than for other rules emergencies. The value of uniformity prevailed, making one improvement in the draft submitted for discussion. Under the new version, Rule 87(b)(1)(B) provides that a declaration of a rules emergency "adopts all of the emergency rules in Rule 87(c) * * * unless one or more of them is expressly excepted."

**Emergency Rules Side-By-Side Comparison**



| Appellate | Bankruptcy | Civil | Criminal |
|---|---|---|---|
| **Rule 2. Suspension of Rules**<br><br>**(b) In an Appellate Rules Emergency.**<br><br>**(1)** ***Conditions for an Emergency.*** The Judicial Conference of the United States may declare an Appellate Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to the court, substantially impair the court's ability to perform its functions in compliance with these rules. | **Rule 9038. Bankruptcy Rules Emergency**<br><br>(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Bankruptcy Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a bankruptcy court, substantially impair the court's ability to perform its functions in compliance with these rules. | **Rule 87. Civil Rules Emergency.**<br><br>(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules. | **Rule 62. Criminal Rules Emergency**<br><br>**(a) Conditions for an Emergency.** The Judicial Conference of the United States may declare a Criminal Rules emergency if it determines that:<br><br>(1) extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules; and<br><br>(2) no feasible alternative measures would sufficiently address the impairment within a reasonable time. |

| Appellate | Bankruptcy | Civil | Criminal |
|---|---|---|---|
| **(2) *Content*.** The declaration must:<br><br>(A) designate the circuit or circuits affected; and<br><br>(B) be limited to a stated period of no more than 90 days.<br><br>**(3) *Early Termination.*** The Judicial Conference may terminate a declaration for one or more circuits before the termination date. | (b) DECLARING AN EMERGENCY.<br><br>(1) *Content*. The declaration must:<br><br>(A) designate the bankruptcy court or courts affected;<br><br>(B) state any restrictions on the authority granted in (c) to modify the rules; and<br><br>(C) be limited to a stated period of no more than 90 days.<br><br>(2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more bankruptcy courts before the termination date. | (b) DECLARING AN EMERGENCY.<br><br>(1) *Content*. The declaration must :<br><br>(A) designate the court or courts affected;<br><br>(B) adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them; and<br><br>(C) be limited to a stated period of no more than 90 days.<br><br>(2) *Early Termination.* The Judicial Conference may terminate a declaration for one or more courts before the termination date. | **(b) Declaring an Emergency.**<br><br>(1) Content. The declaration must:<br><br>(A) designate the court or courts affected;<br><br>(B) state any restrictions on the authority granted in (c) and (d) to modify the rules; and<br><br>(C) be limited to a stated period of no more than 90 days.<br><br>**(2) Early Termination**. The Judicial Conference may terminate a declaration for one or more courts before the termination date. |

| Appellate | Bankruptcy | Civil | Criminal |
|---|---|---|---|
| **(4)** ***Additional Declarations*****.** The Judicial Conference may issue additional declarations under Rule 2(b).<br><br>**(5)** ***Proceedings in a Rules Emergency*****.** When a rules emergency is declared, the court may:<br><br>(A) suspend in all or part of that circuit any provision of these rules, other than time limits imposed by statute and described in Rule 26(b)(1)-(2); and<br><br>(B) order proceedings as it directs. | (3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule. | (3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule. | **(3) Additional Declarations.** The Judicial Conference may issue additional declarations under this rule. |

# TAB 9

## 9. MULTIDISTRICT LITIGATION SUBCOMMITTEE REPORT

At the October 2020 meeting, the MDL Subcommittee reported to the full Advisory Committee that it had reached a consensus not to pursue the possibility of a new rule regarding interlocutory appellate review in MDL proceedings, and this Committee accepted that recommendation. During the January 2021 meeting of the Standing Committee, that matter was presented to the Standing Committee, which did not urge reconsideration of the decision.

The subcommittee still has pending before it another issue that remains somewhat in abeyance. Originally it was presented as "vetting" claims in MDL proceedings, based on reports that often a significant proportion of claims turn out to be unsupportable. One reaction to this concern has been to call for early completion of a plaintiff fact sheet (PFS) by each claimant, showing at least that the claimant had used the product in question and manifested the harmful condition alleged to have resulted from use of the product. (This issue seems frequently to be raised in product liability cases premised on personal injury due to use of a product.) Research by the Federal Judicial Center showed that in nearly 90% of large MDLs a PFS is already employed, and that these questionnaires are often tailored to the specific issues of the MDL proceeding, so that a uniform rule on contents did not seem promising. It also appeared that drafting a PFS is often challenging and time-consuming, so a uniform rule on time limits could cause difficulties.

Instead, a new concept of a "census," which might be regarded as an abbreviated version of a PFS, emerged as a possible solution. This new idea has been used in three ongoing MDLs. One of those is the Zantac MDL, which is pending before Judge Rosenberg, the new Chair of this subcommittee. Early reports indicate that this method holds promise both in identifying claims that lack support and in organizing the litigation for more efficient handling in court. So this idea remains under study, though if it offers promise it may not be a suitable focus for a rule provision, but more appropriately included in a manual or instructional material from the Judicial Panel on Multidistrict Litigation.

What remains under active study at this time is the remaining issue the subcommittee has identified — rule provisions addressing judicial appointment and oversight of leadership counsel and supervising certain settlement activities. The subcommittee expects to learn more about these issues during a March 24, 2021, miniconference. Because the agenda materials for the upcoming full Committee meeting were due before that date, it is not possible here to report on the results of the conference. Below, however, is the background memo for the conferees, and the subcommittee should be able to offer a report at or before the full Committee meeting.

# APPENDIX

## *Background Materials for the March 24, 2021 Conference on Issues Regarding Leadership Counsel and Judicial Supervision of Settlement*

For some time, the MDL Subcommittee of the Advisory Committee on Civil Rules has been examining a variety of issues related to possible rulemaking for MDL proceedings. This memorandum provides background for the issues to be discussed during the March 24, 2021, conference. It is drawn from the report on this subject submitted to the Standing Committee at its January 2021 meeting.

It bears emphasis that, even though a sketch of a possible rule addressing these issues is included with these background materials, no decision has been made on whether to proceed to serious study of this possibility. After intense discussion, the subcommittee decided not to pursue some other rulemaking possibilities that were urged on it. The sketch below is intended, therefore, only to provide food for discussion during the March 24 event.

The subcommittee is grateful to all who have agreed to participate, and confident it will gain valuable insights into these issues as a result.

The topic presently on the subcommittee's agenda is the possibility of developing a rule addressing appointment of leadership counsel, judicial supervision of compensation of leadership counsel, and judicial oversight of "global" settlements sometimes negotiated by leadership counsel. This set of issues appears in important ways to be the most challenging of the questions the subcommittee has confronted. It may be that the wise course is to move forward on some but not all these fronts.

Owing to the attention focused on the other issues that the subcommittee has been reviewing, it has thus far given little attention to this topic. The consensus view of the subcommittee is that it needs more information about these issues. That is what it hopes to gain from this conference.

Because less work has been done on this subject than the others the subcommittee has considered, the following is an introduction designed to stimulate discussion.

A starting point is to recognize that, fairly often, it seems that the gathering power of MDL proceedings bears a significant resemblance to the class action device. Perhaps an MDL proceeding can even seem like a de facto class action from the perspective of many claimants. But the history of rules for these two semi-parallel devices (the class action and MDL treatment) has differed considerably, particularly regarding supervision of counsel, attorney's fees for leadership counsel, and settlement review.

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

In class actions, a judicial role approving settlements flows from the binding effect Rule 23 prescribes for a class-action judgment. Absent a court order certifying the class, there would be no binding effect. After the rule was extensively amended in 1966, settlement became normal for resolution of class actions, and certification solely for purposes of settlement also became common. Courts began to see themselves as having a "fiduciary" role to protect the interests of the unnamed (and otherwise effectively unrepresented) members of the class certified by the court. But the court's order in that "fiduciary" role can bind all class members, even those who object.

Part of that responsibility connects with Rule 23(g) on appointment of class counsel, which requires class counsel to pursue the best interests of the class as a whole, even if not favored by the designated class representatives. The court may approve a settlement opposed by class members who have not opted out. The objectors may then appeal to overturn that approval; otherwise they are bound despite their dissent. Now, under amended Rule 23(e), there are specific directions for counsel and the court to follow in the approval process.

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

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

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

> § 10.22. Coordination in Multiparty Litigation – Lead/Liaison Counsel and Committees
> § 10.221. Organizational Structures
> § 10.222. Powers and Responsibilities
> § 10.223. Compensation

So sometimes – again perhaps particularly in "mass tort" MDLs – the actual evolution and management of the litigation may resemble a class action. Though claimants have their own lawyers (sometimes called IRPAs – individually represented plaintiffs' attorneys), they may have a limited role in managing the course of the MDL litigation. A court order may forbid the IRPAs to initiate discovery, file motions, etc., unless they obtain the approval of the attorneys appointed by the court as leadership counsel. In class actions, a court order appointing "interim counsel" under Rule 23(g) even before class certification may have a similar consequence of limiting settlement negotiation (potentially later presented to the court for approval under Rule 23(e)), which might be likened to the role of the court in appointing counsel to represent one side or the other in MDL litigation.

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

One method of doing what the Manual directs is to set up a common benefit fund and direct that in the event of individual settlements a portion of the settlement proceeds (usually from the IRPA's attorney's fee share) be deposited into the fund for future disposition by order of the transferee court. And in light of the "free rider" concern, the court may also place limits on the

percentage of the recovery that non-leadership counsel may charge their clients, sometimes reducing what their contracts with their clients provide.

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

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

The absence of clear authority or constraint for such judicial activity in MDL proceedings has produced much uneasiness among academics. One illustration is Prof. Burch's recent book *Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation* (Cambridge U. Press, 2019), which provides a wealth of information about recent MDL mass tort litigations. In brief, Prof. Burch urges that it would be desirable if something like Rules 23(e), 23(g), and 23(h) applied in these aggregate litigations. In somewhat the same vein, Prof. Mullenix has written that "[t]he non-class aggregate settlement, precisely because it is accomplished apart from Rule 23 requirements and constraints, represents a paradigm-shifting means for resolving complex litigation." Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 Rev. Lit. 129, 135 (2018). Her recommendation: "[B]etter authority for MDL judicial power might be accomplished through amendment of the MDL statute or through authority conferred by a liberal construction of the All Writs Act." *Id.* at 183.

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

But it is not clear that judges who have been handling these issues feel a need for either rules-based authority or further

direction on how to wield authority already widely recognized. Research has found that judges do not express a need for greater or clarified authority in this area. And the subcommittee has not, to date, been presented with arguments from experienced counsel in favor of proceeding along this line. All participants — transferee judges, plaintiffs' counsel and defendants' counsel — seem to prefer avoiding a rule amendment that would require greater judicial involvement in MDL settlements.[4]

For the present, the subcommittee's very preliminary discussions have identified a number of issues that could be presented if serious work on possible rule proposals occurs. These issues include the following:

Scope: Appointment of leadership counsel and consolidation of cases long antedate the passage of the Multidistrict Litigation Act in 1968. As with the PFS/census topic (still under study by the subcommittee but not on the agenda for this conference), a question on this topic would be whether such a rule should apply only to some MDLs, to all MDLs, or also to other cases consolidated under Rule 42. The *Manual for Complex Litigation* has pertinent provisions, and has been applied to litigation not subject to an MDL transfer order. Its predecessor, the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960), antedated Chief Justice Warren's appointment of an ad hoc committee of judges to coordinate the handling of the outburst of Electrical Equipment antitrust cases, which proved successful and led to the enactment of § 1407.

Standards for appointment to leadership positions: Section 10.224 of the *Manual for Complex Litigation* (4th ed. 2004) contains a list of considerations for a judge appointing leadership counsel. Rule 23(g) has a set of criteria for appointment of class counsel. Though similar, these provisions are not identical. Any rule could opt for one or another of those models, or offer a third template. When an MDL includes putative class actions, it would seem that Rule 23(g) is a reasonable starting place, however.

Interim lead counsel: Rule 23(g) explicitly authorizes appointment of interim class counsel. The goal is that the person or persons so appointed would be subject to the requirements of Rule 23(g)(4) that counsel act in the best interests of the class as a whole, not only those with whom counsel has a retainer

[4] One more recent development deserves mention. In September 2019, Judge Polster used Rule 23 to certify a "negotiation class" to negotiate a settlement on behalf of local governmental entities with claims involved in the Opioids MDL litigation. After accepting an appeal under Rule 23(f), the Sixth Circuit, by a 2-1 vote, ruled that such certification was not authorized by Rule 23. *In re National Prescription Opiate Litig.*, 976 F.3d 664 (6th Cir. 2020). A petition for rehearing en banc was denied.

agreement. In some MDL proceedings, an initial census or other activity may precede the formal appointment of leadership counsel. Whether such interim leadership counsel can negotiate a proposed global settlement (as interim class counsel can negotiate before certification about a pre-certification classwide settlement) could raise issues not pertinent in class actions. It may be that the more appropriate assignment of such interim counsel should be — as seems to be true of the MDL proceedings where this has occurred — to provide effective management of such tasks as an initial census of claims.

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

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

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

Capping fees: Somewhat in keeping with the "free ride" idea, judges have sometimes imposed caps on fees due to IRPAs at a lower level than what is specified in the retainer agreements these lawyers have with their clients. The rules of professional responsibility direct that counsel not charge "unreasonable" fees, and sometimes authorize judges to determine that a fee exceeds that

level. It is not clear whether this "capping" activity is as common as orders creating common benefit funds. Whether a rule should address, or try to regulate, this topic is uncertain.

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

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

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

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

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

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

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

So it may be that, if more formalized provisions are needed, the anchor could be the court's authority to designate a leadership structure, something that has been widely recognized. The reality is that judges may prescribe specific duties for leadership counsel (and also on occasion restrict the authority of non-leadership lawyers to act for their clients). A judge's authority to appoint and prescribe responsibilities for leadership counsel might also include continuing authority to supervise the performance of the leadership lawyers, including in connection with settlement negotiation. This undertaking could introduce further complexity in addressing the nature of possible responsibilities leadership counsel have to claimants who are not their direct clients.

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

proceedings.

At least the following questions have already emerged:

1. Is there any need to formalize rules of practice — whether in structuring management of MDL proceedings or in working toward settlement — that are already familiar and that continue to evolve as experience accumulates?

2. Do MDL judges actually hold back from taking steps that they think would be useful because of doubts about their authority?

3. There are indications that any formal rulemaking would initially be resisted by all sides of the MDL bar and by experienced MDL judges. Is that an important concern that should call for caution? Or is it a good reason to look further into the arguments of some academics that it is important to regularize the insider practices that characterize a world free of formal rules?

4. Even apart from concerns about the reach of Enabling Act authority, would many or even all aspects of possible rules interfere improperly with attorney-client relationships?

5. Would rules in this area unwisely curtail the flexibility transferee judges need in managing MDL proceedings?

6. Would rule provisions for common-benefit fund contributions, and for limiting fees for representing individual clients, impermissibly modify substantive rights, even though courts are often enforcing such provisions without any formal authority now?

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

The subcommittee looks forward to active engagement with these issues, and any others that ought to be considered, during the March 24 conference.

## Sketch of Possible Rule Approach

The sketch below is offered solely to provide a concrete example of how the topics discussed above might be addressed in a rule. As already emphasized, the subcommittee has not made any decision about whether to recommend attempting to draft a rule. Indeed, even if some provisions regarding these matters would be useful, it need not follow that they should be embodied in a rule, as opposed to a manual or instructional materials for the Judicial Panel.

**Rule 23.3. Multidistrict Litigation Counsel**

(a)(1) *Appointing Counsel*. When actions have been transferred for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407, the court may appoint [lead][5] counsel to perform designated [acts][responsibilities] on behalf of[6] all counsel who have appeared for similarly aligned parties.[7] In appointing [lead] counsel the court:

(A) must consider:

(i) the work counsel has done in preparing and filing individual actions;

(ii) counsel's experience in handling complex litigation, multidistrict litigation, and the types of claims asserted in the proceedings;

(iii) counsel's knowledge of the

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

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

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

applicable law; and

(iv) the resources that counsel will commit to the proceedings;

(B) may consider any other matter pertinent to counsel's ability to perform the designated [acts][responsibilities];

(C) may order potential [lead] counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and taxable costs;

(D) may include in the appointing order provisions about the role of lead counsel and the structure of leadership, the creation and disposition of common benefit funds under Rule 23.3(b), discussion of settlement terms [for parties not represented by lead counsel] under Rule 23.3(c), and matters bearing on attorney's fees and nontaxable costs [for lead counsel and other counsel] under Rule 23.3(d); and

(E) may make further orders in connection with the appointment[, including modification of the terms or termination].

(2) *Standard for Appointing Lead Counsel.* The court must appoint as lead counsel one or more counsel best able to perform the designated responsibilities.

(3) *Interim Lead Counsel.* The court may designate interim lead counsel to report on the ways in which an appointment of lead counsel might advance the purposes of the proceedings.

(4) *Duties of Lead Counsel.* Lead counsel must fairly and adequately discharge the responsibilities designated by the court [without favoring the interests of lead counsel's clients].

(b) COMMON BENEFIT FUND. The court may order establishment of a common benefit fund to compensate lead counsel for discharging the designated responsibilities. The order may be modified at any time, and should [must?]:

(1) set the terms for contributions to the fund [from fees payable for representing individual plaintiffs]; and

(2) provide for distributions to class counsel and other lawyers or refunds of contributions.

(c) SETTLEMENT DISCUSSIONS. If an order under

Rule 23.3(a)(1)(D) authorizes lead counsel to discuss settlement terms that [will? may?] be offered to plaintiffs not represented by lead counsel, any terms agreed to by lead counsel:

(1) must be fair, reasonable, and adequate;[8]

(2) must treat all similarly situated plaintiffs equally; and

(3) may require acceptance by a stated fraction of all plaintiffs, but may not require acceptance by a stated fraction of all plaintiffs represented by a single lawyer.

(d) ATTORNEY FEES.

(1) *Common Benefit Fees.* The court may award fees and nontaxable costs to lead counsel and other lawyers from a common benefit fund for services that provide benefits to [plaintiffs? parties?] other than their own clients.[9]

(2) *Individual Contract Fees.* The court may modify the attorney's fee terms in individual representation contracts when the terms would provide unreasonably high fees in relation to the risks assumed, expenses incurred, and work performed under the contract.

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

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

# TAB 10

## 10. DISCOVERY SUBCOMMITTEE REPORT

The newly formed Discovery Subcommittee (Judge Godbey, chair, Judge Boal, David Burman, Joe Sellers, Susan Soong, Ariana Tadler, and Helen Witt) has a relatively full agenda. The first two items below were introduced at the full Committee's October 2020 meeting. Two more submissions have come in, and are addressed in this report. The subcommittee intends to pursue at least the first of these four potential amendment topics, is uncertain about whether to pursue the second and third, and has reached a consensus that the idea in the fourth submission does not merit action at present.

All the submissions involved are in this agenda book for purposes of reference. They four topics are:

1. Privilege logs (Suggestions 20-CV-R and 20-CV-DD)
2. Sealing of filed materials (Suggestion 20-CV-T)
3. Attorney fee shifting under Rule 37(e) (Suggestion 21-CV-D)
4. Amending Rule 27(c) to authorize a pre-litigation application for an order to preserve evidence (Suggestion 20-CV-GG)

On February 26, 2021, the subcommittee held an online conference about these four topics. Notes of that conference are in this agenda book. The subcommittee invites insights and reactions from the full Committee on these items.

### (1) Rule 26(b)(5)(A): Privilege Logs

Two suggestions (20-CV-R (Lawyers for Civil Justice)) and 20-CV-DD (Jonathan Redgrave)) focus on practice under Rule 26(b)(5)(A). The subcommittee's discussion on February 26 supported the idea behind the submissions — that privilege logs often cost too much and nevertheless provide insufficient information.

Rule 26(b)(5)(A) was added in 1993, to require parties withholding materials requested in discovery to disclose information about what has been withheld on privilege grounds. The rule was often interpreted to require a privilege log, modeled on practice under the Freedom of Information Act. The proposal is that the rule be amended to add specifics about how parties are to provide details about materials withheld from discovery due to claims of privilege or protection as trial-preparation materials. These submissions identify a problem that can produce waste. But it is not clear how or whether a rule change will helpfully change the current situation.

The basic difficulty is that an extremely detailed listing of the withheld materials may sometimes be unworkable or extremely costly to produce without providing significant benefit to the parties or the court. But there appears to be no enthusiasm for retracting the general requirement that parties provide notice

about what they have withheld. The subject is being carried forward for further study based on initial discussion at the Oct. 2020 Committee meeting.

Because the rulemaking background bears considerably on the current situation, it is useful to sketch that background.

*1993 Adoption of Rule 26(b)(5)*

Before 1993, parties withheld materials covered by a privilege from discovery without enumerating what was withheld. Often they relied on some sort of "general objection" that no privileged materials would be produced. Indeed, since Rule 26(b)(1) says only "nonprivileged matter" is within the scope of discovery, one might have asserted that the objection was not needed. In any event, it would often be very difficult for other parties to determine what had not been turned over based on a claim of privilege. There were suspicions that sometimes parties were overly aggressive in their privilege claims.

In 1993, therefore, Rule 26(b)(5)(A) was added. It now provides:

> When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

This provision (modeled on a similar provision added to Rule 45 in 1991) sought to dispel the uncertainty that existed before it went into effect, but did not seek to impose a heavy new burden on responding parties. Hence, the committee note accompanying the 1993 amendment advised:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.

Notwithstanding this suggestion, there is reason to worry that overbroad claims of privilege still occur. As Judge Grimm noted in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 265

(D. Md. 2008): "[B]ecause privilege review and preparation of privilege logs is increasingly handled by junior lawyers, or even paralegals, who may be inexperienced and overcautious, there is an almost irresistible tendency to be over-inclusive in asserting privilege protection."

But privilege logs — the customary expectation for complying with Rule 26(b)(5)(A) — were a poor solution to the problem, as Judge Grimm also recognized (id.):

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or in camera review of the documents themselves.

For further discussion, *see* 8 Fed. Prac. & Pro. § 2016.1.

*2008-09 Advisory Committee Consideration*

At the April 2008 Advisory Committee meeting, Prof. Gensler (then the academic member of the Advisory Committee) raised concerns about the actual experience implementing Rule 26(b)(5)(A). Thereafter, further background work was done and the question was further discussed at the Advisory Committee's November 2008 meeting. This discussion was about both the content of privilege logs and the timing for them. One point made was: "Vendors have become insistent that electronic screening software can do the job at much lower cost." Several members of the Advisory Committee reported then that the parties usually work out arrangements that cope with the potential difficulties. The matter was continued on the Committee's calendar, but no further action has been taken.

*Pertinent Post-1993 Rule Changes*

Since 1993, other rule changes have added provisions that could affect the possible burden of complying with Rule 26(b)(5)(A).

First, in 2006 Rule 26(b)(5)(B) was added, providing that any party could make a belated assertion of privilege, after production, which would require all parties that received the identified information to sequester the information unless the court determined that the privilege claim was unsupported. At the same time, Rule 26(f) was amended to add what is now in Rule 26(f)(3)(D), directing that the parties' discovery plan discuss issues about claims of privilege. But these rule changes did not precisely address the question whether production constituted a waiver, particularly a subject-matter waiver.

Second, in 2008 Congress enacted Evidence Rule 502. In Rules 502(d) and 502(e), that rule gives effect to party agreements that production of privileged material will not constitute a waiver of privilege. In addition, even in the absence of an agreement, Rule 502(b) insulates inadvertent production against privilege waiver if the producing party "took reasonable steps to prevent disclosure." Rule 502 *does* directly address the question whether a waiver has occurred.

Finally, as amended in 2015, Rule 34(b)(2)(B) and (C) require that a response to a discovery request must "state with specificity the grounds for objecting to the request" and also state whether any materials have actually been withheld on the basis of the objection.

Owing to these post-1993 rule changes, therefore, one may conclude that the burdens of complying with Rule 26(b)(5)(A) have abated somewhat, and that requirements for specifics about withheld materials have become more pervasive. A significant concern had been that failure to log a particular item would work a waiver even if the item was not produced. But it seemed that courts finding such waivers did so only as a sort of sanction for relatively flagrant disregard of the Rule 26(b)(5)(A) obligation, not for a simple slip-up. Due to Rule 26(b)(5)(B), there is now a procedure to retrieve a mistakenly-produced privileged item, leaving it to the party that obtained the item to seek a ruling in court that it is not privileged. Rule 502, then, directs that no waiver be found for inadvertent production of a privileged item if reasonable steps were taken to review before production, and that even if reasonable steps were not taken the parties could guard against waiver by making an agreement under Rule 502(d). In short, the pressure of a waiver due to oversight — particularly the risk of a subject-matter waiver — has abated considerably since 1993.

Meanwhile, it may be that technology now exists to provide a useful assist to the parties in preparing a privilege log. Technology-assisted review (TAR) is often or routinely employed to review large volumes of electronically-stored information to identify responsive materials. As discussed in 2008 by the Advisory Committee, software was then being promoted as effectively identifying not only responsive materials, but also materials that might be claimed to be privileged. It may be that such programs could then also generate at least a draft privilege log. At least some products are presently touted as greatly simplifying both the process of privilege review and the preparation of a privilege log once that review has been completed.

Nonetheless, there have also been criticisms of the reported requirement of some courts that parties prepare a "document-by-document" privilege log. As Judge Facciola observed in *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 98-99 (D.D.C. 2012):

> [I]n the era of "big data," in which storage capacity is cheap and several bankers' boxes of documents can be

> stored with a keystroke on a three inch thumb drive, there are simply more documents that everyone is keeping and a concomitant necessity to log more of them. This, in turn, led to the mechanically produced privilege log, in which a database is created and automatically produces entries for each of the privileged documents. * * *
>
> But, the descriptor in the modern database has become generic; it is not created by a human being evaluating the actual, specific contents of that particular document. Instead, the human being creates one description and the software repeats that description for all the entries for which the human being believes that description is appropriate. * * * This raises the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive as it is useless.

*Cost of Responding to Discovery and Withholding Privileged Materials without Preparing a Privilege Log*

In Judge Facciola's view, then, use of AI programs to create the privilege log can be viewed as part of the problem, rather than a solution to the problem.

It seems worth noting that preparing the privilege log may often be a relatively minor cost in comparison to responding to discovery of ESI more generally. Whether or not a privilege log is prepared, much work is necessary to respond to discovery of ESI. Responsive materials must be located in what is sometimes an enormous quantity of digital data. In addition, either simultaneously or after the responsive materials are extracted, the specific items potentially covered by privilege must be identified and set apart.

After those potentially privileged items are identified and set apart, a legally trained person must verify that it would indeed be legitimate to withhold them from production on that ground. And then care must be taken at least to keep a record of what was withheld on this ground. It would seem that all of these steps would have been required under the pre-1993 rules, and that they would continue to be necessary if Rule 26(b)(5)(A) were amended. So it may be that the additional cost of preparing a privilege log is not a large part of this overall cost of responding to discovery, even though preparing a document-by-document log may in many cases require a disproportionate effort, or at least be a waste of time.

Even the proponents of AI to simplify and streamline this process of review seem to expect that something like "eyes on" review by lawyers is still a necessary part of the process of review. And it's important to keep in mind that the process of privilege review would presumably be necessary even if there were no privilege log requirement.

*Current Submissions*

The LCJ submission (20-CV-R) stresses the difficulties of privilege logs in an era of ESI, emphasizing Judge Facciola's views. Indeed, along with Jonathan Redgrave (who provided the other submission, 20-CV-DD), Judge Facciola proposed in 2010 that "the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement." Facciola & Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 Fed. Cts. L. Rev. 19 (2010). Implementing what Judge Facciola urged by rule could be difficult, however. Both the LCJ and Redgrave submissions accompany this memorandum.

The LCJ submission describes some local district court rules about privilege logs, and also some state court rules. It acknowledges the good sense of what the committee note to the 1993 amendment to Rule 26(b)(5)(A) (quoted above) said about discussion and cooperation among counsel, but reports that "the suggestion has been largely ignored." It also urges that a rule provide for "presumptive exclusion of certain categories" of material from privilege logs, such as communications between counsel and the client regarding the litigation after the date the complaint was served, and communications exclusively between in-house counsel or outside counsel of an organization. Invoking proportionality, it emphasizes that "flexible, iterative, and proportional" approaches are more effective and efficient than document-by-document privilege logging. As mentioned above, even though the 1993 committee note accompanying Rule 26(b)(5)(A) recognized that detailed logging is not generally appropriate, "the case law has largely missed the Committee's perspicacity." One might say that the Advisory Committee's urgings did not produce the desired outcome.

The specific LCJ proposal seems more limited. It is to add the following to Rule 26(b)(5) and also to Rule 45(e)(2) on subpoenas:

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

*Would a Rule Amendment Improve Matters?*

There is a limit to what rules can prescribe. The more general concern with proportionality calls for common-sense judgments about what discovery is really warranted under the circumstances of specific cases. That is difficult or impossible to prescribe in the

abstract in a rule.

It may be that improvement by rule of the handling of what Rule 26(b)(5)(A) requires is not really possible because so much depends on the circumstances of the individual case. "Presumptive exclusion of certain categories" (not actually proposed by the submission, as quoted above) could introduce additional grounds for litigation about whether the categories apply in specific circumstances. And it may be worth noting something said during the November 2008 Advisory Committee meeting:

> An observer suggested that an effort to come up with a rule will only intensify costs. There is no real problem. "People work it out." The log is the last thing produced. And in some cases the parties may tacitly agree not to produce them at all, or to generate them only for particular categories of documents.

Alternatively, one might ultimately urge that Rule 26(b)(5)(A) should be abrogated. Perhaps the experience for more than a quarter century under this rule shows that it did not work, or does not now work. This submission does not urge doing that, and it is likely that valid concerns about unrevealed but overbroad claims of privilege mean that the rule should be retained.

But it is not clear that a rule can do more than the rule already does, particularly when augmented by the directive in Rule 26(f)(3)(D), calling for the parties to address "any issues about claims of privilege." And it seems that the committee notes accompanying the original rule in 1993 and the revision of Rule 26(f) in 2006 speak to the concerns raised by the LCJ submission.

At the Advisory Committee's October 2020 meeting, there was considerable discussion of the burdens and costs of privilege logs. Lawyer members of the Advisory Committee, in particular, reported that privilege logs can raise serious problems, particularly if the parties fail to work out an agreed method of satisfying Rule 26(b)(5)(A). At the same time, some judicial members reported not seeing problems frequently, but also that the lawyers (and perhaps magistrate judges) would be more likely to have experience with possible problems.

*Initial Discovery Subcommittee Discussion*

During the February 26 conference, the subcommittee spent considerable time discussing the problem presented by privilege logs, and the ways in which the rules might be amended to ameliorate these problems while retaining the basic disclosure requirement. In particular, several members of the subcommittee stressed that early discussion of the specifics of privilege logging can avoid much difficulty when the logs are actually delivered later in the case. (They often are not delivered until after all or most Rule 34 discovery has been completed, though

sometimes the logs are provided on a "rolling" basis.)

Discussion focused on considering revisions to Rule 26(f) and 16(b) to encourage or even mandate such early discussion. There was also discussion of whether such a mandate would be unnecessary in many cases, for which document-by-document logging may work just fine.

For the present, then, the subcommittee is considering ways in which the rules could be amended to improve the process of privilege review and preparation of privilege logs. During the full Committee meeting, subcommittee members may expand on some of these issues, and the subcommittee invites reactions and ideas from the full Committee. It presently is contemplating how to gather more information about experience under the present rule.

(2) Sealing Court Records

Prof. Eugene Volokh (UCLA), the Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation, has submitted a proposal (Suggestion 20-CV-T) for adoption of a Rule 5.3 on sealing of court records. At the October 16 Advisory Committee meeting, there was consensus about the importance of access to court files, but concern about how this proposal would fit with existing local rules on sealing court records (many of which were cited in this submission). It is notable that the submission concludes there is a wide — perhaps universal — agreement on the importance of public access to court records. It seems that there is only some difference in the methods used to achieve that result.

The focus of this rule proposal is sealing of materials filed in court. In a broad sense, it focuses on a topic that has been on the Committee's agenda repeatedly over the last few decades. To illustrate, in many districts consensual protective orders often allow parties to file documents under seal if they contain confidential information. Such authority may be particularly common in cases involving intellectual property, such as patent cases.

In the mid 1990s, there were two published drafts of possible amendments to Rule 26(c) that would have modified the standards for protective orders, in part by addressing the question of stipulated protective orders and filing confidential materials under seal pursuant to such orders or local rules. These proposals drew much attention and caused some controversy, and were eventually withdrawn. In March 1998 the Committee concluded that it would no longer pursue possible amendments to Rule 26(c) on this general topic.

Meanwhile, in Congress there have been various versions of a Sunshine in Litigation Act during recent decades, directed toward protective orders regarding materials that might bear on public health.

Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had "sealed dockets" in which all materials filed in court were kept under seal. The Federal Judicial Center did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files, and that most of the ones uncovered resulted from applications for search warrants that had not been unsealed after the warrant was served.

In short, there has been considerable controversy and concern about sealed court files and discovery confidentiality, but the Civil Rules have not been amended to address those concerns.

The Civil Rules do not have many provisions about sealing court files. Rule 5(d) does direct that various disclosure and discovery materials not be filed in court until they are used in the action. When filing does occur, that can raise an issue about filing confidential materials under seal. Rule 5.2 provides for redactions from filings and for limitations on remote access to electronic files to protect privacy. In that context, Rule 5.2(d) does say that the court "may order that a filing be made under seal without redaction." The committee note to that provision says that it "does not limit or expand the judicially developed rules that govern sealing."

The cover letter with this submission says that "[e]very federal Circuit recognizes a strong presumption of public access" that is "founded in both the common law and the First Amendment." It adds that more than 80 districts have adopted local rules governing sealing, and says that the rule proposal "borrows heavily from those local rules." Footnotes to the proposal provide voluminous case law authority for these propositions and cite a large number of existing local rules. Nevertheless, the submission urges that "a uniform rule governing sealing is needed; despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously."

There is no question that inappropriate sealing of court records is an important concern. But it is not clear that the problem is so widespread that an effort to develop a uniform national rule is warranted. And if a national rule were promulgated, it is worth noting, that could affect the validity of the cited local rules. *See* Rule 83(a)(1) ("A local rule must be consistent with — but not duplicate — federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075 [the Rules Enabling Act]"). Nor is it clear that a national rule would much reduce the frequency of inappropriate sealing, depending in part on what might be defined as inappropriate. No matter what rules say, mistakes do happen.

During the October 2020 full Committee meeting, Judge Ericksen called attention to the local rule on sealing in the District of Minnesota. Since the submission said that it was modeled on many

local rules, it seemed useful to obtain a some feel for whether the local rules were fairly uniform, and also whether adopting a rule with the provisions urged in the submission would conflict with existing local rules.

Surveying all local rules seemed unnecessary to get a grasp of these issues. Instead, somewhat arbitrarily, the Reporter suggested that the local rules of the districts from which the judicial members of the Committee come be surveyed. The Rules Law Clerk, Kevin Crenny, did that research and prepared a memorandum that is included in this agenda book. It may be that some local rules in these districts were overlooked in this research. (For example, unless "sealing" was mentioned the rule might not turn up.) But the research did permit fairly confident answers to the questions above — (a) the rules are not uniform, and (b) adopting a national rule along the lines proposed in this submission would conflict with (and thus invalidate, in all likelihood) portions of several of them.

The Crenny memo includes a comparison of those local rules, the text of each rule found, and a chart comparing the various provisions these local rules currently contain. Should the Committee decide to proceed to attempt to draft a uniform national rule, this comparison suggests that a number of issues likely will arise:

Standard for sealing: There seems to be variety in the standard stated (or not stated) in the local rules studied. Something like a requirement for a "particularized" showing might be preferred. Saying that a "compelling" showing is required may be unduly demanding. Saying "good cause" is required may be sufficient; that is the standard for a protective order under Rule 26(c). But sealing court files seems to call for a more demanding justification than a protective order regarding unfiled discovery materials. Whether to advert to Rule 11(b) in regard to motions to seal might be considered.

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

Joint or unopposed motions: Some local rules appear to view such motions with approval, while others do not. The question of stipulated protective orders has been nettlesome in the past. Would this new rule invalidate a protective order that directed that "confidential" materials be filed under seal? In at least some

instances, such orders may be entered early in a case and before much discovery has occurred, permitting parties to designated materials they produce "confidential" and subject to the terms of the protective order. It is frequently asserted that stipulated protective orders facilitate speedier discovery and forestall wasteful individualized motion practice.

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

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

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

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

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

Recognizing other legal requirements for sealing: There are statutory requirements for sealing, as in False Claims Act cases. Some provision would presumably need to be made for such statutory requirements.

Matters still subject to regulation by local rule: Local rules now deal (in different ways) with many of the issues above. If a

national rule prescribes a uniform treatment of these issues, the question may arise whether local rules dealing with other issues are still permitted under Rule 83.

No effort has been made thus far to prepare a draft amendment, but drafting one would likely require consideration of specifics of this sort. And additional issues may likely arise.

During the Advisory Committee's October 2020 meeting, discussion focused on the importance of court transparency. At least some matters would raise concerns. For example, the False Claims Act directs that a qui tam action be filed under seal. Another example that came up is that petitions to enforce arbitration awards that (which themselves are generally confidential) could raise concerns. There may be a variety of other statutory commands for confidentiality of certain information. For example, HIPAA requires that certain medical information be held confidential. A rule would need to be designed not to impair these statutory protections.

Somewhat similar issues might be pertinent to the Appellate Rules. Indeed, there may be notable differences among the circuits on sealing. The Appellate Rules Committee studied these issues a few years ago, but did not conclude that any rule change was indicated.

It might also be noted that (as suggested above) it is not obvious that these are problems particularly adapted to treatment in the Civil Rules. In the past, issues have also arisen regarding filings and other materials involved in criminal cases. Indeed, Local Rule 5.4(c) of the S.D. Fla. (reproduced in the Rules Law Clerk memo) is entitled "Procedure for Filing Under Seal in Criminal Cases." The study of "sealed cases" around 15 years ago revealed that many of them were miscellaneous matters opened when a search warrant was sought and never unsealed even though no prosecution eventuated. Overall, it may be that these issues would better be considered by another Judicial Conference committee — perhaps the Committee on Court Administration and Case Management, which has already acted on this subject and issued a best practices document. A Civil Rule might be seen to intrude in that space.

For the present, the subcommittee invites input on whether a uniform national rule addressing sealing in civil cases is needed. If so, it may be that consideration should include topics on which local variation is appropriate. Without in any way questioning the importance of transparency of judicial proceedings, one might conclude that this effort is not needed given the reported unanimity among the courts about the public's right to access court files.

### (3) Attorney's fee shifts under Rule 37(e)

Judge Iain Johnston (N.D. Ill.) has submitted Suggestion 21-CV-D. The concern is whether the court may use an attorney fee

award as either a curative measure under Rule 37(e)(1) or as a sanction under Rule 37(e)(2).

Judge Johnston cites his opinion in *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 2021 WL 185082, 2021 U.S. Dist. LEXIS 9513, ___ F. Supp. 3d ___ (N.D. Ill., Jan. 19, 2021) footnote 54 as addressing his concern. That is a very long opinion that mainly chronicles many years of litigation and discovery disputes leading up to a spoliation proceeding. Footnote 54 says the following:

> Some courts have held that awards of attorneys' fees are curative measures authorized under Rule 37(e)(1). *See, e.g.*, *Karsch v. Blink Health Ltd.*, 17-CV-3880, 2019 WL 2708125, at *----, 2019 U.S. Dist. LEXIS 106971, at *74 (S.D.N.Y. June 20, 2019). This view is held by ESI gurus. *Cat3, LLC v. Black Lineage, Inc.*, 164 F. Supp. 3d 488, 502 (S.D.N.Y. 2016) (Francis, J.). Even knowing it is in the distinct minority on this issue, this Court is not so sure attorneys' fees are available but is open to being convinced otherwise. *Snider*, 2017 WL 2973464, at *----, 2017 U.S. Dist. LEXIS 107591, at *12-13 (attorneys' fees are not identified in Rule 37(e) but are specifically identified in all other sections of Rule 37); *Newman v. Gagan, LLC*, No. 2:12-CV-248, 2016 WL 1604177, at *6, 2016 U.S. Dist. LEXIS 123168, at *20-21 (N.D. Ind. May 10, 2016). Because the Court is not imposing an award of attorneys' fees under Rule 37(e), it need not conclusively address this issue now. All attorneys' fees imposed are under other rules. Imposing attorneys' fees as a sanction under this rule at this time would be redundant.

In his submission, Judge Johnston cites an article by Tom Allman, who provided advice about these issues to the Advisory Committee and prior Discovery Subcommittees over the years. Thomas Allman, *Dealing With Prejudice, How Amended Rule 37(e) Has Refocused ESI Spoliation Measures*, 26 Richmond J. Law & Tech. Issue 2, at 1 (2020). At page 50, Allman begins by asserting that "[c]ourts routinely award monetary sanctions under Rule 37(e)(1) consisting of attorney's fees and expenses. This permits recovery of the expenditure of time and effort necessary to bring the issue of spoliation before the court." But the ensuing discussion is a bit equivocal. Allman even invokes the notes of a 2014 Discovery Subcommittee conference call to show that the subcommittee "acknowledged the award as a curative measure" when it was developing the preliminary draft that was published for public comment. *See id.* at 51 & n.245.

Actually, the Rule 37(e) amendment had a checkered evolution and went through many iterations before ultimately being published for comment. Many, many issues were examined in great detail during this multi-year process. Eventually, the Committee was satisfied with a draft, which was published for public comment. The draft rule then was redrafted after public comment for presentation at

the Advisory Committee's April 2014 meeting, but further redrafted after dinner on the first day of that meeting, with a revised version presented to the Advisory Committee and approved by it on the second day of the meeting. The Committee also voted then that, although the revisions could be seen as substantially modifying the originally published proposal and therefore to call for re-publication for public comment, there was no significant likelihood that further public comment would yield useful information. It therefore recommended going forward with the revised version, and the Standing Committee, Judicial Conference, and Supreme Court did so. The rule amendment went into effect on December 1, 2015. One point of this history is that the issues addressed by Rule 37(e) have in the past proven very challenging.

The question of attorney fee awards was not a significant feature of the multi-year effort to revise Rule 37(e). Instead, the focus was on (a) the trigger for the duty to preserve; (b) the scope of the duty to preserve; (c) the duration of the duty to preserve; (d) whether "inaccessible" ESI had to be preserved even though not produced by a party that invoked Rule 26(b)(2)(B) (the answer is yes); and (e) how proportionality should bear on the preservation of ESI. As revised after public comment and during the April 2014 Committee meeting, the main focus was on (1) what was necessary to support an adverse inference or the other severe consequences permitted under Rule 37(e)(2) when a party failed to preserve ESI "with the intent to deprive another party of the information's use in litigation," and (2) what lesser measures the court could employ under Rule 37(e)(1), having found prejudice due to the failure to preserve.

So it is difficult to say that there is a lot in the record about the precise question of allocation of costs resulting from failure to preserve. The committee note does say:

> Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken.

So even if neither "curative measures" under Rule 37(e)(1) nor more severe measures under Rule 37(e)(2) are appropriate, there is some support for reimbursing the victim under Rule 26(c)(1)(B) for costs resulting from the failure to preserve.

Curative measures under Rule 37(e)(1) depend on a finding of prejudice, but the committee note is pretty expansive about what they might be:

> The range of such [curative] measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures; the severity of given measures must be calibrated in

> terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.
>
> In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist it in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies [adverse inference instructions]. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

True, that note discussion does not mention requiring the party that failed to preserve to reimburse the victim for the attorney's fees that it had to pay to address the failure to preserve. But the basic theme is about what might be called more aggressive merits-related measures such as excluding evidence, and the caution is about striking pleadings or forbidding evidence on the "central" claim or defense in the case. To many, an attorney's fees order might seem small beer in contrast to measures that clearly are contemplated under (e)(1). If the requesting party must incur attorney fees for the additional discovery contemplated by Rule 37(e) to restore or replace the lost information, the fees can readily be seen as prejudice that can be cured by an order under Rule 37(e)(1).

Rule 37(e)(2), then, authorizes more severe actions when a party did destroy ESI in order to prevent its use in litigation. It would be really odd if the rule protected such a party from having to bear the resulting costs of the victim (including attorney's fees) when such reimbursement could seemingly be ordered in connection with "lost" ESI that could be replaced or restored, and probably under (e)(1) when restoration was not possible and curative measures short of the (e)(2) consequences were under consideration.

So the bottom line is that, although neither the rule nor the note precisely addresses the question Judge Johnston has raised, there is good reason to find authority to shift attorney fees in the rule. But it does not seem that many courts have felt unduly constrained by that reality. Perhaps members of the subcommittee can offer experiences that bear on whether the provisions of the current rule have actually produced problems that an amendment might solve.

As we approach these issues, it seems worth sketching a bit more history about the evolution of current Rule 37(e). At the Duke Conference in May 2010, the one panel that seemed relatively unanimous was the one about preservation (including Tom Allman, Judge Shira Schiendlin and other luminaries). There ensued a miniconference, and many Discovery Subcommittee conference calls to reach the point of proposing the draft that was published for public comment. As Judge Johnston suggests, the eventual outcome of all that effort may have been to "swing the pendulum a little too far against sanctions for spoliation."

Nonetheless, returning to the rule might open Pandora's box. It would likely invite suggestions that since we are looking at the rule again we should address other issues that have arisen since it went into effect, or that were already before the Committee in the 2013-15 era. It makes sense to say that once the Committee begins to look at a rule it should not use blinders to focus on only a narrow part of it. So besides considering whether the attorney's fees problem is really a problem at all, it might make sense to consider whether the problem is of sufficient significance to reopen the Rule 37(e) topic on the Committee's agenda.

During the February 26 conference, the Discovery Subcommittee members did not report that the attorney fee shifting problem had proved significant in Rule 37(e) practice. There was, however, some confirmation that the previous drafting effort leading up to the 2015 amendment to the rule was rigorous and challenging. The subcommittee invites reports and reactions from the full Committee on whether the issue identified by Judge Johnston has presented difficulties that might be solved by a rule amendment.

### (4) Rule 27 preservation orders?

Professor Jeffrey Parness has submitted a proposal (Suggestion 20-CV-GG) to amend Rule 27(c) to authorize pre-litigation preservation orders. A copy of the submission should accompany this memorandum. The proposed change is to amend the rule as follows:

> (c) PERPETUATION BY AN ACTION. This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action.

Rule 27(c) is not a staple of modern litigation. Indeed, it may not serve any purpose at all as presently written:

> Subdivision (c) makes it clear that Rule 27 is not preemptive and does not limit the power of a court to entertain an action to perpetuate testimony. However, the statutory procedure for perpetuation of testimony referred to in the committee note to the original rule was repealed in the 1948 revision of Title 28.

8A Fed. Prac. & Pro. § 2071 at 387. The existing rule nonetheless still authorizes "an action to perpetuate testimony" beyond what Rules 27(a) and (b) authorize. Perhaps it might be abrogated as no longer necessary. This proposal would introduce a wholly new "action to preserve evidence."

Rule 27(a) authorizes the court to enter orders for taking testimony of a witness who may become unavailable before litigation commences, when the petitioner "cannot presently bring it or cause it to be brought." The petitioner is to give notice to "each expected adverse party" and the court may then grant the requested relief if doing so "may prevent a failure or delay of justice." Rule 27(b) permits a similar order pending appeal when the party seeking the deposition can show that failure to take the deposition promptly could cause "a failure or delay of justice."

In a sense, this submission seems to fit with the current rule, but it cuts against the grain of much that we learned during the Rule 37(e) experience. During that study, it became clear that preservation orders are often blunt instruments. The current rule's provision that reasonable preservation must begin in many instances before litigation commences cuts against the idea of pre-litigation court orders of this sort. Indeed, the expectation was that, even after litigation is commenced, some significant showing would be necessary to justify a preservation order. So this proposal (compared to the one just discussed under (3) above) seems to point in a different direction from Rule 37(e).

This proposal goes beyond Rule 37(e) in another way — after considerable consideration, the Advisory Committee decided to limit that rule to ESI. This proposal is not so limited. Indeed, it might be said to come close to the line in Enabling Act authority, to the extent it creates a basis for a court order against a nonparty possessor of potential evidence who is not identified as a prospective party to the contemplated litigation. Rule 37(e) focuses on parties to eventual litigation and their preservation of potential evidence after notice of possible litigation. Rule 27(a) calls for notice to prospective parties to the litigation before an order for prelitigation depositions is entered. After litigation begins, however, any party may issue a subpoena to a nonparty, and presumably a court could enforce that subpoena on a motion to compel. But though the authority contemplated under the proposed amendment does not rely on a subpoena, it could have consequences similar to a motion to compel enforcement of one, or at least to

compel preservation.

The proposal also seems inconsistent with decisions declaring that Rule 27 does not authorize presuit discovery by a plaintiff who wants to find out whether there is actually a claim. One can debate whether such presuit discovery should ever be allowed, and whether "notice pleading" suits followed by broad discovery demands amount to more or less the same thing. But authorizing presuit preservation orders may be a step beyond that.

Another feature of the consideration of current Rule 37(e) emerged during a miniconference at the beginning of study of this idea after the Duke Conference is worth mentioning. Large companies said that under existing law they had open-ended preservation holds that often overlapped and, in a sense, "never went away" because there was always pending litigation that might make some records pertinent, and if no litigation were filed it was not clear when the pre-litigation hold could be removed. If such prelitigation orders are to be authorized, perhaps they should come with time limits, but the proposal does not appear to invite such limits.

Ironically, such a rule provision might also narrow the common law preservation duty in some instances. If the court orders certain specified preservation, does that mean that the entity subject to the order is free to discard everything not covered by the order? Would that be true even if, in the absence of the order, there would be a duty to preserve? The idea of the common law obligation to preserve seems, in part, to depend on the awareness of the possessor of the evidence to preserve of the potential importance of the information. The potential litigant seeking a preservation order, whether a prospective plaintiff or defendant, may not appreciate what should be preserved, and therefore not request an order with regard to all of the things that would be subject to the common law duty absent an order. So there is a risk of under-coverage with such orders.

But given the likely broad initial demands for preservation, under-coverage may be less frequent than overly broad demands. Even without this added court order possibility, prospective plaintiffs reportedly often serve very broad demands for preservation. The proposal contemplates a right for the entity receiving such a preservation demand to seek immediate relief in court. Arguably there may be a value in providing a route to judicial relief for a recipient of an overbroad prelitigation preservation demand, but the prospect of such applications may not be welcomed by district courts. And the proposal also suggests that there should be appellate review of such orders, perhaps not a prospect welcomed by the appellate courts. Ordinarily, A Rule 27 order will be regarded as a final judgment subject to immediate appellate review. *See* 8 Fed. Prac. & Pro. § 2006 at 93-94 (3d ed. 2010).

There is no doubt that preservation of evidence is important, and that Rule 37(e) currently requires parties to make difficult

decisions about when and what preservation is required. But it does not seem that this proposal would likely be helpful, and there is a possibility that it could create rather than solve problems.

During the February 26 conference, the Discovery Subcommittee reached a consensus that it is not promising to proceed with this suggestion, and that it should be dropped from the agenda.

# APPENDIX

*Videoconference Notes*

**Discovery Subcommittee**
**Advisory Committee on Civil Rules**
**February 26, 2021**

On February 26, 2021, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a meeting via Microsoft Teams. Those present were Judge David Godbey (Chair, Discovery Subcommittee), Judge Robert Dow (Chair, Advisory Committee), Judge Jennifer Boal, David Burman, Joseph Sellers, Ariana Tadler, Helen Witt, Susan Soong (clerk liaison), Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter of the Discovery Subcommittee), Julie Wilson (Rules Office), and Kevin Crenny (Rules Law Clerk).

The meeting proceeded through the issues identified in the materials circulated before the meeting.

*(1) Privilege Logs*

The Advisory Committee has received two submissions urging consideration of amendments to Rule 26(b)(5)(A) to relieve parties of unnecessary burdens in preparing privilege logs.

The issues were introduced as originating in the 1993 amendments to the discovery rules. Before 1993, though Rule 26(b)(1) limited discovery to nonprivileged matter, parties would often interpose a general objection to producing any privileged materials. But there was no requirement that they reveal anything about those withheld materials, or even if anything was actually being withheld.

The 1993 amendments added what is now Rule 26(b)(5)(A), which does direct that a party responding to discovery make the claim that materials have been withheld on grounds of privilege and also describe those materials. The description should be made “in a manner that, without revealing information itself privileged or protected” will enable the other parties and the court to assess the claim of privilege.

The committee note accompanying the 1993 amendment cautioned that the rule did not define how this new requirement must be satisfied, and recognized that a general description might be appropriate if “voluminous documents” have been withheld.

Though the rule did not explicitly recommend this method, the courts soon borrowed the “privilege log” practice that had been established to deal with responses to FOIA demands for application of the new Rule 26(b)(5)(A). The current submissions contend that this privilege log practice has become very burdensome.

One reason for current burdens is something that was likely not foreseen when the 1993 amendment was drafted — the central importance of digital material in almost everything we do nowadays. This development has vastly expanded the volume of material subject to discovery. There have been efforts to calibrate discovery appropriately for application to digital materials — including in particular the 2006 and 2015 amendments to the discovery rules — but there has been no significant change to Rule 26(b)(5)(A). The vast expansion of digital material subject to discovery has also led to a vast expansion of material subject to a privilege review. In many cases, that has also meant a vast increase in the number of items to be disclosed on the privilege log.

Other rule changes since 1993 do bear on the general issues, however. In 2006, Rule 26(b)(5)(B) was added, authorizing a "claw back" of privileged material produced through discovery, something that could lessen the stakes in privilege review and production.

In 2008, Fed. R. Evid. 502 went into effect. Rule 502(a) retracts the former subject matter waiver rule, under which mistaken production of a single privileged item could lead to waiver of the privilege as to all other privileged items on the same subject. In Rule 502(b), the rule itself protects against inadvertent waiver whenever reasonable efforts are made to cull privileged material before production. And Rule 502(d) permits the court to order that production of privileged material is not a waiver whether or not the efforts to cull were deemed reasonable later by a court.

The reception of Rule 502 was initially disappointing, as too many lawyers did not pay attention to it. Indeed, the Evidence Rules Committee convened a conference about the pervasive failure of lawyers to utilize the rule. Partly as a result of the recommendations of that conference, a specific reference was added to Rule 502 in Rule 26(f)(3)(D). A parallel addition to Rule 16(b)(3)(B)(iv) called the court's attention to Rule 502 in connection with the scheduling order.

Meanwhile, technology to deal with discovery has developed beyond the stage it had reached in 1993, and technology assisted review (TAR) is often used to locate responsive materials in huge caches of digital information. It may be that some similar algorithms could be used to identify privileged materials, and possibly even to prepare at least a first draft of a privilege log. Thus technology could with one hand have a role in solving the problem that has resulted from the enormous expansion of discoverable material technology has produced with the other hand.

In the background, however, there is the seemingly enduring reality that privilege review itself can be a very time-consuming process. A judgment whether given materials qualify for privilege protection may involve a tricky call, and that call likely has to be made by a relatively experienced lawyer. An algorithm might made a first cut, but it likely would not suffice to make the final

call. It would seem that those burdens of making the privilege call would largely continue to exist even if the privilege log problem could be solved, because that solution would not seem to relieve parties of the obligation to make a privilege review.

So as things now stand, there seem to be two basic issues: (1) Are there serious problems with the current privilege log practice?, and (2) Could a rule change significantly solve those problems, or at least significantly improve the situation?

The first member to speak began by saying "I don't think we need a rule change." Rule 26(f) already refers to Rule 502. At least in most complex cases, the parties are able to negotiate an appropriate protocol for the case. The protocol may specify the methods to be used to identify privileged materials (perhaps like agreements between the parties on how to use predictive coding to identify responsive materials), and also specify when the log has to be delivered.

The problems arise when counsel are unable to reach agreement. These problems can be most acute when the log is not ultimately delivered until near the end of the discovery process. Then the recipient of a long privilege log may find it necessary to seek an extension of the discovery period to deal with issues raised by the log. That is surely something the judges do not want to confront frequently.

It is often true that difficult calls are necessary in identifying materials subject to privilege protection, and this is not limited to attorney-client and work product protection. For example, HIPAA may dictate that certain materials be kept confidential

This attorney noted that one idea that has been suggested in the submissions is to use metadata logs or "categorical" methods. These solutions may not actually solve the problems. In the Blue Shield litigation, for example, privilege disputes continued for years, and the process finally morphed into line-by-line logs of withheld materials.

We must be careful about adopting a rule that won't fit most cases. Categorical approaches, in particular, are prone to producing many problems. On the other hand, automation can sometimes facilitate the privilege review and privilege log process.

The most valuable goal might be to get the judge involved early. From the judge's perspective, there is a definite advantage to addressing these issues up front. For one thing, that minimizes the risk that somebody will come forward at the end of the discovery period and insist that a postponement is necessary due to what's turned up in a huge privilege log. Beyond that, if the protocol put in place from the outset sets a timetable and requires challenges to claims of privilege to be made seasonably, that could

mean that the court will be able to indicate what sorts of materials it views as privileged or not privileged. For the parties, those early indications can reduce the occasions for approaching the court as the litigation moves forward because they show what the likely ruling will be on recurring privilege issues.

A second subcommittee member expressed agreement with some but not all the points made by the first member to speak. It is not really true that lawyers currently have available the tools necessary to prepare privilege logs with a reasonable amount of effort.

Perhaps more important, though some issues are best addressed by agreements about a protocol, too often the parties don't agree. In the Blue Shield case, for example, the first effort was to rely on metadata, and a categorical approach was also attempted. But these methods did not solve the problem, and a document-by-document method became necessary as the end of the discovery period drew near.

This sort of thing takes a lot of time, a disproportionate investment of time. One explanation is that there are often suspicions that valuable and nonprivileged information has been hidden behind generalities on a privilege log. The reaction is to challenge "bad document logs."

It may be that the proposed ideas in these submissions are not the best way to deal with the situation, but further work is warranted.

Another member reported having focused on Rule 16. In this member's experience, when it's possible to negotiate protocols with the other side that sort of resolution can solve 90% of the problems.

But it's not a "one size fits all" sort of problem. Instead, it seems most promising to prompt counsel to address these questions early, probably at the time of the Rule 16(b) scheduling order. Frankly, it's too easy to treat the Rule 26(f)/Rule 16(b) process as a sort of "check the boxes" exercise. It may be that revising those rules could prod the parties to do what's needed at the beginning to avoid big problems later on.

Although insisting on document-by-document methods is surely not warranted in many cases, particularly of the more complex sort that members of this committee deal with, that does not mean that this method is always a bad choice. Not all cases are like the complex cases most of the attorneys on the subcommittee do most of the time, and in some cases descriptions of individual documents might be the best route.

All of this returns this member to a focus on Rule 16. The real need is to get the parties to formulate a focused method of dealing with these issues before they become big problems. The

committee note from 1993 already offers guidance about calibrating the level of effort, but it seems that too often that guidance is not pursued. Perhaps a rule change now would help achieve the goal expressed by the 1993 note.

Another member of the subcommittee agreed with much that had been said. There is certainly a lot of makework, expensive makework, in many cases. The level of suspicion is understandable, but can also be counterproductive.

It does make sense to try to force the parties to grapple with these issues early in the case. Sometimes it's really difficult to make privilege calls. Consider, for example, highly regulated industries in which companies are likely to have and rely on in-house counsel in regard to many of their activities. In those situations, it may be that there is no real substitute for in camera inspection by the court of at least a sample of documents.

A response to these comments was that it is worth exploring the timing question. Deferring serious attention to challenges to privilege claims until the end of the discovery period is a bad idea. And having the judge keeping a finger on the pulse of the litigation on this subject early on can be very useful. One thing that matters is having a structured method of challenging privilege claims, and a time limit for doing that. That can lead to rulings on what is and is not protected, and those rulings can serve as guidance as the case moves forward.

The objective should be "early efforts to avoid later effort." That will make the logs more refined when there is rolling production.

A judge reported that privilege log issues frequently arise. The idea of prompting or even requiring early attention to timing of logs and perhaps categorization in the logging seems an elegant way of designing a method to accomplish useful results. Categorical logs can sometimes work, and perhaps work even better in tandem with some in camera inspection, perhaps of a random selection of documents for which privilege has been claimed.

Another judge reported having limited experience with privilege logs, since this judge has most discovery issues handled by magistrate judges.

Another judge raised a concern: The lawyers on this committee have limited involvement in the sort of "bread and butter" litigation that probably constitutes 90% of the civil caseload of the federal courts. Operating in that world, this judge can't recall a single privilege log dispute. Maybe one can say this is just "run of the mill" litigation, but rules designed for the big complex case ought not unduly complicate those cases.

A lawyer member described prior experience in another job with litigation of more ordinary dimensions. That experience shows that

individual logging should not simply be abandoned. If we pursue a rule change, we must be careful that it is flexible enough. For example, if we convene a miniconference or otherwise seek input from the bar about these issues, it will be important to involve lawyers who handle such cases.

A question was raised: Has experience shown that there is a widely adopted format for "categorical" approaches, or a widely adopted "protocol" that might inform design of a rule?

A response was that using a categorical approach is very case-specific. For example, one could conclude that there is no reason to log communications among counsel or between counsel and the client about the case. But that sort of approach may not routinely be effective. For example, if a party has an extensive in-house counsel staff, particularly if those lawyers are involved in non-litigation activities, it might be that communications between those lawyers and others at the client do not qualify for protection.

Another concern was raised: A categorical approach can present difficulties even if drafted for a specific case. One type of categorical approach might be to exclude all documents dated before or after a given time. But that may prove unsatisfactory later on. For example, consider a data breach case. It might be that as discovery moves forward it turns out that this was not the only data breach, and that there were others some time before the one at issue. In a securities case, a similar broadening of the temporal horizon may become necessary.

With protocols more generally, experience does not indicate that one will likely find a model for a rule suitable for all, or probably even most, cases. These protocols are negotiated between the parties. To use an analogy, some courts have standing ESI Protocols. Helpful as those are, they may not work in some cases.

It might be more promising to consider the concept of a protocol, but approach it as something that the parties are to negotiate by a certain time. This could fit in with the Rule 16 idea discussed earlier; the protocol could addressed by the judge near the outset and be a subject of the Rule 26(f) planning meeting between counsel. It might also call for early resolution of disputes so as to avoid disrupting the close of discovery.

These ideas drew a reaction: even that sort of more general directive might not fit all cases. The fast track is not always the best track.

The discussion of privilege logs concluded with the expectation that the subcommittee would report on the efforts made so far and invite input from other Committee members on how best to proceed, and what possible methods deserve consideration in this regard.

*(2) Sealed Filings*

The Committee has received a joint proposal from Prof. Volokh (UCLA), the Reporters Committee for Freedom of the Press, and the Electronic Frontier Foundation for adoption of a new Rule 5.3 on sealing of filings in court.

An introduction began with the point that this topic is very different from the privilege log topic just discussed. That problem could be said to have resulted from the 1993 amendment adding Rule 26(b)(5)(A). Sealing has not been much regulated by the Civil Rules. In 2000, Rule 5(d) was amended to direct that discovery requests and responses not be filed unless they were used in the action. But that said nothing about sealing things that were filed. Rule 5.2 does have provisions insulating some privacy-related materials such as Social Security Numbers, including authority in Rule 5.2(d) for filing unredacted documents under seal by court order. But that does not seem to be the kind of issue this submission addresses.

More generally, the question of litigation confidentiality has come up fairly often in recent decades. In the 1990s, there was extended consideration of a Rule 26(c) amendment dealing with protective orders that was not adopted. In the first decade of this century, there was a good deal of concern about suspicions that district courts had "sealed dockets." That concern prompted an extensive Federal Judicial Center study of court dockets across the country. That study did not reveal significant problems with fully sealed civil cases, though it did show that in some places miscellaneous matters (particularly warrant applications) that should have been unsealed after service of the warrant often were not. Finally, Congress has on occasion shown interest in these issues; on a number of occasions, a version of a "Sunshine in Litigation" bill has been introduced.

More generally yet, it might be that the entire question of sealed filings is more suitably addressed by another Judicial Conference committee — perhaps the Court Administration and Case Management Committee.

Regarding the specific proposal before the subcommittee, it could be said to have a lot of "bells and whistles" that might be shorn from it as work moves forward, if moving forward seems warranted. Quite a few features seem to present potential difficulties. And other things in the proposal simply don't look like rules, but more like exhortations. The memorandum introducing the issues for this meeting identifies several of those issues.

The proposal itself says that there is nearly universal agreement among courts on the importance of transparency of court proceedings, and universal acknowledgment of both the First Amendment and common law public right of access. Yet, according to the submission, there is considerable divergence among local rules (many of which are invoked in regard to features of the proposed

rule). And sometimes, it seems, courts don't properly follow their rules on sealing, at least in the view of the proponents of this new rule.

During the October full Committee meeting, there was some initial discussion of provisions in the local rules of some of the districts on which member judges serve. To get a handle on the local rule situation, the Rules Law Clerk analyzed the provisions of the local rules in the courts "represented" on the current Advisory Committee. This is an arbitrary collection of local rules, but the survey served to show (a) whether they are all pretty much the same, and (b) whether features of the current submission would conflict with provisions of some of those local rules.

By way of background, it was noted that sometimes national rules may, in a sense, "emerge" from fairly uniform local rule practice. An example was mentioned above – the 2000 amendment to Rule 5(d) regarding routine filing of discovery materials. The great majority of districts, by the late 1990s, had local rules directing that discovery not be filed. So the national rule in a sense built on that fairly uniform practice reflected in local rules.

The Rules Law Clerk's survey of the local rules in the districts studied showed that the current situation is very different from the practice in the late 1990s on filing of discovery. The various local rules seem to be very different from one another. It also appears that various provisions of the submission we have received are inconsistent with several provisions of some, or even most, of those local rules.

So the question is whether this topic holds promise for the civil rulemaking process going forward.

The first response from a subcommittee member was the local rule in that district is presently under discussion. For one thing, there is the recent SolarWinds intrusion, which has called for a response from the courts. It is not clear that all courts are responding to the SolarWinds problem in a uniform way.

A lawyer member reported feeling initially reluctant to propose a uniform rule. Local divergences may reflect varying community values. But we must be cautious. None of us is speaking for the public. This is a question about finding the right balance. It seems too easy for the parties just to agree to put things under seal when filed in court. At least when those filings bear on a court ruling, that's troubling because the public has a legitimate interest in access to the materials on which a judicial decision is based.

A judge noted that about 10 years ago the Appellate Rules Committee looked into variations in approaches toward sealing among the courts of appeals, and found a fairly wide variation. One possibility is that the divergence among local rules may reflect

different approaches of the differing circuits. A district court would probably hew fairly closely to the circuit's attitude in drafting its local rules. This possibility might suggest a value to national rulemaking.

Another comment drew on the 1990s experience with the Rule 26(c) protective orders — what might be called the "reinvent the wheel" problem. If there are 10 litigations in 10 districts about the same product, does it make sense to send the parties in each of those litigations through the same hoops on discovery and litigation confidentiality? One idea discussed then was creating some sort of depository for discovery fruits. This would not be publicly accessible, but could be used by the parties in all the cases. It may be, however, that the recent large rise in MDL proceedings has ensured that in many of the situations under discussion in the 1990s there would now be a multidistrict proceeding with shared discovery, so that these issues would be addressed only once.

An attorney member added another concern — third parties. Take merger cases as an example. Often there is highly sensitive material sought from third parties. It would be very important to provide strong protections for the confidentiality of such third party material.

Another attorney member pointed out that even though there may be a significant number of high profile cases, there are a lot more cases that are not high profile cases. It may be that the lawyers on this subcommittee more often than not represent parties in cases with some public profile. For those cases, an exacting process to obtain permission to file under seal may be appropriate. But for the "mine run" litigation, an exacting process may be quite excessive. Indeed, we have seen that there are a variety of factors that prompt private litigants to shun the public court system and rely instead on arbitration. One of them is that arbitration is confidential.

On the other hand, having strict rules might have a benefit in making lawyers think twice about whether they really need to file certain materials.

Another lawyer member agreed with the last comment. In one court, this lawyer confronts very stringent requirements to obtain permission to file under seal. This may have some positives, but it might be a hard sell as a national standard.

The last comment prompted a question: How do those strict standards affect meeting filing deadlines? If permission must be obtained in advance of a filing that must be made by a certain date, how confining is the need to get advance permission?

The answer was that this is indeed a constraint. One has to think this through well in advance of the filing date. It may be necessary to touch base with the opposing party before approaching

the court. But it may also be that one is not certain whether it is necessary or desirable to file this document at this point. Reaching out to the other side may in a sense require that one tip one's hand in a way that one would prefer not to do.

For some motions, it was also noted, the amount of material can be fairly voluminous. Motions for summary judgment often fall into that category.

A final note was that the proposal includes a requirement that all sealed materials be unsealed within 60 days of a case's conclusion. That could be a significant challenge for a clerk's office. There is not presently any way for PACER or CM/ECF to make such an action automatic. Instead, it would require "the human touch" at the clerk's office, which can add up to a burden.

The discussion concluded with the expectation that the report to the full Committee would introduce these issues and raise the question whether further work should be pursued.

*(3) Attorney Fees Under Rule 37(e)*

Judge Iain Johnston (N.D. Ill.) has submitted a question about measures permitted under Rule 37(e) in a situation when a party has not preserved materials that should have been preserved. He reports that the majority view is that ordering compensation for the victim's attorney fees resulting from the failure to preserve is within the court's authority. But he is concerned that there may be contrary authority. The example from one of his decisions involved a situation in which the issue did not have to be resolved.

The present issue was introduced with background on the development of current Rule 37(e). That took about five years and involved many, many drafts and discussion of a great variety of issues. The present issue was not, however, one of the issues explored during the extended discussion and drafting process. It may be that opening consideration of the rule would not end up being confined to the narrow issue raised by Judge Johnston.

In addition, the thrust of the committee note to the current rule is that the court does have authority to shift expenses. Indeed, the cautions in the note are about other measures in the absence of the bad faith that can unlock severe Rule 37(e)(2) sanctions. The note recognizes that under Rule 37(e)(1) the court can deny the offending party the right to put on witnesses or to use certain evidence, and that it also may permit the victim to put on evidence of the failure to preserve and make arguments to the jury about the significance of that failure. The caution in the note is that such measures should not be comparable in impact to the very serious sanctions allowed only under Rule 37(e)(2) — default, dismissal, or an adverse inference instruction. Requiring the offending party to compensate the victim for the added litigation costs that result from the failure to preserve seems of quite a different order.

A subcommittee member urged that we should "tread very carefully" in light of the tangled history of this rule when asked to embark on a new consideration of the rule. This can be very controversial.

Another member admitted being "nervous" about beginning to work on Rule 37(e).

Another comment was that it might prove impossible to confine amendment of Rule 37(e) to the narrow issue identified by Judge Johnston. Understandably, those who were deeply involved in the arduous development of the current rule might regard this as their "only chance" to deal with other things that they feel should be changed. There is some merit to the idea that the Advisory Committee does not return repeatedly to specific rules, so once it begins to study a given rule there may be good reason to expand the focus to include other possible issues.

A remaining question was whether there really is a significant uneasiness about whether judges are presently empowered to require the party that failed to preserve to reimburse the other side for the resulting attorney fees. It does seem premature to conclude that there is such a problem.

The issue can be presented to the full Committee, with the explanation that there is not as yet an indication of a serious problem.

*(4) Rule 27 Pre-litigation Preservation Orders*

A law professor proposed amending Rule 27(c) to authorize parties to apply for pre-litigation orders for preservation of potential evidence.

Rule 27(a) provides a method for a party that cannot commence litigation but needs to take the deposition of a witness who may be unavailable later even though the litigation has not begun to obtain a court order for such a pre-litigation deposition. The party seeking such authority must show that the case could be brought in federal court, and also give notice to all expected adverse parties, who could also examine the witness. (Rule 27(b) provides similar authority for a deposition to perpetuate testimony while an appeal is proceeding.)

Rule 27(c) is different; as currently written it provides no authority to the court but only affirms that the power it has granted does not limit the court's power to entertain an action to perpetuate testimony. It is not entirely clear that there is still such authority, but the rule does not create it.

This rule proposal would confer new authority, and that could be out of step with other rules. For one thing, the long Rule 37(e) drafting experience (described above) included discussion of court orders for preservation. Those were seen as rather blunt

instruments, and the court's contempt power a rather heavy hand wielding such a blunt instrument. Rule 37(e) elects instead to recognize existing duties to preserve, and addresses responses when parties do not adhere to those duties.

Inviting pre-litigation forays into court to obtain preservation orders seems inconsistent with the thrust of Rule 37(e). It also seems inconsistent with considerable case law under Rules 27(a) and (b) that says they are not methods to enable a party to use discovery to determine whether it really has a claim.

Moreover, the explanation of the proposal suggested that parties receiving pre-litigation preservation demands might be able to go to court to challenge them or get them modified. This sort of effort might impose an additional burden on the courts.

The consensus of the subcommittee was that this proposal be removed from the agenda.

# MEMORANDUM

**To:** Professor Marcus and Professor Cooper
Reporters, Advisory Committee on Civil Rules

**From:** Kevin Crenny, Rules Law Clerk

**Date:** March 10, 2021

**Re:** Local Rules on Sealing

This memo analyzes proposed Civil Rule 5.3 concerning the sealing and unsealing of court records in civil cases (Suggestion 20-CV-T). At the October 2020 meeting of the Advisory Committee on Civil Rules, Judge Ericksen suggested that the reporters evaluate the District of Minnesota's local rule addressing the same area. Building on this idea, Professor Marcus suggested that we compare the proposed rule ("the proposed Rule") against local rules in all districts in which members of the Advisory Committee work. This collection of local rules may or may not be representative of all federal district court local rules as it does not cover all 94 districts. The submission states that "[m]ore than 80 U.S. Districts have created local rules governing sealing," and represents that this proposal "borrows heavily from those local rules." This may be true across all the districts, but my review of nine jurisdictions in this memo revealed more differences than similarities. To be sure, some local rules share some common features with the proposed Rule, but these correspondences are not the norm.

Nine district courts are "represented" by district court judges or other members of the Advisory Committee on Civil Rules. Whether or not these districts are representative of the federal courts in general, these make for a logical starting point, because members of the Advisory Committee would likely have some familiarity with their own jurisdictions. The nine districts reviewed here are:

1. District of Minnesota (Judge Ericksen)
2. District of Montana (Judge Morris)
3. Northern District of California (clerks' representative Susan Soong)
4. Northern District of Texas (Judge Godbey)
5. Northern District of Illinois (Judge Dow)
6. Southern District of Florida (Judge Rosenberg)
7. District of Massachusetts (Judge Boal)
8. Northern District of Ohio (Judge Lioi)
9. District of Delaware (former district of Judge Jordan, now on the Third Circuit)

Each of these districts has a local rule addressing the sealing of court records in civil cases. Conveniently, they reflect a variety of approaches. Three have detailed rules (Northern District of California, District of Minnesota, District of Montana); four have less-detailed rules (Northern District of Texas, Northern District of Illinois, Southern District of Florida, District of

Massachusetts); and two have a rule with very little detail. (Northern District of Ohio, District of Delaware).[1]

In order to compare the proposed Rule with the local rules in a systematic way, I have organized the analysis in this memo around five issue areas or priorities that might be important to consider in drafting a rule for the filing of sealed materials. These issue areas, and some of the questions they raise, are:

1. Standards
    a. Does the rule emphasize a default rule of public access?
    b. What standard must be met before the court can order sealing?
    c. Is the parties' agreement or stipulation a sufficient basis for filing under seal?
2. Timeline
    a. Is temporary or provisional sealing available?
    b. When can a party actually file something under seal?
    c. How much argument or briefing does the rule anticipate will occur before a motion is decided?
3. Public access
    a. What is a member of the public looking at a CM/ECF docket or a public case file able to see? When?
    b. Does a party filing under seal have to file a redacted public version (if possible)? If yes, when is this required?
4. Nonparties
    a. Does the rule account for the fact that nonparties' interest in keeping the material confidential or in making the material public? How?
5. Unsealing
    a. Are motions to unseal explicitly made available by the rule?
    b. What happens at the end of the case?
    c. What happens after the end of the case? How much later does it happen?

This memo proceeds in three parts. Part One focuses on the proposed Rule and summarizes what it would accomplish in the five areas I've identified. The full text of the proposed Rule is available in the Agenda Book. Part Two describes the local rules under consideration. Part Three compares the local rules of all nine districts to the proposed Rule. This analysis is presented in two ways – first in text and then in a chart format. An appendix presents the text of local rules that were analyzed.

## I. The Proposed Rule

### A. Rationale

The submission offers the following reasons why a uniform rule is needed:

[1] I did not read each complete set of local rules from beginning to end, so it remains possible that some districts might have other rules that bear less directly on the general issues presented.

> Every federal Circuit recognizes a strong presumption of public access to court records, under which any sealing of documents or parts of documents must be narrowly tailored to an overriding interest, such as the protection of trade secrets or medical privacy. This presumption of openness (founded in both the common law and the First Amendment [footnote omitted]) is needed so the public can supervise the public court system, and better understand how courts operate.
>
> More than 80 U.S. Districts have created local rules governing sealing, and this proposal borrows heavily from those local rules. But a uniform rule governing sealing is needed: despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously, for reasons that fall short of what the public access precedents require. This leads to inconsistencies and uncertainties in the justice system—parties in districts where there is no local rule governing sealing, for instance, might think they are entitled to more privacy than the case law permits.
>
> And having a clear and detailed Rule would be especially helpful here because sealing decisions are often made without adversary briefing. Though sealing restricts the public's rights of access, members of the public are not always available to intervene in such cases.

### B. Proposal Summary

*Standards* – The proposed Rule emphasizes the default presumption that "all documents filed in a case shall be open to the public," and explains that motions to file under seal are disfavored. Nothing can be filed under seal under this rule until the court grants a motion allowing it. The proposal would require that the movant(s) seeking to file under seal present "compelling reasons to seal the documents," arguments that "overcome the common law and First Amendment rights of access," and an explanation of "why alternatives to sealing, such as redaction, are inadequate." The party seeking to file under seal must also "make a good faith effort to limit the sealing to the shortest necessary time." Under this rule a party may seal or redact "only as much as necessary" and it is "rarely appropriate" to seal "entire case files, docket sheets, or" even "entire documents." An agreement or stipulation between the parties is not a sufficient basis for filing under seal. The court order granting leave to file under seal must contain "particularized findings."

*Timeline* – The proposed Rule does not allow temporary or provisional filing under seal. Nothing may be placed under seal until an order is granted. The proposed Rule anticipates one round of briefing before something can be sealed (though I assume that if the case is before a magistrate judge there might be a second round).

*Public Access* – Under the proposed Rule, a motion for leave to file under seal must be publicly filed and must contain "compelling reasons" for sealing and a "general description of the information the party seeks to withhold from the public." A motion for leave to file under seal cannot be ruled on for seven days, in order to allow parties or "others" the opportunity to see the public motion and to object to the requested sealing.

When a document is filed under seal under the proposed Rule, it must be accompanied by a publicly accessible redacted version filed at the same time.

*Nonparties* – The proposed Rule accounts for nonparties' interests in access to documents that might be placed under seal. The rule would allow nonparties to object to a motion for leave to file under seal or to file a motion to unseal without having to intervene in the case. It does not include any provisions that directly account for the possibility that a nonparty might have an interest in placing or keeping material under seal.

*Unsealing* – Sealed documents can be unsealed sua sponte by the court or by a motion that can be filed at any time. By default, they are unsealed "60 days after the final disposition of a case, unless the seal is renewed" and any motion seeking to renew sealing past this date (or an extended date) must be filed 30 days before the expected unsealing date.

## II. District Court Rules

The **District of Minnesota**'s Local Rule 5.6 provides instructions for filing documents under seal in civil cases. Local Rule 5.6(c) allows a party to file a document connected to motion under temporary seal if the document contains information that "the filing party contends is confidential or proprietary" or if the document is covered by a non-disclosure agreement or protective order, or if it "is otherwise entitled to protection." The sealed document must be filed on CM/ECF as its own separate document (with its own docket number) and must be accompanied by either a publicly filed redacted version or a statement that the entire document is confidential. Rule 5.6(d). Within 21 days after briefing on the motion is completed, the parties must fill out and file a Joint Motion Regarding Continued Sealing Form. Local Rule 5.6(d)(2). The joint motion must describe the sealed document(s), precisely identify those portions that the parties agree or disagree on the sealing of, explain their position(s), and "identify any nonparty who has designated the document or information in the document as confidential or proprietary." Local Rule 5.6(d)(2)(A). This motion is referred to a magistrate judge. A party or nonparty that is unhappy with the magistrate judge's resolution may file a motion for further consideration under paragraph (d)(3) and may file an objection to the disposition of that order under paragraph (d)(4). Material under temporary seal remains sealed until the latest of the following: (i) 28 days after the entry of the magistrate judge's order on the initial joint motion; (ii) 21 days after the magistrate judge's order on the motion for further consideration; or (iii) the entry of the district judge order on an objection. If a document is under seal when a case is disposed of, it will remain sealed unless the court orders otherwise.

The **District of Montana**'s Local Rule 5.2 sets out procedures for filing under seal in that district. Unless filing under seal is already authorized by a protective order, state law, federal law, or another order in the case, a party seeking to file under seal must file a motion for leave to file under seal. Local Rule 5.2(b). The motion must be publicly filed and must describe the material that will be sealed and "why inclusion in the public record is not appropriate." Local Rule 5.2(d). The motion must include either a redacted version or an explanation of why filing one is not feasible. *Id.* When filing electronically, an unredacted copy must be filed under seal. Local Rule 5.2(e).

The court can rule on the sealing motion "without awaiting a response." If leave is granted, the document is deemed filed. If it is denied, the sealed version remains docketed but is treated as

not filed and the party must, presumably, re-file. There are no provisions of the rule addressing unsealing.

The District of Montana rule also reminds attorneys of their obligations under Civil Rule 11(b) and requires that filers "certif[y] that sealing is appropriate to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances and with due regard to the public's right of access." Local Rule 5.2(a).

In the **Northern District of California**, filing under seal in civil cases is governed by Local Rule 79-5. It provides that "no document may be filed under seal . . . except pursuant to a court order" and that such a "sealing order may issue only upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law." Local Rule 79-5(b). The request for sealing must be "narrowly tailored." *Id.*

Provisional filing under seal is essentially allowed, though it is not identified by that name. A party seeking to file under seal must publicly file an administrative motion with a declaration explaining the basis for the sealing, a proposed order, and a redacted version (if possible) of the material, along with an unredacted version which can be filed under seal. Local Rule 79-5(d)(1). If the motion is granted, the document will remain under seal; if it is denied in part or in its entirety, the submitting party will have to re-file a new version without (or with fewer) redactions. Local Rule 79-5(f).

A stipulation or protective order is "not sufficient to establish that a document . . . [is] sealable." Local Rule 79-5(d)(1)(A). If a party is seeking to file under seal material designated as confidential by the opposing party or a non-party, the declaration in support of the motion to file under seal must identify the designating party. The designating party then has four days to file a declaration. If the designating party fails to do so and the motion is denied, the submitting party can file the document after four days. Local Rule 79-5(e). The Court can delay this further for good cause. *Id.*

Documents remain under seal "during the pendency of the case" and, it seems, indefinitely unless someone asks to see them. After ten years from the date when the case is closed, documents filed under seal "shall, upon request, be open to public inspection without further action by the Court." However, at the conclusion of a case, the party that filed the material or the party that designated it as confidential can seek an order extending the sealing to a specific date beyond ten years out. Local Rule 79-5(g).

The **Northern District of Texas** has two relatively straightforward local civil rules governing the filing of material under seal. Local Rule 79.3 provides that parties "may file under seal any document that a statute or rule requires or permits to be so filed" or – if no such authority permits it – may file under seal "on motion and by permission of the presiding judge." Local Rule 79.3(a)–(b). A motion to seal may itself be filed under seal. Local Rule 79.3(c). Per Local Civil Rule 79.4, "all sealed documents maintained on paper will be deemed unsealed 60 days after final disposition of a case," though a party can move to maintain the seal before the 60 days run out.

Local Rule 79.4. There does not appear to be a local rule addressing sealed documents that have been filed electronically. It is not clear to me the 60-day-unsealing provision would apply to these.

The **Northern District of Illinois** has two local rules regarding the filing of sealed materials. Local Rule 26.2 states that a party wishing to file something under seal may file the document provisionally under seal along with a motion for leave to file under seal. Local Rule 26.2(c). The party must also file "a public-record version of the brief, motion or other submission with only the sealed document excluded." Local Rule 26.2(c). Copies served on opposing parties and the judge's paper courtesy copy must be complete, unredacted versions. Local Rule 26.2(d). The court can order sealing "for good cause shown." Local Rule 26.2(b). Sealed documents remain under seal indefinitely, though non-electronically filed sealed documents may be destroyed following the final disposition of the case including appeals. Local Rule 26.2(h). Local Rule 5.8 explains procedures for filing material under seal.

The **Southern District of Florida**'s Local Civil Rule 5.4 governs procedures for filing under seal. A party seeking to file material under seal in a case that is not entirely sealed must first publicly file a motion to file under seal "that sets forth the factual and legal basis for departing from the policy that Court filings are public and that describes the information or documents to be sealed . . . with as much particularity as possible." Local Civil Rule 5.4(b)(1). The duration of the proposed seal must be specified in the motion. *Id.* While S.D. Fla. does not allow filing under provisional seal, it allows a party that has filed a motion to file under seal to file versions of documents that redact everything that is the subject of the motion. *Id.* If the court grants leave to file under seal, the moving party can then file the sealed version. *Id.* The court's order must specify the duration of the sealing. Local Civil Rule 5.4(e)(1).

The **District of Massachusetts**'s Local Rule 7.2 governs "Impounded and Confidential Materials." This district appears to use the word "impounded" in the way that most courts use the word "sealed." This local rule permits the filing of a motion to impound and does not allow any material sought to be impounded to be filed before the motion is ruled upon (unless the court orders otherwise). Local Civil Rule 7.2(a), (c). The moving party must include "a statement of the earliest date on which the impounding order may be lifted, or a statement, supported by good cause, that the material should be impounded until further order of the court." Local Rule 7.2(a). If an expiration date is included, the clerk of court will make the material available to the public upon that date. Local Rule 7.2(b). Blanket orders ("that counsel for a party may at any time file material with the clerk, marked confidential") are not permitted. Local Rule 7.2(d).

In the **Northern District of Ohio**, "[n]o document will be accepted for filing under seal unless a statute, court rule, or prior court order authorizes the filing of sealed documents." Local Rule 5.2. Materials purportedly filed under seal will not be filed under seal if there is no such authority allowing it. *Id.* There is no guidance in this district's rules regarding what a party must do to secure a court order authorizing the filing of sealed documents.

The **District of Delaware**'s local rules say only that "[d]ocuments placed under seal must be filed in accordance with CM/ECF Procedures, unless otherwise ordered by the Court." Local Rule 5.1.3.

## III. Comparisons

The proposed Rule is significantly more detailed than anything we see in the nine districts reviewed for this memo. While all nine districts have a rule governing the filing of sealed material, two of these lack much detail. Of the seven remaining rules, three are relatively complex and detailed – though less so than the proposal – while four others are somewhat less detailed.

If the proposed Rule were adopted, it would be a major departure from current practice in each of the nine districts. In those districts that have less detailed rules, the proposed Rule would provide a new structure to processes that might differ from judge to judge under the current practice. In those districts that already have detailed rules, the proposed Rule would mean a departure from practices with which judges and practitioners are familiar.

*Standards* – All nine jurisdictions that have a rule governing the filing of sealed material require that a court order issue before anything can officially be filed under seal. (Provisional or temporary filing under seal, discussed below, is a different story.) Only one articulates a clear standard for courts to apply. This is the Northern District of Illinois which requires "good cause shown." The proposed rule is very different in this regard. As explained above, that rule requires that the movant(s) seeking to file under seal present "compelling reasons to seal the documents," arguments that "overcome the common law and First Amendment rights of access," and an explanation of "why alternatives to sealing, such as redaction, are inadequate." Further, the order granting leave to file under seal under the proposed Rule must include "particularized findings."

Two of the local rules I've reviewed – those from the District of Montana and the Southern District of Florida – and one comment to a local rule – from the Northern District of California – emphasize the general policy that court filings should be public. None goes so far in emphasizing this as the language in the proposed Rule, which states that "[m]otions to file documents under seal are disfavored and discouraged."

The proposed Rule provides that a document cannot be sealed based only on the parties' agreement or stipulation to filing under seal or to a protective order. The Northern District of California likewise says that this is an insufficient basis for sealing. No other district appears to have a comparable rule, and the Districts of Minnesota and Montana both state in their rules that the existence of a protective order can be a basis for filing under seal.

*Timeline* – Five of the seven districts with detailed rules on filing under seal permit the temporary or provisional filing under seal of the material that is the subject of a motion for leave to file under seal. Only the Southern District of Florida and District of Massachusetts are in line with the proposed Rule in disallowing this. Under these two rules, a party cannot file anything non-publicly until a motion for leave to file under seal has been granted by the court.

A few rules have unique features relating to timing. The proposed Rule would require a seven-day wait before a court can rule on a sealing motion, in order to allow an opportunity for other parties or nonparties to object. No district has anything comparable. The District of Montana is the most different in that it explicitly allows the court to rule on a motion for leave to file under seal without waiting for a response. The District of Minnesota puts all motions for leave to file

under seal before magistrate judges and allows parties to move for further consideration of the magistrate judge's decision of that motion, as well as to raise objections with the district court judge.

*Public Access* – In four districts and under the proposed Rule, a party filing a motion for leave to file under seal must simultaneously and publicly file a redacted version of the material to be placed under seal that reveals as much information as possible. These four districts are the District of Montana, the Northern District of California, the Northern District of Illinois, and the Southern District of Florida. It is worth noting that under each rule, if an entire document is to be filed under seal, this rule does not accomplish anything because it is not possible to file a redacted version.

In the District of Minnesota, a party files the material to be sealed under provisional seal at the time that the motion is made, and does not have to file a public version with redactions (to the extent possible) until 21 days after the conclusion of briefing on the substantive motion that the sealed material is filed in connection with (i.e. the motion for summary judgment, not the motion for leave to file under seal).

The other five districts, including the somewhat detailed Northern District of Texas and District of Massachusetts rules, do not mention the extent to which public versions must be filed.

*Nonparties* – Only the Northern District of California, the District of Minnesota, and the proposed Rule take into account nonparties' interest in disclosure or nondisclosure in a way that goes beyond referencing a default policy of public access.

The Northern District of California rule takes into account the fact that nonparties might be the ones interested in keeping information sealed. It provides a mechanism by which parties other than the filing party who have an interest in confidentiality may – and in fact must – file declarations asserting their interest. This ensures that the party actually interested in keeping the material under seal is the one that makes the required assertions to the court.

The proposed Rule does not seem to account for nonparties' interests in keeping things sealed. It does, however, account for nonparties' interests in access to information. The proposed Rule allows nonparties to object to a motion to seal or to file a motion to unseal without having to intervene in the case. The Northern District of California does not take these interests into account until ten years after the close of the case, at which point anyone can request access to the material.

The District of Minnesota rule accounts for the possibility that a nonparty might have "designated the document or information . . . as confidential or proprietary." It also requires notice to nonparties if a magistrate judge orders the unsealing of information that a nonparty designated as confidential or proprietary. In the District of Minnesota a nonparty may file a Motion for Further Consideration of Sealing or may object to an order disposing of such a motion.

*Unsealing* – None of the district court rules reviewed for this memo make any mention of a motion to unseal material that has been filed under seal. The proposed Rule explicitly allows such motions, including by nonparties, and would allow the court to unseal material sua sponte.

Only one local rule – in the Sothern District of Florida – requires that a court order allowing filing under seal specify the duration of a seal. The proposed Rule similarly emphasizes at several points that sealing should last no longer than necessary. Five of the reviewed local rules anticipate material staying under seal indefinitely – District of Minnesota, District of Montana, the Northern District of Texas, the Northern District of Illinois, and the District of Massachusetts. The District of Massachusetts rule encourages a moving party to suggest an end date, but allows a permanent seal "for good cause." In the latter two of these, sealed material filed in hard copy can be destroyed following the final disposition of a case. These two rules do not mention electronically filed material.

The Northern District of California's rule is unique in that material remains under seal for ten years, at which point any member of the public may access the material without having to file a motion. A party seeking to extend a seal beyond ten years may seek an order extending the seal through a specific date beyond ten years out.

A. Side-by-Side Comparisons

| | Proposed Rule | D. Minn. | D. Mont. | N.D. Cal. | N.D. Tex. | N.D. Ill. | S.D. Fla. | D. Mass. |
|---|---|---|---|---|---|---|---|---|
| Standards | Emphasizes the default presumption that "all documents filed in a case shall be open to the public," and explains that motions to file under seal are disfavored. Nothing can be filed under seal under this rule until the court grants a motion allowing it.<br><br>Requires that the movant(s) seeking to file under seal present "compelling reasons to seal the documents," arguments that "overcome the common law and First Amendment rights of access," and an explanation of "why alternatives to sealing, such as redaction, are inadequate." The party seeking to file under seal must also "make a good faith effort to limit the sealing to the shortest necessary time." Under this rule a party may seal or redact "only as much as necessary" and it is "rarely appropriate" to seal "entire case files, docket sheets, or" even "entire documents."<br><br>An agreement or stipulation between the parties is not a sufficient basis for filing under seal. The court order granting leave to file under seal must contain "particularized findings." | Allows a party to file a document connected to motion under temporary seal if the document contains information that "the filing party contends is confidential or proprietary" or if the document is covered by a non-disclosure agreement or protective order, or if it "is otherwise entitled to protection." This local rule does not emphasize the default of public filing.<br><br>The parties' agreement to seal material is a sufficient basis for filing under seal. | Does not set a clear standard for courts to apply when deciding motions for leave to file under seal, but court permission is required unless an existing order or law allows filing under seal. The party filing the motion is instructed to explain "why [the material's] inclusion in the public record is not appropriate." This is as close as the rule comes to articulating a standard. This framing does emphasize – though softly – the public's right of access to court filings.<br><br>The rule's reminder about attorneys' obligations under FRCP 11(b) also, arguably, serves to emphasize that motions for leave to file under seal should be approached with the same rigor as more substantive motions. | A comment to the Northern District of California local rule emphasizes that "the Court has a policy of providing the public full access to documents filed with the Court." But this principle does not appear in the text of the rule.<br><br>This rule does not set out a standard for courts to apply. | Requires court permission for filing under seal but does not say what standard the court must apply. | Sealing can be ordered "for good cause shown." | Mentions the general policy that court proceedings are matters of public record. It also refers to a general "policy that Court filings are public." It also instructs that the materials to be sealed must be described "with as much particularity as possible."<br><br>Does not set a clear standard for courts to apply when deciding motions for leave to file under seal, but court permission is required unless an existing order or law allows filing under seal. | No standard is given for a motion to impound for a period of time. A motion to impound indefinitely requires "good cause." |

| | Proposed Rule | D. Minn. | D. Mont. | N.D. Cal. | N.D. Tex. | N.D. Ill. | S.D. Fla. | D. Mass. |
|---|---|---|---|---|---|---|---|---|
| Timeline | Does not allow temporary or provisional filing under seal. Nothing may be placed under seal until an order is granted.<br><br>Anticipates one round of briefing before something can be sealed (though I assume that if the case is before a magistrate judge there might be a second round). It also allows for subsequent motions to renew a seal or to unseal.<br><br>Requires a seven-day wait before a court rules on a sealing motion in order to allow objections. | Allows filing under temporary seal.<br><br>Anticipates up to three rounds of argument over sealing: the joint motion under paragraph (d)(2) and the motion for further consideration under paragraph (d)(3) – both before magistrate judges – followed by objections under paragraph (d)(4). | Allows provisional filing under seal. If the motion is granted, the document will be deemed filed. It will be treated as unfiled if the motion is denied, but it will remain docketed.<br><br>Permits the court to rule on a motion without awaiting a response. | Allows provisional filing under seal.<br><br>Requires that a copy of the material to be sealed be filed under provisional seal at the time that an Administrative Motion to File Under Seal is filed. | Allows provisional filing under seal. Allows that a motion for leave to filed under seal may itself be filed under seal. | Allows provisional filing under seal. | Does not allow temporary or provisional filing under seal. A sealed document cannot be filed until a motion has been granted. | Does not allow temporary or provisional filing under seal. Nothing may be placed under seal until an order is granted. |

| | Proposed Rule | D. Minn. | D. Mont. | N.D. Cal. | N.D. Tex. | N.D. Ill. | S.D. Fla. | D. Mass |
|---|---|---|---|---|---|---|---|---|
| Public Access | A motion for leave to file under seal must be publicly filed and must contain "compelling reasons" for sealing and a "general description of the information the party seeks to withhold from the public." A motion for leave to file under seal cannot be ruled on for seven days, in order to allow parties or "others" the opportunity to see the public motion and to object to the requested sealing.<br><br>When a document is filed under seal, it must be accompanied by a publicly accessible redacted version filed at the same time. | Allows provisional filing under seal and does not require that a publicly accessible redacted version be filed until 21 days after the conclusion of briefing on the substantive motion (i.e., the motion for summary judgment, not the motion for leave to file under seal). This could be months after the initial sealed filing is made. | An unredacted version of the material the party seeks to seal must be filed under provisional seal at the time that the motion is filed. A redacted version of the document to be filed under seal must also be filed along with the motion (if possible). | Allows for provisional filing under seal at the outset of a motion, but also requires that the motion include a public version with redactions, revealing as much information as possible at the front end. | | A party filing a motion for leave to file under seal can file the material under provisional seal alongside the motion, but must also file a public-record version of the broader brief or motion with only the sealed document excluded. | In S.D. Fla. a motion for leave to file under seal must be filed publicly and the document that will be sealed must be filed publicly with redactions (if possible). Even if the document cannot be filed in redacted form, the motion must describe the document to be sealed "with as much particularity as possible."<br><br>Nothing can be filed under seal until the motion is granted and the motion must be filed publicly. | |
| | | | *The District of Montana and Northern District of California rules are essentially the same on this issue. They are phrased differently in this chart only because I drafted these summaries to reflect the phrasing and organization of each local rule.* | | | | | |

| | Proposed Rule | D. Minn. | D. Mont. | N.D. Cal. | N.D. Tex. | N.D. Ill. | S.D. Fla. | D. Mass. |
|---|---|---|---|---|---|---|---|---|
| Nonparties | Accounts for nonparties' interests in access to documents that might be placed under seal.<br><br>The rule would allow nonparties to object to a motion for leave to file under seal or to file a motion to unseal without having to intervene in the case.<br><br>It does not include any provisions that directly account for the possibility that a nonparty might have an interest in placing or keeping material under seal. | Accounts for the possibility that a nonparty might have "designated the document or information . . . as confidential or proprietary."<br><br>Also requires notice to nonparties if a magistrate judge orders the unsealing of information that a nonparty designated as confidential or proprietary.<br><br>A nonparty may file a Motion for Further Consideration of Sealing or may object to an order disposing of such a motion. | | Accounts for the possibility that nonparties may have an interest in keeping information sealed. Provides a mechanism by which parties other than the filing party who have an interest in confidentiality may – and in fact must – file declarations asserting their interest. This ensures that the party actually interested in keeping the material under seal is the one that makes the required assertions to the court.<br><br>Does not take nonparties' interests into account until ten years after the close of the case, at which point anyone can request access to sealed material. | | | | |

| | Proposed Rule | D. Minn. | D. Mont. | N.D. Cal. | N.D. Tex. | N.D. Ill. | S.D. Fla. | D. Mass. |
|---|---|---|---|---|---|---|---|---|
| Unsealing | Emphasizes at several points that sealing should last no longer than necessary.<br><br>Sealed documents can be unsealed sua sponte by the court or by a motion that can be filed at any time. By default, they are unsealed "60 days after the final disposition of a case, unless the seal is renewed" and any motion seeking to renew sealing past this date (or an extended date) must be filed 30 days before the expected unsealing date. | Anticipates that anything filed under seal can remain under seal indefinitely by default.<br><br>Does not address motions to unseal. | Does not address motions to unseal or the duration of seals. | Material remains sealed for ten years by default.<br><br>Does not address motions to unseal. | Sealed documents maintained in hard copy are unsealed 60 days after the final disposition of a case.<br><br>Does not address sealed documents that were filed only electronically.<br><br>Does not address motions to unseal. | Sealed material can remain under seal indefinitely, or can be destroyed after the final disposition of the case (non-electronically filed sealed material only).<br><br>Does not address motions to unseal. | Requires that a court order allowing filing under seal must specify the duration of the seal.<br><br>Does not address motions to unseal. | Material placed under seal for a period of time is unsealed automatically when the deadline passes. Material can be sealed indefinitely for good cause.<br><br>Does not address motions to unseal. |

# Appendix: Text of Local Rules

## 1. District of Minnesota

### LR 5.6 FILING DOCUMENTS UNDER SEAL IN CIVIL CASES

**(a) Application of Rule.**

(1) A document may be filed under seal in a civil case only as provided by statute or rule, or with leave of court.

(2) This rule does not require a party to file any document under seal, but sets forth the procedures used when a party seeks to file a document under seal.

(3) This rule does not affect a party's obligation to redact personal identifiers under Federal Rule of Civil Procedure 5.2 or LR 5.5, or any statutory, contractual, or other obligation to keep information confidential.

**(b) Electronic Filing Required.** All documents filed in a civil case — whether sealed or not — must be filed in compliance with the CIVIL ECF PROCEDURES GUIDE.

**(c) What May Be Temporarily Sealed.** A party may file a document under temporary seal only if the document contains information that:

(1) the filing party contends is confidential or proprietary;

(2) has been designated as confidential or proprietary by another party, by a nonparty, or under a non-disclosure agreement or protective order; or

(3) is otherwise entitled to protection from disclosure under a statute, rule, order, or other legal authority.

**(d) Procedure for Filing Under Temporary Seal in Connection with LR 7.1 or LR 72.2.**

(1) *Filing Under Temporary Seal.* A party seeking to file a document under seal in connection with a motion under LR 7.1 or an objection under LR 72.2 must first file the document under temporary seal. That party must file the temporarily sealed document separately so that the document is assigned its own docket number (e.g., ECF No. 15 or ECF No. 15-3).

(A) Redacted Public Version. A party filing a document under temporary seal must contemporaneously and publicly file:

(i) a version of that document with the information described in LR 5.6(c) redacted; or

(ii) a statement that the entire document is confidential or that redaction is impracticable.

(B) Temporary Seal While Case is Pending. Except as provided in LR 5.6(d)(1)(C), or as otherwise ordered by the court, a document filed under temporary seal remains under temporary seal until the latest of the following:

(i) 28 days after entry of the magistrate judge's order disposing of the joint motion regarding continued sealing under LR 5.6(d)(2);

(ii) 21 days after entry of the magistrate judge's order disposing of a motion for further consideration under LR 5.6(d)(3); or

(iii) entry of the district judge's order disposing of an objection under LR 5.6(d)(4).

(C) Temporary Seal upon Disposition of Case. A document that is under temporary seal at the time that the case is disposed of – such as by remand, transfer, dismissal, or entry of judgment – will remain sealed unless the court orders otherwise.

(2) *Joint Motion Regarding Continued Sealing.* Within 21 days after the filing of the final memorandum authorized by LR 7.1 or response authorized by LR 72.2 in connection with the underlying motion or objection, the parties must file a completed Joint Motion Regarding Continued Sealing Form.

(A) Joint Motion's Contents. The joint motion must list by docket number each document filed under temporary seal in connection with the underlying motion or objection and, for each such document:

(i) briefly describe the document;

(ii) precisely identify:

a) the information that the parties agree should remain sealed;

b) the information that the parties agree should be unsealed; and

c) the information about which the parties disagree;

(iii) explain why the parties agree that the information should remain sealed or be unsealed or, if the parties disagree, briefly explain each party's position; and

(iv) identify any nonparty who has designated the document or information in the document as confidential or proprietary.

(B) Party to File Joint Motion. Unless the parties agree or the magistrate judge orders otherwise, the party who filed the first document under temporary seal in connection with the underlying motion or objection must file the joint motion.

(C) Order on Joint Motion. The magistrate judge will ordinarily rule on the joint motion without oral argument. A party or nonparty who objects to the order must file a motion for further consideration under LR 5.6(d)(3).

(D) Notice to Nonparties. If the magistrate judge orders the unsealing of information that a nonparty has designated as confidential or proprietary, the party who filed that information under temporary seal must, within 7 days after entry of the order, serve on the nonparty a copy of the document containing that information and the order.

(3) *Motion for Further Consideration of Sealing.* Within 28 days after entry of the magistrate judge's order disposing of a joint motion regarding continued sealing under LR 5.6(d)(2), a party or nonparty may file a motion for further consideration by the magistrate judge. If the motion for further consideration relates to information that a nonparty has designated as confidential or proprietary, the movant must serve on that nonparty a copy of the motion and all documents filed in support of the motion. The motion for further consideration is a nondispositive motion governed by LR 7.1(b).

(4) *Objection to Order Disposing of Motion for Further Consideration of Sealing.* A party or nonparty may object to a magistrate judge's order disposing of a motion for further consideration of sealing, but only if that party or nonparty filed or opposed the motion. The objection is governed by LR 72.2(a).

**(e) Procedure for Filing Other Documents Under Seal.** A party who seeks leave of court to file a document under seal other than in connection with a motion under LR 7.1 or an objection under LR 72.2 must obtain direction from the court on the procedure to be followed.

**2. District of Montana**

**Civil Rule 5. Serving and Filing Pleadings and Papers 5.1 Filing with the Clerk.**

Papers not filed electronically must be delivered to the clerk. A judge's acceptance of any paper for filing does not constitute agreement to accept any other paper for filing.

**5.2 Filing Under Seal.**

**(a) Good Faith.** In addition to the certifications set forth in Fed. R. Civ. P. 11(b), any person who files a document or item under seal, with or without prior leave, certifies that sealing is appropriate to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances and with due regard to the public's right of access.

**(b) When Motion for Leave Required.** A motion for leave to file under seal is required unless the case is sealed or unless:

(1) a protective order is sought under Fed. R. Civ. P. 26(c) and L.R. 26.4; or

(2) filing under seal is otherwise preauthorized by state or federal law or an order already entered in the case.

**(c) Caption.** Any document preauthorized to be filed under seal must include the phrase "FILED UNDER SEAL" in the case caption, followed by citation to the authority for sealing, e.g., "Per Fed. R. Civ. P. 45(e)(2)(B)," or "D. Mont. L.R. 5.1(b)(1), 26.4."

**(d) Contents of Motion for Leave.** A motion for leave to file under seal must:

(1) be filed in the public record of the case;

(2) without disclosing confidential information, describe the document or item to be sealed and explain why inclusion in the public record is not appropriate; and

(3) either:

(A) state why it is not feasible to file a redacted version of the document or item in the public record, or

(B) be accompanied by a redacted version of the document or item filed in the public record.

**(e) Electronic Filing.** Following the directions of the clerk's office, attorneys filing electronically must lodge under seal the document or item for which leave to seal is sought. Electronically filed sealed documents must be conventionally served on all other parties unless ex parte filing is authorized.

**(f) Conventional Filing.** Persons filing conventionally must submit to the clerk:

(1) the document or item to be sealed, placed in an envelope with the case number, date, and "Filing Under Seal Requested" clearly printed on the envelope; and,

(2) if required, the motion for leave to seal and brief in support.

**(g) Response and Order.**

(1) The court may rule on a motion for leave to seal without awaiting a response.

(2) If leave to file under seal is granted, the document or item will be deemed filed under seal, and the party need not refile the document.

(3) The court may order that a document be redacted for the public record. Until the filing party complies, the unredacted document will not be deemed filed.

(4) If leave to file under seal is denied, the document or item will remain in the record under seal but will be deemed not filed.

### 3. Northern District of California

### 79-5. Filing Documents Under Seal in Civil Cases

**(a)** This Rule Applies to Electronic and Manually-Filed Sealed Documents. The procedures and requirements set forth in Civil L.R. 79-5 apply to both the e-filing of sealed documents submitted by registered e-filers in e-filing cases; and the manual filing of sealed documents submitted by non-e-filers and/or in non-e-filing cases. For the purposes of Civil L.R. 79-5, "file" means: (1) to electronically file ("e-file") a document that is submitted by a registered e-filer in a case that is subject to e-filing; or (2) to manually file a document when it is submitted by a party that is not permitted to e-file and/or in a case that is not subject to e-filing. See Civil L.R. 5-1(b) for an explanation of cases and parties subject to e-filing.

**(b)** Specific Court Order Required. Except as provided in Civil L.R. 79-5(c), no document may be filed under seal (i.e., closed to inspection by the public) except pursuant to a court order that authorizes the sealing of the particular document, or portions thereof. A sealing order may issue only upon a request that establishes that the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law (hereinafter referred to as "sealable"). The request must be narrowly tailored to seek sealing only of sealable material, and must conform with Civil L.R. 79-5(d).

**Commentary**

As a public forum, the Court has a policy of providing to the public full access to documents filed with the Court. In some cases, however, law or regulation requires a document to be filed under seal (e.g., a False Claims Act complaint). Those cases are exempt from the procedures described in this rule. In other, non-exempt, cases, the Court recognizes that it must consider confidential information. This rule governs requests in civil cases to file under seal documents or things, whether pleadings, memoranda, declarations, documentary evidence or other evidence. Proposed protective orders, in which parties establish a procedure for designating and exchanging confidential information, must incorporate the procedures set forth in this rule if, in the course of proceedings in the case, a party proposes to submit sealable information to the Judge. This rule is designed to ensure that the assigned Judge receives in chambers a confidential copy of the unredacted and complete document, annotated to identify which portions are sealable, that a separate unredacted and sealed copy is maintained for appellate review, and that a redacted copy is filed and available for public review that has the minimum redactions necessary to protect sealable information.

**(c)** Documents that May Be Filed Under Seal Before Obtaining a Specific Court Order. Only the unredacted version of a document sought to be sealed, may be filed under seal before a sealing order is obtained, as permitted by Civil L.R. 79-5(d)(1)(D) .

**(d)** Request to File Document, or Portions Thereof, Under Seal. A party seeking to file a document, or portions thereof, under seal ("the Submitting Party") must:

**(1)** File an Administrative Motion to File Under Seal, in conformance with Civil L.R. 7-11. The administrative motion must be accompanied by the following attachments:

**(A)** A **declaration** establishing that the document sought to be filed under seal, or portions thereof, are sealable. Reference to a stipulation or protective order that allows a party to designate certain documents as confidential is not sufficient to establish that a document, or portions thereof, are sealable. The procedures detailed in Civil L.R. 79-5(e) apply to requests to seal in which the sole basis for sealing is that the document(s) at issue were previously designated as confidential or subject to a protective order.

**(B)** A **proposed order** that is narrowly tailored to seal only the sealable material, and which lists in table format each document or portion thereof that is sought to be sealed.

**(C)** A **redacted version** of the document that is sought to be filed under seal. The redacted version shall prominently display the notation "REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED." A redacted version need not be filed if the submitting party is seeking to file the entire document under seal.

**(D)** An **unredacted version** of the document sought to be filed under seal. The unredacted version must indicate, by highlighting or other clear method, the portions of the document that have been omitted from the redacted version, and prominently display the notation "UNREDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED." The unredacted version may be filed under seal pursuant to Civil L.R. 79-5(c) before the sealing order is obtained. Instructions for e-filing documents under seal can be found on the ECF website.

**(2)** Provide a courtesy copy of the administrative motion, declaration, proposed order, and both the redacted and unredacted versions of all documents sought to be sealed, in accordance with Civil L.R. 5-1(e)(7).

The courtesy copy of unredacted declarations and exhibits should be presented in the same form as if no sealing order was being sought. In other words, if a party is seeking to file under seal one or more exhibits to a declaration, or portions thereof, the courtesy copy should include the declaration with all of the exhibits attached, including the exhibits, or portions thereof, sought to be filed under seal, with the portions to be sealed highlighted or clearly noted as subject to a sealing motion.

The courtesy copy should be an exact copy of what was filed, and for e-filed documents the ECF header should appear at the top of each page. The courtesy copy must be contained in a sealed envelope or other suitable container with a cover sheet affixed to the envelope or container, setting forth the information required by Civil L.R. 3-4(a) and prominently displaying the notation "COURTESY [or CHAMBERS] COPY - DOCUMENTS SUBMITTED UNDER SEAL."

The courtesy copies of sealed documents will be disposed of in accordance with the assigned judge's discretion. Ordinarily these copies will be recycled, not shredded, unless special arrangements are made.

**(e)** Documents Designated as Confidential or Subject to a Protective Order. If the Submitting Party is seeking to file under seal a document designated as confidential by the opposing party or a non-party pursuant to a protective order, or a document containing information so designated by an opposing party or a non-party, the Submitting Party's declaration in support of the Administrative Motion to File Under Seal must identify the document or portions thereof which contain the designated confidential material and identify the party that has designated the material as confidential ("the Designating Party"). The declaration must be served on the Designating Party on the same day it is filed and a proof of such service must also be filed.

**(1)** Within 4 days of the filing of the Administrative Motion to File Under Seal, the Designating Party must file a declaration as required by subsection 79-5(d)(1)(A) establishing that all of the designated material is sealable.

**(2)** If the Designating Party does not file a responsive declaration as required by subsection 79-5(e)(1) and the Administrative Motion to File Under Seal is denied, the Submitting Party may file the document in the public record no earlier than 4 days, and no later than

10 days, after the motion is denied. A Judge may delay the public docketing of the document upon a showing of good cause.

**(f)** Effect of Court's Ruling on Administrative Motion to File Under Seal. Upon the Court's ruling on the Administrative Motion to File Under Seal, further action by the Submitting Party may be required.

**(1)** If the Administrative Motion to File Under Seal is granted in its entirety, then the document filed under seal will remain under seal and the public will have access only to the redacted version, if any, accompanying the motion.

**(2)** If the Administrative Motion to File Under Seal is denied in its entirety, the document sought to be sealed will not be considered by the Court unless the Submitting Party files an unredacted version of the document within 7 days after the motion is denied.

**(3)** If the Administrative Motion to File Under Seal is denied or granted in part, the document sought to be sealed will not be considered by the Court unless the Submitting Party files a revised redacted version of the document which comports with the Court's order within 7 days after the motion is denied.

**(g)** Effect of Seal. Unless otherwise ordered by the Court, any document filed under seal shall be kept from public inspection, including inspection by attorneys and parties to the action, during the pendency of the case. Any document filed under seal in a civil case shall, upon request, be open to public inspection without further action by the Court 10 years from the date the case is closed. However, a Submitting Party or a Designating Party may, upon showing good cause at the conclusion of a case, seek an order to extend the sealing to a specific date beyond the 10 years provided by this rule. Nothing in this rule is intended to affect the normal records disposition policy of the United States Courts.

**4. Northern District of Texas**

**Civil Rule 79.3 - Sealed Documents**

a. A party may file under seal any document that a statute or rule requires or permits to be so filed. The term "document," as used in this rule, means any pleading, motion, other paper, or physical item that the Federal Rules of Civil Procedure permit or require to be filed.

b. If no statute or rule requires or permits a document to be filed under seal, a party may file a document under seal only on motion and by permission of the presiding judge.

c. When a party files a motion for leave to file a document under seal, the party may file the motion under seal and must attach the proposed sealed document as an exhibit. If leave is granted, the sealed document will be deemed filed as of the date of the order granting leave, or as otherwise specified by the presiding judge, and the clerk will file a copy of the sealed document.

**Civil Rule 79.4 - Disposition of Sealed Documents.**

Unless the presiding judge otherwise directs, all sealed documents maintained on paper will be deemed unsealed 60 days after final disposition of a case. A party that desires that such a document remain sealed must move for this relief before the expiration of the 60-day period. The clerk may store, transfer, or otherwise dispose of unsealed documents according to the procedure that governs publicly available court records.

### 5. Northern District of Illinois

**L.R. 5.8. Filing Materials Under Seal**

Any document to be filed under seal shall be filed in compliance with procedures established by the Clerk of Court and approved by the Executive Committee. All attorneys and unrepresented parties with an electronic filing account, shall file sealed documents pursuant to LR 26.2 and should do so electronically by way of the Court's electronic case management system. Except where pursuant to court order a restricted or sealed document as defined by LR 26.2 is not filed electronically

(A) by an attorney or by an unrepresented party with an e-filing account: the paper documents shall be accepted by the Clerk of Court. The Clerk of Court shall file those paper documents in the appropriate case, but those documents are to be filed as unsealed and publicly available.

(B) by an unrepresented party without an e-filing account: the paper documents shall be accepted by the Clerk of Court. Where restricted or sealed documents are submitted under this provision, they must be accompanied by a cover sheet which shall include the following:

(1) the caption of the case, including the case number;

(2) the title "Sealed Document Pursuant to LR 26.2"";

(3) a statement indicating that the document is filed under seal in accordance with an order of the court and the date of that order; and

(4) the signature of the unrepresented party filing the document, the party's name and address, and the title of the document.

Any document purporting to be a sealed document as defined in LR 26.2 that is not filed in compliance with such procedures shall be processed like any other document and filed as unsealed and publicly available on the Court's electronic case management system. In such instances, where the document has been submitted in paper and does not show, on the coversheet, compliance with all four of the requirements listed above, the Clerk of Court is authorized to open the sealed envelope and remove the materials for processing as an unsealed document.

**L.R. 26.2. Sealed Documents**

**(a) Definitions.** As used in this rule the term: "Sealed document" means a document that the court has directed be maintained under seal electronically or, where the court allows a sealed document to be filed non-electronically, within a sealed enclosure such that access to the document requires breaking the seal of the enclosure; and "Sealing order" means any order restricting access to one or more documents filed or to be filed with the court.

**(b) Sealing Order.** The court may for good cause shown enter an order directing that one or more documents be filed under seal. No attorney or party may file a document under seal without order of court specifying the particular document or portion of a document that may be filed under seal, except that a document may provisionally be filed under seal pursuant to subsection (c) below.

**(c) Sealing Motion for Documents filed Electronically.** Any party wishing to file a document or portion of a document electronically under seal in connection with a motion, brief or other submission must: (1) provisionally file the document electronically under seal; (2) file electronically at the same time a public-record version of the brief, motion or other submission with only the sealed document excluded; and (3) move the court for leave to file the document under seal. The sealing motion must be filed before or simultaneously with the provisional filing of the document under seal, and must be noticed for presentment promptly thereafter. Any document filed under seal without such a sealing motion may be stricken by the court without notice.

**(d) Sealing Motion for Documents not filed Electronically.** Where the court has permitted documents to be filed non-electronically, the party seeking to file a document under seal must, before filing the document, move the court for a sealing order specifying the particular document or portion of a document to be filed under seal. The final paragraph of the order shall state the following information: (1) the identity of the persons, if any, who are to have access to the documents without further order of court; and (2) instructions for the disposition of the restricted documents following the conclusion of the case. A copy of the sealing order must be included with any document presented for filing under seal. The attorney or party submitting a restricted document must file it in a sealed enclosure that conspicuously states on the face of the enclosure the attorney's or party's name and address, including e-mail address if the attorney is registered as a Filing User of electronic case filing, the caption of the case, and the title of the document.

**(e) Copies Served on Counsel and Judge's Paper Courtesy Copy.** Any sealed document served on any other party and any judge's paper courtesy copy must be a complete version, without any redactions made to create the public-record version unless otherwise ordered for good cause shown.

**(f) Docket Entries.** The court may on written motion and for good cause shown enter an order directing that the docket entry for a sealed document show only that a sealed document was filed without any notation indicating its nature. Unless the Court directs otherwise, a sealed document shall be filed pursuant to procedures referenced by Local Rule 5.8.

**(g) Inspection of Sealed Documents.** The clerk shall maintain a record in a manner provided for by internal operating procedures approved by the Court of persons permitted access to sealed documents that have not been filed electronically. Such procedures may require anyone seeking access to show identification and to sign a statement to the effect that they have been authorized to examine the sealed document.

**(h) Disposition of Sealed Non-electronic Documents.** When a case is closed in which an order was entered pursuant to section (b) of this rule, the clerk shall maintain the documents filed under seal non-electronically as sealed documents for a period of 63 days following the final disposition including appeals. Except where the court in response to a request of a party made pursuant to this section or on its own motion orders otherwise, at the end of the 63 day period the clerk shall notify the attorney or party who filed the documents that the documents must be retrieved from the clerk's office within 30 days of notification. If the parties do not retrieve the sealed documents within 30 days, the clerk shall destroy the documents.

### 6. Southern District of Florida

**RULE 5.4 FILINGS UNDER SEAL; DISPOSAL OF SEALED MATERIALS**

**(a) General Policy.** Unless otherwise provided by law, Court rule, or Court order, proceedings in the United States District Court are public and Court filings are matters of public record. Where not so provided, a party seeking to file matters under seal and/or ex parte shall follow the procedures prescribed by this Local Rule and Sections 5A, 5K, 9A-D, and 10B, as applicable, of the CM/ECF Administrative Procedures. In criminal matters, the procedures prescribed by this Local Rule and by the CM/ECF Administrative Procedures concerning the filing of ex parte documents shall only apply to cases in which a person already has been charged by criminal complaint, criminal information, or indictment.

**(b) Procedure for Filing Under Seal in Civil Cases.** A party seeking to file information or documents under seal in a civil case shall:

(1) In a case that is not otherwise sealed in its entirety as permitted or required by federal law, file and serve electronically via CM/ECF a motion to file under seal that sets forth the factual and legal basis for departing from the policy that Court filings are public and that describes the information or documents to be sealed (the "proposed sealed material") with as much particularity as possible, but without attaching or revealing the content of the proposed sealed material. The proposed sealed material shall not be filed unless the Court grants the motion to file under seal. The motion to file under seal shall specify the proposed duration of the requested sealing. The motion to file under seal and the docket text shall be publicly available on the docket. If, prior to the issuance of a ruling on the motion to file under seal, the moving party elects or is required to publicly file a pleading, motion, memorandum, or other document that attaches or reveals the content of the proposed sealed material, then the moving party must redact from the public filing all content that is the subject of the motion to file under seal. If the Court grants the motion to file under seal, then the moving party shall file any pleading, motion, memorandum, or other document that has been authorized to be filed under seal via CM/ECF using events specifically earmarked for sealed civil filings, but if a redacted filing previously has been made or is accompanying the sealed filing, then the material that is being filed under seal shall be filed as an attachment to a "Notice of Sealed Filing" which shall be filed via CM/ECF (using events specifically earmarked for sealed civil filings). The moving party must complete any required service of the sealed filing or Notice of Sealed Filing conventionally, indicating the corresponding docket number of the sealed filing or Notice of Sealed Filing.

(2) A party appearing pro se seeking to make a filing under seal in a civil case that is not otherwise sealed in its entirety as permitted or required by federal law must comply with the procedures set forth in Local Rule 5.4(b)(1), except that the motion to file under seal shall be filed conventionally with the Clerk of Court and, if the Court grants the motion to file under seal, the sealed filing or Notice of Sealed Filing shall be submitted to the Clerk of Court in a plain envelope clearly marked "sealed document" with the case number and style of the case noted on the outside. The pro se party must also complete any required service of the sealed filing or Notice of Sealed Filing conventionally indicating the corresponding docket number of the sealed filing or Notice of Sealed Filing.

(3) A party or pro se party seeking to seal a case in its entirety must file a motion to seal conventionally with the Clerk of Court in a plain envelope clearly marked "sealed document" with the style of the case noted on the outside of the envelope. The motion to seal must set forth the factual and legal basis for departing from the policy that Court filings be public, describe the proposed sealed filing with as much particularity as possible without revealing the confidential information, and specify the proposed duration of the requested sealing. If the motion is granted, subsequent filings shall be filed conventionally with the Clerk of Court as sealed documents in a plain envelope clearly marked "sealed document" with the case number and style of the case noted on the outside. The filer must complete any required service of the sealed document(s) conventionally.

**(c) Procedure for Filing Under Seal in Criminal Cases.** A party seeking to make a filing under seal in a criminal case shall:

(1) Conventionally file a motion to seal that sets forth the factual and legal basis for departing from the policy that Court filings be public and that describes theproposed sealed filing with as much particularity as possible without revealing the confidential information. The motion shall specify the proposed duration of the requested sealing. Unless the Court expressly orders otherwise, the motion to seal will itself be sealed from public view and the docket text appearing on the public docket shall reflect only that a sealed filing has been made.

(2) Conventionally file the proposed sealed filing in a plain envelope clearly marked "sealed document" with the case number and style of the case noted on the outside.

**(d) Procedure for Filing Ex Parte.** A party submitting an ex parte filing shall:

(1) Include the words "ex parte" in the title of the motion and explain the reasons for ex parte treatment. Upon submission, unless the Court directs otherwise the ex-parte filing will be restricted from public view and the docket text appearing on the public docket will reflect only that a restricted filing has been made. Counsel need not serve motions filed ex parte and related documents unless and until the Court so orders.

(2) In criminal matters, conventionally file the ex parte filing in a plain envelope clearly marked "ex parte" with the case number and style of the case noted on the outside.

(3) In civil matters, electronically file the ex parte filing via CM/ECF as a restricted document using the events specifically earmarked for ex parte filings as described in Section 9 of the CM/ECF Administrative Procedures.

(4) A party appearing pro se must file documents conventionally.

**(e) Court Ruling**.

(1) *Sealed Filings*. An order granting a motion to seal shall state the period of time that the sealed filing shall be sealed.

(2) *Ex Parte Filings*. Access to ex parte motions and related filings will remain restricted unless the Court orders otherwise.

**7. District of Massachusetts**

RULE 7.2 IMPOUNDED AND CONFIDENTIAL MATERIALS

**Generally.** Whenever a party files a motion to impound, the motion shall contain a statement of the earliest date on which the impounding order may be lifted, or a statement, supported by good cause, that the material should be impounded until further order of the court. The impounded material will be scanned and docketed in CMECF and restricted from public access.

**Expiration of Period.** If the impoundment order provides a cut-off date but no arrangements for custody, the clerk (without further notice to the court or the parties) shall remove the restriction in CMECF and make the material available to the public upon expiration of the impoundment period.

**Rulings on Motions.** Motions for impoundment must be filed and ruled upon prior to submission of the actual material sought to be impounded, unless the court orders otherwise.

**No Blanket Orders.** The court will not enter blanket orders that counsel for a party may at any time file material with the clerk, marked confidential, with instructions that the clerk withhold the material from public inspection. A motion for impoundment must be presented each time a document or group of documents is to be filed.

### 8. Northern District of Ohio

**Rule 5.2 Filing Documents Under Seal**

No document will be accepted for filing under seal unless a statute, court rule, or prior court order authorizes the filing of sealed documents. If no statute, rule, or prior order authorizes filing under seal, the document will not be filed under seal.

Materials to be sealed shall be filed electronically whenever possible pursuant to the Court's Electronic Filing Policies and Procedures Manual. Sealed documents which exceed the size limitations for electronic filing shall be presented in an envelope which shows the citation of the statute or rule or the filing date of the court order authorizing the sealing, and the name, address and telephone number of the person filing the documents.

If the sealing of the document purports to be authorized by court order, the electronically filed sealed document shall be linked to the order authorizing the sealing. For manually filed sealed documents, the person filing the documents shall include a copy of the order in the envelope. If the order does not authorize the filing under seal, or the electronic filing is not linked to the order, or in the case of manual filing no order is provided, the Clerk will unseal the documents. Before unsealing the documents, the Clerk will notify the electronic filer by telephone. If the document was manually filed, the Clerk will notify the person whose name and telephone number appears on the envelope in person (if he or she is present at the time of filing) or by telephone. The filer may withdraw the documents before 4:00 p.m. the day the Clerk notifies him or her of the defect. If not withdrawn, the documents will be unsealed.

After the entry of a final judgment or an appellate mandate, if appealed, the sealed record will be shipped to the Federal Records Center in accordance with the disposition schedule set forth in the guide to Judiciary Policies and Procedures.

**9. District of Delaware**

**RULE 5.1.3. Filing Documents under Seal.**

Documents placed under seal must be filed in accordance with CM/ECF Procedures, unless otherwise ordered by the Court.

**SUGGESTION FOR RULEMAKING**
**to the**
**ADVISORY COMMITTEE ON CIVIL RULES**

# PRIVILEGE AND BURDEN: THE NEED TO AMEND RULES 26(b)(5)(A) AND 45(e)(2) TO REPLACE "DOCUMENT-BY-DOCUMENT" PRIVILEGE LOGS WITH MORE EFFECTIVE AND PROPORTIONAL ALTERNATIVES

August 4, 2020

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Suggestion for Rulemaking to the Advisory Committee on Civil Rules ("Committee"), recommending amendments to Rule 26(b)(5)(A) and Rule 45(e)(2) of the Federal Rules of Civil Procedure ("FRCP") that would modernize the procedure for withholding otherwise discoverable information under claims of privilege or other protection and replace "document-by-document" privilege logs with more effective and proportional alternatives. Rule 25(b)(5)(A), adopted prior to the explosion of electronically stored information ("ESI"), has remained untouched for over twenty-five years. The time has come to amend rule 26(b)(5)(A) to reflect best practices and eliminate the disparities among local rules.

## I. INTRODUCTION

"[T]he modern privilege log [is] as expensive to produce as it is useless."[2] This conclusion – widely shared by judges, litigants, and litigators – is based on common experience with producing, receiving, and ruling on "document-by-document" privilege logs. Importantly, this indictment of the status quo is not a castigation of counsel preparing logs but a critique of prevailing practices and existing rules. The inherent difficulties in describing applicable privileges for all withheld documents individually have been compounded by the geometric growth of ESI, often resulting in claims by requesting parties that privilege logs fail to meet the standard of Rule 26(b)(5)(A)(ii) or provide sufficient information to resolve privilege claims.

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C 2012).

These challenges provoke a large amount of satellite litigation unrelated to the merits of the case.[3]

The burdens of preparing privilege logs, the inherent futility of many logging exercises, and the resulting collateral disputes arise from Rule 26(b)(5)(A) and its case law progeny. Some courts interpret the Rule as establishing a *de facto* default to "document-by-document" logs by interpreting the "expressly make the claim" language to require document-by-document logging. While the 1993 Advisory Committee Note indicates that alternative approaches could be considered, few litigants or courts follow that advice. That such a "default" expectation exists is evident in a plethora of cases requiring that producing parties must provide "document-by-document" logs in order to maintain claims of privilege.

Recognizing the ineficiencies of document-by-document privilege logs and collateral disputes, several district courts have adopted local rules or guidance that embrace the flexibility intended by the Advisory Committee Note. Consequently, a patchwork of different standards has emerged, resulting in today's lack of uniformity among federal districts.[4]

The Committee should modernize the procedures for privilege logs to provide greater procedural clarity and consistency and make them more useful, efficient, and proportional to the needs of the case. The amendments proposed in Attachment A and Attachment B (the "Proposed Amendments") are targeted to reduce the disputes that ultimately require judicial attention and resolution as well as promote procedural consistency and predictability without imposing an inflexible standard for form and content. The Proposed Amendments motivate and enable parties (and subpoenaed non-parties) to customize logging procedures and log content proportional to the needs of each case, while assuring the appropriate scope of information subject to logging, clarifying the standards, and reserving a role for the court in the event that the parties need guidance. The Proposed Amendments endorse: (1) categorical logs where appropriate in cases (with sampling and provisions to ascertain whether privilege claims are factually and legally sound); (2) iterative logging (moving from broad categories or summary logs to more detailed logs for subsets of important, material documents); (3) excluding from logging categories of communications that are facially privileged; (4) alternative logging protocols for particular types of linked/serial communications (e.g., emails); (5) procedures for privilege challenges and limitations of challenges to truly material and unique information; and (6) other procedures and protocols that either technology or the creativity of parties, counsel, and the bench may devise.

[3] The authors used a Westlaw search (lasted updated on 1/9/2020) in the ALLFEDS databases using the following search syntax "privilege /s index log /s insufficient waiv! fail! & date(aft 10/01/2006)" to find cases where there was an attack on a privilege log as being insufficient, a failure, or should result in a waiver of privileges. The search pulled back 4,018 cases and more than 10,000 "trial court documents." A cursory examination of selected cases demonstrates the extraordinary amount of time and effort invested in logging, logging disputes, and court involvement in resolving these disputes.

[4] *See The* Sedona Conference *Commentary on Protection of Privileged ESI*, *17 SEDONA CONF. J.* 95, 156 (2016) ("The process of logging is further complicated by the lack of a uniform standard applied by the courts regarding the adequacy of the content of privilege logs.").

## II. BACKGROUND

Since 1993, Rule 26(b)(5)(A) and Rule 45(e)(2) have directed litigants and non-parties withholding documents from production based on claims of privilege or work product protection to identify those documents in a manner that "will enable other parties to assess the claim."[5] The *de facto* default method of doing so (reflected in most relevant case law) is for the withholding entity to prepare a log of all withheld records on a "document-by-document basis."[6] But a comprehensive document-by-document logging method should be used only infrequently, when clearly justified by the needs of the case and the materiality of the information. Such logs are expensive to produce and inefficient in conveying useful information,[7] and they frequently lead to disputes that require *ex parte* and *in camera* reviews by courts. The default to document-by-document logging is based, in part, on a flawed premise that each document (or portion of document) should be treated with equal detail when, in reality, documents and the foundation of the privilege and protection claims differ greatly. Some categories of documents and communications are by their authorship, exchange, or content transparently privileged or protected, while others merit more information. The exponential proliferation of ESI since Rule 26(b)(5)(A) was enacted in 1993 has rendered the current practices unworkable.

Although the Committee has retooled many rules to equip parties, counsel, and the courts to address discovery issues related to ESI, Rule 26(b)(5) largely has been left behind. And despite

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[5] Specifically, Fed. R. Civ. P. 26(b)(5)(A) provides:

> **(5)** Claiming Privilege or Protecting Trial-Preparation Materials.
> **(A)** *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:
> **(i)** expressly make the claim;
> **(ii)** describe the nature of the documents, communications or tangible things not produced or disclosed−and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

[6] *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 159 comment 10.h (2018) ("[T]he precise type and amount of information required to meet the general standard set forth in Rule 26(b)(5)(A)(ii) varies among courts…").

[7] *See* Hon. John M. Facciola & Jonathan M. Redgrave, ASSERTING AND CHALLENGING PRIVILEGE CLAIMS IN MODERN LITIGATION: The Facciola-Redgrave Framework, 4 FED. CTS. L. REV. 19 (2010) ("The authors submit that the majority of cases should reject the traditional document-by-document privilege log in favor of a new approach that is premised on counsel's cooperation supervised by early, careful, and rigorous judicial involvement."); *see also Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 251, 265 (D. Md. 2008) (emphasis added):

> In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made regarding the appropriateness of the privilege/protection asserted without resorting to extrinsic evidence or *in camera* review of the documents themselves. *Few judges find that the privilege log is ever sufficient to make the discrete fact-findings needed to determine whether a privilege/protection was properly asserted and not waived.*

the 1993 Committee Note to Rule 26(f) regarding flexibility with respect to privilege logging,[8] rulemaking is required to provide guidance about optional methods due to the continued adherence to inflexible, archaic standards.

Adopting the Proposed Amendments would enhance efficiency and expedite litigation by enabling parties to work collaboratively and creatively to avoid needless costs and disputes, saving judicial resources. The Proposed Amendments would also permit the parties to develop new and emergent technologies, including technology applications that automatically identify privileged documents and ESI, and extracting information for automated logging. Finally, the Proposed Amendments would bring uniformity to the best practices that have developed in many federal courts pursuant to local rules and pilot programs.

## III. CURRENT PROCUDRES GOVERNING PRIVILEGE LOGS ARE OVERBURDENSOME, DISPROPORTIONAL, AND OFTEN UNHELPFUL

### A. Document-by-Document Privilege Logs are Very Time Consuming and Expensive to Produce.

Indiscriminate document-by-document privilege logs are one of the most labor-intensive, burdensome, costly and wasteful parts of pretrial discovery in civil litigation,[9] and many courts have interpreted current rules 26(b)(5)(A) and 45(e)(2) as making document-by-document logs the default form. The costs associated with creating traditional privilege logs have become a significant - possibly the largest - category of pretrial spending for litigants in document-intensive litigation.[10] The Sedona Conference has recognized that "[i]n complex litigation, preparation of [privilege] logs can consume hundreds of thousands of dollars or more. . . ."[11] Typically, preparing such logs requires lawyers to identify potentially privileged documents, conduct extensive research into the elements of each potential claim, make and then validate initial privilege calls, and then construct a privilege log describing each withheld document

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[8] FED. R. CIV. P. 26(b)(5) advisory committee's note to 1993 amendment:

> The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described categories.

[9] *See* New York State Bar Association, REPORT OF THE SPECIAL COMMITTEE ON DISCOVERY AND CASE MANAGEMENT IN FEDERAL LITIGATION, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document-intensive case, especially one with many e-mails and e-mail strings.").

[10] *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 155 ("Privilege logging is arguably the most burdensome and time-consuming task a litigant faces during the document production process.").

[11] *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 103; *see also* New York State Bar Association, *Report of the Special Committee on Discovery and Case Management in Federal Litigation*, at 73 (June 23, 2012) ("Most commercial litigation practitioners have experienced the harrowing burden the privilege log imposes on a party in a document intensive case, especially one with many e-mails and e-mail strings.").

without disclosing privileged or protected information. In jurisdictions where all emails in an email chain must be separately itemized on a privilege log, the degree of difficulty is increased many fold.[12] For example, metadata that can be used to populate the log entry automatically, e.g., author and recipients, is available only for the most recent email in a chain, and information for all other emails in the chain must be manually entered on the log. Even in cases with relatively modest quantities of discoverable documents and ESI, this labor-intensive procedure results in substantial costs.[13]

### B. Document-by-Document Privilege Logs Are, By Their Nature, Rarely Proportional to the Needs of the Case.

The resources devoted to identifying, logging and resolving disputes about privileged documents are often out of proportion to the needs of the case, particularly when the parties do not have or anticipate disputes over withheld documents. It is a rare case in which privileged documents, whether the claim is sustained or overruled, are introduced as evidence and have any discernible effect on the outcome of the litigation. Although there are exceptional instances where documents withheld as privileged are central to resolving the issues, the current default of "boiling the ocean" is unjustified when rules with sufficient flexibility (such as the Proposed Amendments) would enable targeted identification and adjudication when appropriate.

A proportional approach is perhaps even more important for non-parties facing the prospect of producing a privilege log pursuant to Rule 45. While Rule 45 makes clear that non-parties should be entitled to greater protection against undue burdens, it fails to provide it. There is no current mechanism in Rule 45 to facilitate scaled and proportional approaches to privilege logs by non-parties.

The logic behind revising Rule 45 is highlighted by the January 2020 release of The Sedona Conference's revised Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition (Public Comment Version).[14] The document specifically notes the need to consider alternative logging:

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[12] *See In re Universal Serv. Fund Tel. Billing Practices Litig*., 232 F.R.D 669, 674 (D. Kan. 2005). The court in *In re Universal Serv. Fund* recognized:

> requiring each e-mail within a strand to be listed separately on a privilege log is a laborious, time-intensive task for counsel. And, of course, that task adds considerable expense for the clients involved; even for very well-financed corporate defendants such as those in the case at bar, this is a very significant drawback to modern commercial litigation. But the court finds that adherence to such a procedure is essential to ensuring that privilege is asserted only where necessary to achieve its purpose.

*Id.*

[13] *See First Horizon Nat'l Corp. v. Houston Cas. Co*., No. 2:15-cv-2235-SHL-dkv, 2016 WL 5867268 at *6 (W.D. Tenn. Oct. 5, 2016) ("[p]laintiffs assert that production of a document-by-document privilege log would cost them $150,000 and take three to four weeks.") (plaintiff's log in *First Horizon* was to describe 5,941 documents, a cost of $25.25 per entry. ECF No. 186, Plaintiff's Opposition).

[14] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas.

> Practice Pointer 15. Rule 45(e)(2)(A) and (B) require a non-party subpoena recipient to, among other things, expressly make a "claim [of privilege] and the basis for it" and set forth a process for the handling of the inadvertent production of such information. The party issuing a subpoena should seek to minimize the burden of privilege claims on the non-party. For example, the issuing party and the non-party may agree to exclude some potentially privileged and protected information from the subpoena based upon dates, general topics, or subjects. To minimize the burden on the non-party, the subpoenaing party, where appropriate, should agree to alternatives to the traditional privilege log.[15]

### C. Document-by-Document Privilege Logs Frequently Fail to Assist Parties or Courts to Resolve Privilege Issues.

Privilege disputes are most often collateral to the issues in the case and often involve form over substance. Unfortunately, document-by-document privilege logs are frequently of marginal value to the requesting party and the court in assessing the privilege claims, despite the time, effort and money spent preparing them.[16] Privilege logs also rarely 'enable other parties to assess the claim' as contemplated by Rule 26(b)(5). Nor do the logs achieve the other goal of the rule - to 'reduce the need for *in camera* examination of the documents.' "Indeed, many judges will acknowledge that resolving privilege challenges almost always requires the *in camera* examination of the documents, and the logs are of little value when trying to determine the accuracy of either the factual or legal basis upon which documents are being withheld from production. In short, the procedure and process for protecting privileged ESI from production is broken."[17]

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[15] *Available at* https://thesedonaconference.org/publication/Commentary_on_Non-Party_Production_and_Rule_45_Subpoenas at p.43.

[16] *TheSedona Principles*, *supra* note 6, at p. 81 ("[o]ften, the privilege log is of marginal utility."); *id at* p. 159, Comment 10.h ("[T]he precise type and amount of information required to meet the general standards set forth in Rule 26(b)(5)(A)(ii) varies among courts, and frequently fails to provide sufficient information to the requesting party to assess the claimed privilege."); *Auto. Club of New York, Inc., v. Port Authority of New York and New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) ("With the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.") (internal citation omitted); *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 155. ("[T]he deluge of information and rapid response time required by pressing dockets have forced attorneys into using mass-production techniques, resulting in logs with vague narrative descriptions. In some instances, the text of privilege logs 'raise[] the term "boilerplate" to an art form, resulting in the modern privilege log being as expensive to produce as it is useless.'").

[17] *The Sedona Conference, Commentary on Protection of Privileged ESI*, *supra* note 4, at 103 (internal citation omitted). Judge Paul Grimm previously recognized the current incentive for collateral disputes:

> Requesting parties also know of the limited utility of privilege logs (for they likely have served similar privilege logs in response to their adversary's discovery requests), and thus, when they receive the typical privilege log, they are wont to challenge its sufficiency, demanding more factual information to justify the privilege/protection claimed. This, in turn, is often met with a refusal from the producing party, and it does not take long before a motion is pending, and the court is called upon to rule on the appropriateness of the assertion of privilege/protection, often with the producing party's "magnanimous" offer to produce the documents withheld for *in*

### D. Disparate Local Rules Regarding Privilege Logs Demonstrate the Need for Amendments to the FRCP that Update and Unify Privilege Log Practices.

In the absence of new national rulemaking many district courts across the country have attempted to address the problems with Rules 26 and 45 by adopting local rules and standing orders that provide for limits on logging requirements and endorse alternative methods of privilege logging.[18] While some of these rules reduce the burdens in creating logs, others create new burdens. And while some are consistent with each other, others are in conflict.[19] But all indicate a need to modernize the current regime and address procedural inconsistencies that result in uncertainty and the consequential inability to predict and meet differing logging procedures. Here is a sampling:

- In the District of Connecticut, Local Rule of Civil Procedure 26(e) reduces the scope of privilege logs by providing that a party need not prepare a privilege log for "written or electronic communications between a party and its trial counsel after commencement of

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> *camera* review. *In camera* review, however, can be an enormous burden to the court, about which the parties and their attorneys often seem to be blissfully unconcerned.

*Victor Stanley, Inc.,* 250 F.R.D. at 265.

[18] Even in jurisdictions where courts have not undertaken larger-scale efforts to address the problem of logging privileged documents in the digital age, a growing number of courts have recognized the appropriateness of categorical privilege logs based on the burden imposed by individual logs and lack of benefit they provide. *See, e.g., Asghari-Kamrani v. U.S. Auto. Ass'n*, No. 2:15-cv-478, 2016 WL 8243171, at *1– 4 (E.D. Va. Oct. 21, 2016) (finding party's categorical privilege log complied with 26(b)(5) and holding that requiring plaintiffs to separately list each of the 439 documents categorically logged would be "unduly burdensome for no meritorious purpose"); *Companion Prop. and Cas. Ins. Co. v. U.S. Bank Nat'l Ass'n*, No. 3:15-cv-01300, 2016 WL 6539344 (D.S.C. Nov. 3, 2016); *Manufacturers Collection Co., LLC v. Precision Airmotive*, *LLC*, No. 3:12-CV-853-L, 2014 WL 2558888, at *4-5 (N.D. Tex. June 6, 2014) (permitting categorical privilege log when a "document-by-document listing…. would be unduly burdensome" and provide "no material benefit to Precision in assessing whether a privilege …. claim is well grounded."); *First Horizon National Corp.*, 2013 WL 11090763, at*7 (permitting categorical privilege log).

[19] LCJ has conducted a review of local rules and guidelines pertinent to the scope, form and content of privilege logs. The review reflects the disparate approaches among districts. Although pertinent local district court rules can be classified in a number of ways, LCJ has identified four general groupings that have emerged:

> (1) Federal district courts in 28 states do not address Rule 26(b)(5)(A)(ii) in their local rules. Accordingly, each judge and magistrate may apply the current rule in accordance with their interpretation of whether a document-by-document log is required and whether the content of the log complies with the (A)(ii) standard.
>
> (2) Local district court rules or guidelines in 13 jurisdictions expressly follow the (A)(ii) standard and either require document-by-document logs or document-by-document logs are the *de facto* default.
>
> (3) The local rules or guidelines in two jurisdictions emphasize the importance of addressing privilege logs at the parties' 26(f) discovery conference.
>
> (4) Ten jurisdictions emphasize alternatives to document-by-document logging, specifically exclude certain categories of attorney-client privileged communications and trial preparation materials from logging, and, in several instances mandate discussion of privilege logs at the 26(f) conference, but generally do not expressly address or modify the 26(A)(ii) standard.

the action and the work product material created after commencement of the action."[20] The local rule further provides that "[t]he parties may, by stipulation narrow or dispense with the privilege log requirement, on the condition that they agree not to seek to compel production of documents that otherwise would have been logged."[21]

- In the Southern and Eastern Districts of New York, the Committee Note to Local Rule 26.2 recognizes that, with the proliferation of emails and email chains, traditional privilege logs are expensive and time-consuming to prepare. To address the problem, the Committee Note states that parties should cooperate to develop efficient ways to communicate the information required by Local Rule 26.2 without the need for a traditional log and otherwise proceed in accordance with Rule 1 to ensure a just, speedy and inexpensive termination of the case. The rule states, "For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form."[22] The Western District of New York has adopted the same local rule.[23]

- The District of Colorado's ESI Discovery Guidelines specifically addresses the escalating costs of document-by-document privilege logs, urges counsel to confer in good faith "in an effort to identify types of document (*e.g.*, email strings, email attachments, duplicates, or near-duplicates, communications between counsel and a client after litigation commences) that need not be logged on a document-by-document basis pursuant to FED. R. CIV. P. 26(b)(5)(A) or at all, if the parties so agree. "The end-result should be a more useful log for a narrowly defined range of documents, thereby minimizing the need for judicial intervention."[24]

- The Southern District of Florida's detailed local rule both expands the requirements for logging while also exempting post-complaint materials:

> (i) The party asserting the privilege shall in the objection to the interrogatory or document demand, or subpart thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

[20] D. Conn. Civ. R. 26(e).

[21] *Id.*

[22] S.D.N.Y. Civ. R. 26.2(c).

[23] W.D.N.Y. Civ. R. 26(d)(4).

[24] D. Colo. Guidelines Addressing the Discovery of Electronically Stored Information 5.1.

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(a) For documents or electronically stored information, to the extent the information is readily obtainable from the witness being deposed or otherwise: (1) the type of document (e.g., letter or memorandum) and, if electronically stored information, the software application used to create it (e.g., MS Word, MS Excel); (2) general subject matter of the document or electronically stored information; (3) the date of the document or electronically stored information; and (4) such other information as is sufficient to identify the document or electronically stored information for a subpoena duces tecum, including, where appropriate, the author, addressee, and any other recipient of the document or electronically stored information, and, where not apparent, the relationship of the author, addressee, and any other recipient to each other;

(b) For oral communications: (1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (2) the date and the place of communication; and (3) the general subject matter of the communication.

(C) This rule requires preparation of a privilege log with respect to all documents, electronically stored information, things and oral communications withheld on the basis of a 44 claim of privilege or work product protection except the following: written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action.[25]

- District of New Mexico Local Rule 26.6 provides 21 days to challenge entries on a privilege log.[26]

- The District of Maryland promulgated "Principles for the Discovery of Electronically Stored Information in Civil Cases" recognizing that discovery of ESI is a source of "cost, burden, and delay" and instructing parties to apply the proportionality standard to all phases of ESI discovery.[27] The Principles contemplate conferral amongst the parties to

[25] S.D. Fla. R. 26.1(B) and (C).

[26] *See Sedillo Elec. v. Colorado Cas. Ins. Co.*, No.15-1172 RB/WPL, 2017 WL 3600729, at *7 (D.N.M. Mar. 9, 2017) (holding that a challenge to a privilege log is subject to Rule 26.6).

[27] District of Maryland Principles for the Discovery of Electronically Stored Information in Civil Cases 1.01 and 1.02.

determine whether categories of information may be excluded from logging and explore alternatives to document-by-document privilege logs.[28]

- The District of Delaware created a "Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI)" that contemplates the parties will confer to determine "whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged."[29]

- A judge in the Northern District of Ohio has a case management order stating: "Where the dispute involves claims of attorney-client privilege or attorney work product, it is not necessary, unless I order otherwise, to prepare and submit a privilege log." [30]

In parallel to such local rulemaking by federal districts, many state courts are also modernizing procedures for privilege logs. For example, the New York Commercial Division recognizes a preference for categorical privilege logs and requires the parties to meet and confer to discuss "whether any categories of information may be excluded from the logging requirement."[31] The Commercial Division guides parties to agree, where possible, to utilize a categorical approach to privilege designations.[32] To the extent the requesting party refuses to agree to a categorical approach in favor of a document-by-document privilege log, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log.[33]

Similarly, the New Jersey Complex Business Litigation Program has adopted a preference for the use of categorical designations in privilege logs to reduce the time and cost associated with document-by-document privilege log preparation.[34]

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[28] *Id.* 2.04(b).

[29] District of Delaware Default Standard for Discovery, Including the Discovery of Electronically Stored Information (ESI). Similarly, the Model Stipulated Order Regarding Discovery of Electronically Stored Information for Standard Litigation" in the Northern District of West Virginia clarifies that the use of a categorical privilege log is acceptable. ("Communications may be identified on a privilege log by category, rather than individually, if agreed upon by the parties or ordered by the Court.").

[30] Judge Carr Civil Cases - Case Management Preferences.

[31] *See* Rules of the Commercial Division of the Supreme Court [22 NYCRR] § 202.70, Rule 11-b.

[32] "The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs." *See id.*

[33] *Id*. at 11-b(2).

[34] N.J. R. 4:104-5(c).

## IV. AMENDING THE PRIVILEGE LOGGING RULES WOULD ENCOURAGE NATIONWIDE BEST PRACTICES AND DELIVER NEEDED PROCEDURAL UNIFORMITY

### A. Encouraging Meaningful Meet-and-Confers and Enabling Early Judicial Management Would Lead to Sensible Handling of Privilege Issues.

The 2006 Committee Notes to Rule 26(f) recommend that parties address issues concerning privilege during the Rule 26(f) conference. Unfortunately, the suggestion has been largely ignored, and the current practice appears to have been largely parties proceeding in silence at their own peril. At the same time, early discussions when the matter has not been fully framed for discovery could be counterproductive. The Proposed Amendments contemplate that the parties take the initiative in addressing and reaching agreement with respect to the scope, structure, content, and timing of submission of privilege logs at the appropriate time in each matter.[35] The discussion may be initiated at the parties' 26(f) initial conference and agreement finalized at a reasonable time preceding the commencement of document productions. The precise procedures agreed to is best incorporated in a court order. If agreement, in full or part, is not achieved, each party could submit its plan or disputed parts to the court for guidance and, if necessary, resolution. The objective of the parties' conference is to agree on procedures for providing sufficient information to assess privilege claims relating to information that is likely to be probative of claims and defenses and that is not facially subject to protection. Such agreements are likely to be proportional to the needs of the case and would reduce, if not eliminate, satellite litigation over collateral disputes regarding the sufficiency of privilege logs. If needed, court guidance regarding the parameters of the legal and factual contours of privilege as applied to the matter at the outset of discovery would get the parties heading in the right direction and reduce the burden on judicial resources including *in camera* review.

### B. Presumptive Exclusion of Certain Categories of Documents and ESI Would Improve the Effectiveness of Privilege Logs and Help Ensure Proportionality.

Some categories of documents and ESI are facially privileged or protected and can be excluded from logging. For example, absent extraordinary circumstances, communications between counsel and client regarding the litigation after the date the complaint is served can be excluded as clearly privileged or protected. Similarly, the Proposed Amendments contemplate that parties might agree that work product prepared for the litigation need not be logged in detail. Certain forms of communications, for example communications exclusively between in-house counsel or outside counsel to an organization, might be so clearly privileged that a simplified log merely identifying counsel as the exclusive communicants is needed. Express exclusions both reduces the burdens of reviews and logging and possible disputes regarding the scope of logging that arise when a party unilaterally excludes documents and ESI otherwise deemed relevant.

[35] The Proposed Amendments to Rules 26(b)(5(A) and 45(e)(2) do not expressly incorporate recommendations regarding the parties' meet and conferral process and the court's involvement when and if necessary. LCJ believes that Advisory Committee Notes are more appropriate for such recommendations and permit the flexibility required for parties to address issues as the case progresses.

### C. Flexible, Iterative and Proportional Approaches Are More Effective and Efficient than Document-by-Document Privilege Logging.

Although it is widely understood that tiered discovery can be an efficient way to focus attention on the most important documents and ESI, courts and parties have been slow to apply that concept to privilege logs. But just as not all documents are equally important to a case, so it is that not all documents withheld on the basis of privilege have the same value in the litigation. Whereas sampling and other procedures are employed to determine whether various categories of documents and ESI are sufficiently probative to warrant additional productions, so can iterative, proportional logging determine which privilege claims should be subject to greater scrutiny in the circumstances of the case. For example, certain claimed privileged documents or ESI may pertain to a mixture of privileged and business information that is probative and requires additional information to assess the claim. Providing initial logs with limited information, for example logs based on extracted metadata fields, permits the receiving party to focus on documents and ESI for which further information in needed to assess the privilege claims.[36] Similarly, well-structured categorical logging can include procedures for the receiving party to sample documents or ESI and receive document-by-document log entries for those documents to ascertain the sufficiency of the privilege claims for the category.

The 1993 Committee Notes to Rule 26(b)(5) recognize that detailed logging (i.e. document-by-document privilege logs) is appropriate when only a few items are being logged, but contemplate identification by category in other circumstances. Thus, even 25 years ago, as the current issues created by the volume of ESI were just beginning to emerge, the Committee recognized the benefit of categorical logs in the face of voluminous productions and claims of privilege. Unfortunately, the case law has largely missed the Committee's perspicacity. The time has come to expand this correct analysis into the Rule text.

Iterative logging prioritizes the most important areas of inquiry. This practical application of proportionality mirrors what courts and local rules have done to tier discovery that has been widely accepted as a means to reduce burdensome ESI discovery.[37] This approach also recognizes the reality that identifying and asserting privileges is an inherently difficult task[38] that

[36] The proposed amended rules substitute "understand" for "assess" which better reflects the intent of the initial identification and the concepts of flexible and iterative logging set forth herein.

[37] *See Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010) (citing The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 SEDONA CONF. J. 289 (2010), the court ordered parties in longstanding case to meet and confer on phasing of discovery "to ensure that discovery is proportional to the specific circumstances of this case, and to secure the just, speedy, and inexpensive determination of this action"). For examples of local rules and guidelines that encourage phasing discovery as a means to achieve proportionality, *see* Northern District of California *Guidelines for the Discovery of Electronically Stored Information*, (as a potential Rule 26(f) topic "where the discovery of ESI is likely to be a significant cost or burden"); Eastern District of Michigan *Model Order Relating to the Discovery of Electronically Stored Information*, Principle 2.01(4) ("the potential for conducting discovery in phases or stages as a method for reducing costs and burden").

[38] "The analysis of any privilege is… historical, common law based, and judge-made. The benefit of codification – uniform rules that apply on a national basis, the hallmark of the rest of the Federal Rules of Evidence – is lost. This

should not made even more cumbersome by a process proven to yield a higher number of disputes than resolutions.

### D. Prioritization of Privilege Claims Reduces the Need for Judicial Intervention.

By prioritizing the most important issues, categorical and iterative logging procedures reduce the number of privilege claims at issue between the parties. Under the Proposed Amendments, parties (and non-parties) would be empowered to address procedures for challenging and resolving challenges to claims of privilege. Such procedures could include meet-and-confers to address samples or categories of claims in which the producing party can provide additional information regarding the factual and legal bases of the claims(s) without detailed document logging. Such flexible procedures are sure to reduce the number of claims subject to motions to compel and adjudication of claims requiring *in camera* review.

### E. Amending the Rules Governing Privilege Logs Would Enhance Parties' and Courts' Ability to Identify Specious Claims.

Some defenders of document-by-document logging assert that categorical and iterative logging may provide incentive or ability to cheat the system by hiding important relevant documents and ESI behind invalid claims of privilege or protection. Setting aside that such conduct would violate the rules of ethics in every jurisdiction, the amendments proposed here contemplate meet-and-confers at the appropriate juncture, providing the opportunity for timely judicial involvement if necessary. Flexible rules such as the Proposed Amendments would allow for new mechanisms for accountability, such as the use of sampling procedures and a challenge process,[39] although all stakeholders must recognize that identifying and describing privileged information is an inexact science and there must be room for good faith disputes and error.[40] It is also important to note that document-by-document logs have often been seen as inherently flawed no matter how well-intended the parties and counsel involved[41]

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creates a dramatic need for [guidance] that must exhaustively cover all the relevant judicial opinions for differences in approach, from the most nuanced to outright contradiction of each other.… [This guidance should be] as thorough an analysis of the case law as can be imagined to lead judges and lawyers through a difficult forest." Hon. John M. Facciola, U.S. Magistrate Judge, U.S. District Court for the District of Columbia, *Forward* to 1 David M. Greenwald et al., *Testimonial Privilege*, at xxiii, xxiv (2015-2016 ed. 2015).

[39] The Facciola-Redgrave Framework, *supra* note 7, at 52-53.

[40] *See, e.g., Am. Nat'l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc'y of the United States*, 406 F.3d 867, 878 (7th Cir. 2005) (reversing district court's imposition of discovery sanctions based on the magistrate judge's determination that a significant number of sampled documents on defendant's log were not privileged and stating that "[defendant] was sanctioned for having too many good-faith differences of opinion with the magistrate judge. That is unacceptable. Simply having a good-faith difference of opinion is not sanctionable conduct."); *Ackner v. PNC Bank, Nat'l Ass'n*, No. 16-CV-81648, 2017 WL 1383950, at *3 (S.D. Fla. Apr. 12, 2017) ("[A]s there has been a good faith dispute [over privileged documents] . . . an award of costs and attorney's fees would be unjust."); *Rogers* at *3 ("[B]ecause Defendants put forth a cogent argument, supported by caselaw, that the [relevant document] was protected by the attorney-client privilege and work product doctrine, an award of costs and fees is inappropriate.").

[41] *See, e.g., Victor Stanley, Inc.*, 250 F.R.D. at 264-65 (noting limitations and challenges to privilege logs). *See also* The Facciola-Redgrave Framework, *supra* note 7, at 19 ("The volume of information produced by electronic

### F. Amending the Rules Would Provide an Opportunity to Include a Helpful Cross-Reference to Federal Rules of Evidence 502(d) and 502(e).

Rule 502 of the Federal Rules of Evidence is one of the most beneficial yet least used tools for an improved privilege log process because it protects all parties from inadvertent waivers. One of the main drivers for the rule's adoption was the recognition that "the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information."[42] Unfortunately, many observers have recognized that the rule is underutilized in practice.[43] An explicit cross-reference to FRE 502, such as that included in the Proposed Amendments, would improve the handling of privilege log issues by increasing awareness among practitioners and providing an important roadmap for its use.

## V. CONCLUSION

Rules 26(b)(5)(A) and 45(e)(2) establish a *de facto* default obligation to prepare document-by-document privilege logs. Notwithstanding the 1993 Committee Note suggesting that other

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discovery has made the process of reviewing that information, to ascertain whether any of it is privileged from disclosure, so expensive that the result of the lawsuit may be a function of who can afford it. The volume also threatens the ability to accurately identify and describe relevant and privileged documents so that the system of claims and adjudication teeters on the brink of effective failure."). Similarly, any process must recognize that the obligation to protect client confidences necessarily and typically yields initially conservative calls and over-inclusion of documents in the privilege net in large document productions *Cf. American Nat. Bank and Trust Co. of Chicago*, 406 F.3d at 878-79 (Because privileged attorney-client communications are "worthy of maximum legal protection, it is "expected that clients and their attorneys will zealously protect documents believed, in good faith, to be within the scope of the privilege.") (internal quotation omitted).

[42] U.S. Judicial Conference's Letter to Congress on Evidence Rule 502 (Sept. 26, 2007). *See also* A BILL TO AMEND THE FEDERAL RULES OF EVIDENCE TO ADDRESS THE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE, U.S. Rep. No. 110-264, at 2–3 (Feb. 25, 2008):

> In sum, though most documents produced during discovery have little value, lawyers must nevertheless conduct exhaustive reviews to prevent the inadvertent disclosure of privileged material. In addition to the amount of resources litigants must dedicate to preserving privileged material, the fear of waiver also leads to extravagant claims of privilege, further undermining the purpose of the discovery process. Consequently, the costs of privilege review are often wholly disproportionate to the overall cost of the case.

[43] A 2010 survey of federal magistrate judges found that "[a]lmost 6 in 10 respondents…indicated that the parties rarely or never employ FRE 502(d)." Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure, 11 SEDONA CONF. J. 201, 212 (Fall 2010). This level of awareness may not have changed much in the intervening years: "Despite the obvious benefits of agreeing to a Rule 502 order, I have found that the bar in general is largely uninformed about the rule and what it offers. So, to avoid problems down the line, the standard discovery order that I issue contains a Fed. R. Evid. 502(d) order that protects them automatically from inadvertent waiver of these important protections." Hon. Paul W. Grimm, District Judge, U.S. District Court for the District of Maryland, *Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases*. 51 Akron L. Rev. 721, 739 (2017). *See also Arconic Inc. v. Novelis Inc.,* No. 17-1434, 2019 WL 911417 at *3 (W.D. Pa. Feb. 26, 2019) for a similar example of 'making the horse drink' approach ("[t]he court's model Rule 26(f) report adopts Rule 502(d) as the default standard and provides a model order in Local Rule 16.1. An overwhelming majority of parties in civil cases in this district choose the default standard and a Rule 502(d) order is entered.").

procedures might be employed, this entrenched default remains by far the common expectation and practice. Local districts have embraced alternatives resulting in a "swiss-cheese" approach to privilege logging that defies the Rule's goal of uniformity. The status quo puts substantial burdens on the parties, non-parties, and the judiciary because expensive and ineffective logs create collateral disputes concerning the sufficiency of logs without providing the information necessary to resolve them. In light of the 2015 FRCP amendments and consistent with the spirit of those amendments, the time is ripe for the Committee to replace the default logging obligation with a modern approach such as the Proposed Amendments that encourages the parties to devise proportional and workable logging procedures while facilitating timely judicial management where necessary to avoiding later disputes. Doing so would reduce both the burdens on the parties and the court while addressing the continual frustration that document-by-document logs seldom, if ever, "enable of the parties [and the court] to assess the claim[s]."

**Attachment A: Proposed Amendment to Rule 26(b)(5)**

(5) *Claiming Privilege or Protecting Trial-Preparation Materials*

(A) *Information Withheld*: When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party, unless otherwise agreed to by the parties or ordered by the court, must:

(i) expressly make the claim; and
(ii) furnish information, without revealing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter, to enable other parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

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

**Attachment B: Proposed Amendment to Rule 45(e)(2)**

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material, unless otherwise agreed to or ordered by the court, must:

(i) expressly make the claim; and

(ii) furnish information, without disclosing information itself privileged or protected, by item, category, or as otherwise that is reasonable and proportional to the needs of the matter that will enable the parties to understand the scope of information not produced or disclosed and the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

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

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***VIA* EMAIL**

October 15, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Submission to Advisory Committee on Civil Rules in Support of Examining Rulemaking Regarding Privilege Logs

Dear Ms. Womeldorf:

I write to encourage and support the Advisory Committee's examination of rulemaking regarding Federal Rule of Civil Procedure 26(b)(5) and Federal Rule of Civil Procedure 45(e)(2).[1] In short, I believe that such examination is needed to address inconsistent application of the current rules and will lead to amended rules that would provide better guidance for parties, counsel, and courts with respect to the identification of documents, ESI, and information that are withheld from production on the basis of a privilege or protection from discovery.

I am currently the Managing Partner of Redgrave LLP, a law firm founded in 2010 that specializes in e-discovery, information governance, data protection, and data privacy and provides legal counsel to its clients on those matters. Chambers USA has ranked Redgrave LLP as the only top tier (Band 1) law firm in America in the areas of E-Discovery and Information Governance. Our practice includes, inter alia, managing document and privilege reviews, principally for corporate clients in complex litigation, and representing clients in disputes regarding privilege logs and privilege claims. Since completing my appellate clerkship in 1992, I have worked at a number of national law firms and I have been involved in civil litigation

[1] On August 4, 2020, Lawyers for Civil Justice ("LCJ") submitted a suggestion for rulemaking to the Advisory Committee "Privilege and Burden: The Need to Amend Rules 26(b)(5)(A) and 45(e)(2) to Replace 'Document-by-Document' Privilege Logs with More Effective and Proportional Alternatives. By way of disclosure, my colleague Ted Hiser and I participated in the preparation of the August 4, 2020 LCJ submission.

across a wide variety of claims, parties, industries, and jurisdictions. In this context, I have personal experience with of the challenges presented by privilege logs, including the burdens of privilege reviews and preparing privilege logs, the challenges presented by receiving insufficient privilege logs, as well as the diversion of judicial and party resources to address unnecessary collateral disputes about the sufficiency of privilege logs and privilege claims.

Based on my personal (and our firm's experience), I have observed:

1. Although the Advisory Committee Note to the 1993 adoption of Rule 26(b)(c) suggested that logging privileged and work product protected materials by category where large numbers of documents are at issue is appropriate, the *de facto* default in many, if not most, courts is document-by-document logs. Indeed, the current Rule facially implies the need for document-by-document logs.[2]
2. Judges (and parties) consistently find that document-by-document logs do not meet the 26(b)(5)(ii) standard to "enable other parties to assess the claim."[3]
3. The burdens – time, legal personnel, and costs – of privilege reviews and preparing document-by-document logs for all withheld documents are substantial, often the costliest component of document productions.
4. Those burdens have grown exponentially with the explosion of electronically stored information ("ESI") in terms of both the quantity of information at issue and the complexities that accompany new forms and structures of ESI that differ from traditional paper documents.[4]
5. Quantitatively while the burdens are greatest for entities in complex matters that have large volumes of documents subject to production they are proportionally equally as burdensome for smaller businesses and individual persons and in less complex matters.
6. The challenge to create extensive document-by-document logs while protecting privilege often yields robotic and insufficient log entries that fail to elucidate enough information to assess the claims.

[2] Rule 26(b)(5)(A) requires that the party must (i) "expressly make the claim" and (ii) "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Taken together, these requirements appear to mandate that a claim of privilege or protection must be made for each document or communication withheld and a description prepared for each. And even though the 1993 Advisory Committee Note opens a door to alternatives, there is a meaningful difference as to the important an effect of text in a rule versus what appears in an Advisory Committee Note.

[3] Identifying and supporting privilege claims, particularly (but not exclusively) for corporations and other entities, involve analyzing complex privileged relationships between in-house and outside counsel, executives, managers, employees, advisors, consultants, agents, and experts. Describing such relationships for each withheld document (or for each message in a thread of emails) is unreasonable, if not impossible as a practical matter in even modest-sized matters.

[4] For example, emails and other serial digital forms of messaging, are often linked in chains, and pose problems in how to log where there are different authors and recipients to discrete messages in the chain. Metadata and "hidden" or embedded text not readily apparent on the face of a document must accessed and assessed for privilege.

7. Motion practice regarding the sufficiency of logs and broad challenges to privilege claims increase the risk of waiver and impose additional burdens on the court and parties. The result is often serial orders to "re-do" logs that still fail to meet the expectations of opposing parties or the court. And parties often seek *in camera* review of challenged documents.

In sum, traditional document-by-document privilege logs, in most cases, are unnecessary, waste resources, and are contrary to the intent of civil rules as stated in Rule 1 – "to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition, the current text of the rule itself ("expressly make the claim") sets up a paradigm that seemingly leaves little room for the express consideration of proportionality being a guide as to what withheld documents need to be identified, and the manner of identification, notwithstanding the 1993 Advisory Committee Note and best practices guidance.

In our experience, sophisticated parties and their counsel often can and do negotiate and devise alternatives to document-by-document logs where counsel have a requisite understanding of technology and act in good faith and with due diligence to provide a proportional solution that meets the needs of the case (on all sides). And courts can and do provide guidance and support the parties in reaching reasonable accords. The withholding party and their counsel, if diligent, has the knowledge of their documents, privileged relationships, and applicable privilege law to employ processes and procedures to make reasonable and defensible claims and, absent evidence to contrary, can be granted deference in asserting claims. The parties can devise methods, including the use of technology, to provide notice of withholding, and procedures for challenging claims for documents and communications that are proportional to the needs of their case. Such procedures include exclusions of defined categories of documents and communications from logging, categorical logs, metadata-based logging of ESI, sampling procedures, and iterative logging.[5] The application of these practices is, however, idiosyncratic and this results in very different experiences in different jurisdictions.

I recognize that the issue of privilege logging has been raised in the past as to whether further amendments to the language of Rules 26(b)(5)(A) and 45(e)(2). In drafting this letter submission, I reviewed the Agenda Book for the October 16, 2020 meeting of the Advisory Committee, including Steven Gensler's October 13, 2008 memorandum. Professor Gensler's 2008 memorandum posited three basic questions regarding compliance with Rule 25(b)(5): "(1) What must be furnished in order to meet is requirements?; (2) When must that materials be furnished"; and (3) What is the consequence of failing to timely furnish the requested information?" I also reviewed Professor Rick Marcus' October 11, 2008 memorandum that was included in the Agenda Book.

[5] Iterative logging refers to procedures whereby initial categorical or metadata logs are employed and, if issues arise concerning the basis of claims regarding specific categories or groups of documents, detailed document-by-document logs are prepared for samples or groups of documents.

As detailed in the LCJ submissions, and based on my anecdotal research and experience, there are an increasing number of privilege challenges arising today, many of which are rooted in the insufficiency of a privilege logging process that, as Professor Gensler notes, evolved to meet the rule language requirements but is not actually dictated by the text of Rule. Indeed, I respectfully submit that the experience of the last twelve years, especially in the world of ever-evolving ESI and increasing volumes, leads to a conclusion that all three aspects identified by Professor Gensler in 2008 and the observations of Professor Marcus are all apt should be examined in more depth now. While the "manner of logging" and the timing for providing additional information fit together within the concerns detailed in more depth in the LCJ submission, the proper and consistent application of Federal Rule of Evidence 502 in the context of withholding (and logging) privileged information is also worthy of additional study as it relates to the "consequence" question. And while the discussion in the Agenda Book for the October 2020 meeting notes that the advent of new technologies may be a potential solution to the burdens posed, there are inherent limits to the available technologies that must be understood[6] and the text of the rules need to be assessed in any event to ensure that the use of any technological solutions will be sufficient to meet the objectives of the rules (and be accepted by courts).[7]

In making this personal submission to encourage further consideration of potential amendments to Rules 26(b)(5)(A) and 45(e)(2) at this time, I am mindful of the fact that drafting the language of amended rules to address these issues is challenging. That said, looking back at the efforts to craft language that was ultimately adopted in the 2006 and 2015 civil rules amendments, there were a multitude of ideas and drafts that were examined, refined, and revised before the final language emerged. During those incubation periods, additional study as well as submissions from the bench and bar yielded helpful suggestions that helped lead to the ultimate formulations. While I cannot predict the path for this rulemaking endeavor, I respectfully submit that we have reached a time to undertake that serious effort to be ahead of the curve where four or five years from now an amended rule can meet the needs of a world with even more varieties (and volumes) of ESI will be generated on a daily basis.

Very truly yours,

Jonathan M. Redgrave

[6] For example, while a "metadata" log can provide basic "objective" information that is recorded in a computer file accompanying a file (which may or may not be accurate), without more such a log does not address the basis for the claims being asserted to justify withholding the document or file from production.

[7] I am wary of presuming that any existing or yet-to-be developed technologies will be fully able to provide a complete solution to the challenges and issues that have been identified.

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August 7, 2020

Dear Members of the Advisory Committee:

I attach a proposed Rule 5.3, which would govern the sealing and unsealing of court records in civil cases. Every federal Circuit recognizes a strong presumption of public access to court records, under which any sealing of documents or parts of documents must be narrowly tailored to an overriding interest, such as the protection of trade secrets or medical privacy. This presumption of openness (founded in both the common law and the First Amendment[1]) is needed so the public can supervise the public court system, and better understand how courts operate.

More than 80 U.S. Districts have created local rules governing sealing, and this proposal borrows heavily from those local rules. But a uniform rule governing sealing is needed: despite these local rules and the largely unanimous case law disfavoring sealing, records are still sometimes sealed erroneously, for reasons that fall short of what the public access precedents require. This leads to inconsistencies and uncertainties in the justice system—parties in districts where there is no local rule governing sealing, for instance, might think they are entitled to more privacy than the case law permits.

And having a clear and detailed Rule would be especially helpful here because sealing decisions are often made without adversary briefing. Though sealing restricts the public's rights of access, members of the public are not always available to intervene in such cases.

The Reporters Committee for Freedom of the Press and the Electronic Frontier Foundation also sign on to the proposal. The proposal itself was written by me, and by my invaluable student coauthor, Jennifer Wilson; the Reporters Committee contributed to the draft.

Sincerely,

Eugene Volokh

Eugene Volokh

[1] Every Circuit that has considered the question has held that the right of access is protected by the First Amendment as well as the common law. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1061 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983)*Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984).

[Aug. 6, 2020 draft, by Eugene Volokh (volokh@law.ucla.edu) and Jennifer Wilson; the Reporters Committee for the Freedom of the Press and the Electronic Frontier Foundation also endorse this proposal.]

**F.R.C.P., Proposed Rule 5.3**

(a) PRESUMPTION OF PUBLIC ACCESS TO COURT RECORDS**.** Unless the court orders otherwise, all documents filed in a case shall be open to the public (except as specified in Rule 5.2 or by statute).[1] Motions to file documents under seal are disfavored and discouraged.[2] Redaction and partial sealing are forms of sealing, and are also governed by this rule, except insofar as they are governed by Rule 5.2. [Proposed Advisory Committee Note: This rule is intended to incorporate the First Amendment and common-law rights of access, and to provide at least as much public access as those rights currently provide.]

(b) REQUIREMENTS FOR SEALING A DOCUMENT. At or before the time of filing,[3] any party may move to seal a document in whole or in part.

(1) Any party seeking sealing must make a good faith effort to seal only as much as necessary to protect any overriding privacy, confidentiality, or security interests.[4] Sealing of entire case files, docket sheets,[5] or entire documents[6] is rarely appropriate. When a motion to seal parts of a document is granted, the party filing the document must file a publicly accessible redacted version of the document.[7]

(2) If the interests justifying sealing are expected to dissipate with time, the party seeking sealing must make a good faith effort to limit the sealing to the shortest necessary time, and the court must seal the document for the shortest necessary time.[8]

(3) There is an especially strong presumption of public access for court opinions, court orders,[9] dispositive motions,[10] pleadings,[11] and other documents that are relevant or material to judicial decisionmaking or prospective judicial decisionmaking.[12]

(4) Because sealing affects the rights of the public, no document filed in court may be sealed in whole or in part merely because the parties have agreed to a motion to seal or to a protective order, or have otherwise agreed to confidentiality.[13]

(c) RETROACTIVE SEALING. Sealing of a document that has already been openly filed is allowed only in highly unusual circumstances, such as when information protected under Rule 5.2 is erroneously made public.[14]

(d) PUBLIC FILING OF MOTIONS TO SEAL. A motion to seal must be publicly filed[15] and must include a memorandum that:

(1) Provides a general description of the information the party seeks to withhold from the public.[16]

(2) Demonstrates compelling reasons to seal the documents,[17] stating with particularity[18] the factual and legal reasons that secrecy is warranted and explaining why those reasons overcome the common law and First Amendment rights of access.[19]

(3) Explains why alternatives to sealing, such as redaction, are inadequate.[20]

(4) States the requested duration of the proposed seal.[21]

(d) NOTICE AND WAITING PERIOD.

(1) Motions to seal shall be posted on the court's website, or on a centralized website maintained by several courts, within a day of filing.[22]

(2) The court shall not rule on the motion until at least 7 days after it is posted, so that objections may be filed by parties or by others,[23] unless the motion explains with particularity why an emergency decision is required.

(e) ORDERS TO SEAL. If a court determines that sealing is necessary, it must state its reasons with particularized findings supporting its decision.[24] Orders to seal must be narrowly tailored to protect the interest that justifies the order.[25] Orders to seal should be fully public except in highly unusual circumstances;[26] and if they are in part redacted, any redactions should be narrowly tailored to protect the interest that justifies the redaction.

(f) UNSEALING, OR OPPOSING SEALING.

(1) Sealed documents may be unsealed at any time on motion of a party or any member of the public, or by the court sua sponte, after notice to the parties and an opportunity to be heard, without the need for a motion to intervene.[27]

(2) Any party or any member of the public may object to a motion to seal, without the need for a motion to intervene.[28]

(3) The motion to unseal or the objection to a motion to seal shall be filed in the same case as the sealing order or the motion to seal, regardless of whether the case remains open or has been closed.[29]

(4) All sealed documents will be deemed unsealed 60 days after the final disposition of a case,[30] unless the seal is renewed.

(5) Any motion seeking renewal of sealing must be filed within 30 days before the expected unsealing date,[31] and the moving party bears the burden of establishing the need for renewal of sealing.[32]

[END]

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[1] *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (noting a "general right to inspect and copy public records and documents, including judicial records and documents"); *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) ("the presumption of access to judicial records is secured by two independent sources: the First Amendment and the common law"); *Hartford Courant v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (noting that the public and press have a "qualified First Amendment right to attend judicial proceedings and to access certain documents"); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) ("the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings"); *Virginia Dept. of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004) ("The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment"); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1177 (6th Cir. 1983) ("the First Amendment and the common

law do limit judicial discretion" "to seal court documents"); *Matter of Continental Illinois Securities Litigation*, 732 F.3d 1302, 1308-09 (7th Cir. 1984) (the public has a First Amendment and common law right of access to judicial records in civil cases); U.S. Ct. of App. 7th Cir. IOP 10 ("Except to the extent portions of the record are required to be sealed by statute or a rule of procedure, every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed"); U.S. Ct. of App. 9th Cir. R. 27-13(a) ("This Court has a strong presumption in favor of public access to documents . . . the presumption is that every document filed in or by this Court (whether or not the document was sealed in the district court) is in the public record unless this Court orders it to be sealed").

[2] D. Utah Civ. R. 5-3 ("The records of the court are presumptively open to the public. The sealing of pleadings, motions, memoranda, exhibits, and other documents or portions thereof . . . is highly discouraged"); E.D. Va. L. Civ. R. 5 ("Motions to file documents under seal are disfavored and discouraged"); W.D. Tex. CV-5.2 ("Motions to keep pleadings, motions, or other submissions requesting or opposing relief from the court under seal are disfavored"); E.D. Okla. L. Civ. R. 79.1 ("It is the policy of this Court that sealed documents, confidentiality agreements, and protective orders are disfavored"); W.D. Mich. R. 10.6; *see also* W.D.N.C. L Civ. R. 6.1 ("To further openness in civil case proceedings, there is a presumption under applicable common law and the First Amendment that materials filed in this Court will be filed unsealed"); C.D. Ill. R. 5(10) ("The Court does not approve of the filing of documents under seal as a Gen. matter"); *see also* D.C. Colo. L. Civ. R. 7.2 ("unless restricted by statute, rule of civil procedure, or court order, the public shall have access to all documents filed with the court and all court proceedings"); N.D. Flor. Gen. Rules, rule 5.5 ("each case file and each document filed in it is public unless one of these provides otherwise: a statute, court rule, administrative order, or order in the case"); S.D. Ga. LR 7.9 ("[e]xcept as required or allowed by statute or rule, no matter may be placed under seal without permission of the court"); N.D. Ind. L.R. 5-3 ("The clerk may not maintain a filing under seal unless authorized to do so by statute, court rule, or court order"); E.D. Mich. R. 5.3(b) ("[e]xcept as allowed by statute or rule, documents (including settlement agreements) or other items may not be sealed except by court order"); D. Minn. L.R. 5.6 ("A document may be filed under seal in a civil case only as provided by statute or rule, or with leave of court"); N.D. Miss. ("Except as otherwise provided by statute, rule, or order, all pleadings and other materials filed with the court ("court records") become part of the public record of the court"); D. N.H. R. 83.12 ("All filings, orders, and docket text entries shall be public unless sealed by order of court or statute"); W.D.N.C. L. Civ. R. 6.1 ("to further openness in civil case proceedings, there is a presumption under applicable common law and the First Amendment that materials filed in this Court will be filed unsealed"); N.D. Okla. L. Civ. R. 79.1 ("strongly urg[ing] attorneys to present all arguments . . . in unsealed pleadings"); E.D. Tenn. L.R. 26.2 ("Except as otherwise provided by statute, rule, or order, all pleadings and other papers of any nature filed with the Court . . . shall become part of the public record of this court."); D. Vt. R. 5.2 ("Cases or court documents cannot be sealed without a court order. Otherwise, all official files in the court's possession are public documents"); W.D. Wash. L. Civ. R. 5(g) ("There is a strong presumption of public access to the court's files. This rule applies in all instances where a party seeks to overcome the policy and presumption by filing a document under seal"); S.D.W .Va. L.R. Civ. P. 26.4 ("The rule requiring public inspection of court documents is necessary to allow interested parties to judge the court's work product in the case assigned to it"); E.D. Wis. L.R. 79 ("The Court will consider any document or material filed with the Court to be public unless, at the time of filing, it is accompanied by a separate motion"); E.D. Ky. R. 5.7 ("all documents filed in district court should be available for the public to access . . . restricting public access can only occur in limited circumstances, as set forth in this Rule"); *see also* The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 153 (2007) (requiring "compelling circumstances" to restrict access); E.D. La. ("No document or other tangible item may be filed under seal without the filing of a separate motion and order to seal"); S.D. W.Va. L.R. Civ. P. 26.4 ("The rule may be abrogated only in exceptional circumstances"); E.D.N.C. R. 79.2 ("No document may be filed under seal except upon entry of an order of the court either acting sua sponte or specifically granting a request to seal that document"); *see also* S.D. Ohio R. 5.2.1 ("Unless permitted by statute, parties cannot file documents under seal without

leave of court"); W.D. Pa. L. CvR 5.2 ("A party wishing to file any document under seal must obtain prior leave of court for each document that is requested to be filed under seal"); N.D. Miss. R. 79.4 ("No document may be filed under seal except upon entry of an order of the court either acting sua sponte or specifically granting a request to seal that document").

[3] E.D. Wis. Gen. L.R. 79 ("The Court will consider any document or material filed with the Court to be public unless, at the time of filing, it is accompanied by a separate motion").

[4] W.D. Wash. L. Civ. R. 5(g) ("a party must explore all alternatives to filing a document under seal" and "only in rare circumstances should a party file a motion, opposition, or reply under seal"); *see also* D.R.I. L.R. Gen. 102(b) ("parties must consider whether redaction would be sufficient"); M.D. Tenn. L.R. 5.03 ("motion must demonstrate compelling reasons to seal documents and that sealing is narrowly tailored"); *see also* D. Utah Civ.R.5-3 (requests to seal must be "narrowly tailored"); 9th Cir. R. 27-13(e) ("the motion shall request the least restrictive scope of sealing and be limited in scope to only the specific documents or portion of documents that merit sealing, for example, propose redaction of a single paragraph or limit the request to a portion of a contract")

[5] *Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) ("The ability of the public and press to inspect docket sheets is a critical component to providing meaningful access to civil proceedings"); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 85 (2d Cir. 2004) (holding "state court practice of sealing certain docket sheets, as well as entire case files" violated the First Amendment); *In re State-Record Co., Inc.*, 917 F.2d 124, 129 (4th Cir. 1990) ("[W]e cannot understand how the docket entry sheet could be prejudicial . . . this information, harmless as it may be, has . . . been withheld from the public. Such overbreadth violates one of the cardinal rules that closure orders must be as narrowly tailored as possible.").

[6] 1st Cir. R. 11.0(c)(2) ("Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in separate supplemental brief, motion, or filing"); *see also* 4th Cir. R. 25(c)(3)(B) ("When sealed material is included in a brief, motion, or any document other than an appendix, two versions of the document must be filed: (i) a complete version under seal in which the sealed material has been distinctively marked and (ii) a redacted version of the same document for the public file"); W.D. Mich. R. 10.6 ("The court strongly resists the sealing of entire civil pleadings, motions or briefs, as it is rare that the entire document will merit confidential treatment"); 10th Cir. R. 25.6(B) ("Redaction is preferable to filing an entire document under seal"); E.D. Va. L. Civ. R.5 ("Anyone seeking to file a document under seal must make a good faith effort to redact or seal only as much as necessary to protect legitimate interests. Blanket sealing is rarely appropriate"); *see also In re Providence Journal Co., Inc.*, 293 F.3d 1, 12 (1st Cir. 2002) ("there is no need to discard the baby with the bath water"; "[w]here a particularized need for restricting public access to legal memoranda exists, that need can be addressed by the tailoring of appropriate relief"); *In re National Prescription Opiate Litigation*, 927 F.3d 919, 939 (6th Cir. 2019) (reversing district court sealing order and requiring district court, before sealing documents, to "explain . . . why the seal itself is no broader than necessary") (internal quotation marks and citations omitted); *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (in a criminal case, "wholesale sealing of motion papers was more extensive than necessary to protect defendants' fair trial rights, their privacy interests, and the privacy interests of third persons"); *U.S. v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (in criminal case, "the public's right to inspect judicial documents may not be evaded by the wholesale sealing of court papers"); *Tafoya v. Martinez*, 787 F.Appx.501, 506 (10th Cir. 2019) ("Mr Tafoya is correct that sensitive information about the victim should be protected, but his request for wholesale sealing of Volumes IV, V, and VI of the Appendix is overbroad"); *IDT Corp. v. eBay*, 709 F.3d 1220, 1224-25 (under the common law, remanding for district court to "evaluate whether redaction was a reasonable alternative to sealing the entire complaint"); *Baxter Intern., Inc. v. Abbott Laboratories*, 297 F.3d 544, 545 (7th Cir. 2002) (criticizing motion to seal that "did not attempt to separate genuinely secret documents from others in the same box or folder that could be released without risk"); The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 156 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf)

("an entire document a party requests to file under seal should not be sealed if, as a practical matter, confidentiality can be adequately protected by more limited means").

[7] D. Haw. L.R. 5.2 (motion must "state that a redacted version of the document will be filed in the public record concurrent with the motion to seal"); *see also* E.D. Mich. L.R. 5.3(b) (requiring parties to file "redacted versions of documents to be sealed"); N.D.N.Y. L.R. 83.13(a) ("[t]he party should also attach to the application or file separately a redacted version of any document that is to contain the sealed material"); D. Utah CivR 5-3 ("[u]nless otherwise ordered by the court, a party must first publicly file a redacted version of the Document"); N.D. Cal. L.Civ.R. 79-5(d)(1)(C) (requiring parties to file a "redacted version of the document that is sought to be filed under seal").

[8] S.D. Ga. L.R. 79.7.

[9] *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (same); *Encyclopedia Brown Prods., Ltd. v. Home Box Office, Inc.,* 26 F. Supp. 2d 606, 612 (S.D.N.Y. 1998) ("There is a particularly strong presumption of public access to [judicial] decisions . . . The Court's decisions are adjudications — direct exercises of judicial power the reasoning and substantive effect of which the public has an important interest in scrutinizing"); 6th Cir. R. 25(h) ("An order or opinion is generally part of the public record"); 9th Cir. R. 27-13(j) ("This Court will presumptively file any disposition publicly, even in cases involving sealed materials"); Fed. Cir. R. IOP 9(7) ("all opinions and orders, precedential and nonprecedential, are public records of the court and shall be accessible to the public"); *see also* The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 159 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) (the "qualified right of access to judgments, judicial opinions and memoranda, and orders issued by a court that can only be overcome in compelling circumstances").

[10] *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 142 (2d Cir. 2016) ("where documents directly affect an adjudication or are used to determine litigants' substantive legal rights, the presumption of access is at its zenith, and thus can be overcome only by extraordinary circumstances") (cleaned up); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 661 (3d Cir. 1991) ("the right of public access applies to the material filed in connection with a motion for summary judgment," and collecting cases); *Parson v. Farley*, 352 F. Supp. 3d 1141, 1153 (N.D. Okla. 2018) (if a document is "attached to a dispositive motion," that "renders it highly relevant to the adjudicative process").

[11] *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 142 (2d Cir. 2016).

[12] S.D. Ind. L.R. 5-11 (requiring statement of "why document should be kept sealed from the public despite its relevance or materiality"); *see also* The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 153 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) (there is a qualified right of access to "documents filed with a court that are relevant to adjudicating the merits of a controversy"); *US v. Amodeo*, 71 F.3d 1044, 1049-50 ("the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the courts"); *Ctr. for Auto Safety v. Chrysler Grp., LLC,* 809 F.3d 1092, 1099 (9th Cir. 2016) (focusing on whether the information for which sealing is sought is "more than tangentially related to the underlying cause of action"); *Leucadia, Inc. v. Applied Extrusion Tech, Inc.*, 998 F.3d 157, 165 (3d Cir. 1993) ("there is a presumptive right of access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith"); *Romero v. Drummond Co., Inc.*, 48 F.3d 1234, 1246 (11th Cir. 2007) (focusing on whether information at issue "is related . . . to the merits of the underlying controversy" or to "the conduct of the court"); *Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992) ("[i]nformation that is used at trial or otherwise becomes the basis of decision enters the public record") (Easterbrook, J., in chambers); *Baxter Intern., Inc. v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002) (First Amendment right of access applies to "materials that formed the basis of the parties' dispute and the district court's resolution"); *Romero v. Drummond Co. Inc.*, 480 F.3d 1234, 1246 ("[a] motion that is presented to the court to invoke its powers or affect its

decisions, whether or not characterized as dispositive, is subject to the public right of access") (internal quotation marks and citations omitted).

[13] M.D. Tenn. L.R.5.03 ("even if unopposed, must specifically analyze in detail, document-by document, the propriety of secrecy, providing factual support and legal citations"); D.C.Colo.L. Civ. R.7.2 (stipulations are insufficient to seal the record); D. Conn. R. 5.3(e) (also prohibiting sealing by stipulation); N.D. Miss. R. 79.4 ("no document may be sealed merely by stipulation of the parties"); D.U.Civ.R5-3 ("stipulation or blanket protective order that allows a party to designate documents as sealable will not suffice"); E.D. Va. L. Civ. R.5 (agreement of the parties is not sufficient justification to seal the record"); 9th Cir. R. 27-13(a) ("The Court will not seal a case or document based solely on the stipulation of the parties"); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993) (noting need "to protect the legitimate public interest in filed materials from overly broad and unjustifiable protective orders agreed to by the parties for their self-interests"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) ("once the documents are made part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery") (internal quotation marks and citations omitted).

[14] "'Once the cat is out of the bag, the ball game is over.'" *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.11 (2d Cir. 2004). "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *In re Copley Press, Inc.*, 518 F.3d 1022, 1024 (9th Cir. 2008) (so stating in a criminal case); *see also Gambale*, 377 F.3d at 144 ("We simply do not have the power, even if we were of the mind to use it if we had, to make what has thus become public private again. The genie is out of the bottle, albeit because of what we consider to be the district court's error. We have not the means to put the genie back.) (citations omitted); *SmithKline Beecham Corp. v. Pentech Pharms., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (refusing to redact information that had previously been disclosed in a court opinion because "the cat is out of the bag"); *Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) ("appeals seeking to restrain further dissemination of publicly disclosed information is moot" because "[p]ublic disclosure cannot be undone") (internal quotation marks and citations omitted); *see also Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834-835 ("[n]o meaningful relief was available" where "[t]he information that Appellants [sought] to keep private ha[d] been publicly available on the Internet in hard copy for nearly five years" and "unidentified" people "may have retained copies or reproduced the disclosures"); Charles Alan Wright et al., 13C *Federal Practice & Procedure* § 3533.3.1 n.35 (3d ed. 2008) (collecting cases where relief was denied because the information had already been made public).

[15] E.D. Wis. Gen. L.R. 7.9 ("must be publicly filed"); *see also* 1st Cir. R. 11.0(c)(2) ("A motion to seal . . . should not itself be filed under seal") E.D. Va. Loc. Civ. R. 5 (requiring a "non-confidential description of what material must be filed"); W.D.N.C. L. Civ. R. 5.1 (requiring a "non-confidential description of material sought to be sealed"); E.D. La. L.R. 5.6 (requiring a "non-confidential memorandum"); C.D. Cal. LR 79-6 ("motion must be "docketed in the public record"); The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 161 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) ("Notice of motions to seal and supporting materials should be reflected in the publicly available docket")

[16] E.D. Wis. Gen. L.R. 7.9 ("must . . . describe the Gen. nature of the information withheld"); *see also* W.D. Va. R. 9 ("written motion must include . . . a generic, non-confidential information of the doc to be sealed") ; D.S.C. R. 5.03 (motion must be accompanied by a non-confidential description of the documents"); D.N.J. R. 5.3 (movants must state the "nature of materials or proceedings at issue"); D. Mont. R. 5.2 (motion to seal must be "filed in the public record"); N.D. Miss. R. 79.4 (requires "non-confidential description of what is to be sealed"); The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 161 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) ("Notice of motions to seal and supporting materials should be reflected in the publicly accessible docket")

[17] M.D. Tenn. L.R. 5.03 ("motion must demonstrate compelling reasons to seal documents and that sealing is narrowly tailored"); *see also* E.D. Okla. L. Civ. R. 79.1 ("relief sought shall be narrowly

tailored to serve the specific interest sought to be protected"); D.N.J. R. 5.3 (requiring a "clearly defined and serious injury that would result if the relief sought is not granted"); E.D. Mich. R. 5.3(b) ("Court may grant a motion to seal only upon a finding of compelling reason why certain documents or portions thereof should be sealed"); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (under the common law, "compelling reasons" required to seal judicial records); *Flynt v. Lombardi*, 885 F.3d 508, 511 (applying "compelling reasons" standard under common-law right of access)

[18] D. Me. R. 7(A) ("motion shall propose specific findings as to the need for sealing"); 3d Cir. R. 106.0(a) ("the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary").

[19] M.D. Tenn. L.R.5.03 ("even if unopposed, must specifically analyze in detail, document-by document, the propriety of secrecy, providing factual support and legal citations"); *see also See* W.D. Tex. CV-5.2 ("sealing motion must . . . state the factual basis for the requested sealing order"); S.D. W.Va. L.R. Civ. P. 26.4 (requiring "a discussion of the propriety of sealing, giving due regard to the parameters of common law and First Amendment rights of access as interpreted by the Supreme Court and our Court of Appeals"); *see also* W.D. Wash. L. Civ. R. 5(g) (requiring "a specific statement of applicable legal standard and reasons for keeping a document under seal, with evidentiary support from declarations where necessary"); E.D. Va. L.R. 5 (requiring "references to governing case law" and "an analysis of appropriate standard for that specific filing" and "a description of how that standard has been satisfied"); D.S.C. R. 5.03 ("memorandum must . . . state the reasons sealing is necessary" and "address the factors governing sealing of documents reflected in controlling case law"); D.S.D. L.R. 7.1 (motion must include "proposed reasons supported by specific factual representations"); M.D. Pa. Gen. R. 5.8 (motion to file under seal must include "a statement of legal and factual justifications for the proposed order"); E.D. Okla. L. Civ. R. 79.1 ("motion must contain sufficient facts to overcome the presumption in favor of disclosure" and sealed documents "may be approved by the Court only upon a showing that the legally protected interest of a party, non-party, or witness outweighs the compelling public interest in disclosure of records"); W.D.N.C. L. Civ. R. 6.1 (requiring a "statement indicating why sealing is necessary"); M.D.N.C. L.R. 5.4 (brief must "address the factors governing sealing of documents reflected in governing case law"); N.D.N.Y. R. 83.13 (requires movant to "set[] forth the reason(s) that the referenced material should be sealed under the governing legal standard"); D.N.H. R. 83.12 (motion must provide "factual and legal basis" for sealing); D. Mont. R. 5.2 (any person who files a document under seal must "certify[y] that sealing is appropriate to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances and with due regard to the public's right of access"); D. Md. R. 105.11 ("motion shall include . . . proposed reasons supported by specific factual representations to justify the sealing"); E.D. La. L.R. 5.6 (requiring "reference to governing case law"); S.D. Ind. L.R. 5-11 (brief in support must include "how document satisfies applicable authority"); C.D. Ill. R. 5.(10) ("motion must include an explanation of how the document meets legal standards for filing sealed documents"); D. Haw. L.R. 5.2 ("motion must . . . set forth the factual basis for sealing a document, specify applicable standard for sealing and how that standard has been met"); S.D. Fla. R. 5.4 ("motion must set forth 'factual and legal basis for departing from the policy that Court filings are public"); D. Colo. L. Civ. R. 7.2 (motion must "identify a clearly defined and serious injury that would result if access is not restricted"); E.D. Cal. R. 141 (requiring motion to "set forth the statutory or other authority for sealing")

[20] 10th Cir. R. 25.6(A)(2) (motions to seal must "explain why the sensitive information cannot be reasonably redacted in lieu of filing the entire document under seal"); *see also* 4th Cir. R. 25(c)(2)(B)(ii) ("Any motion to seal filed with the Court of Appeals shall . . . explain why a less drastic alternative to sealing will not afford adequate protection"); S.D. W.Va. L.R. Civ. P. 26.4 ("reasons why alternatives to sealing such as redaction are inadequate"); W.D. Va. R. 9 (requiring parties seeking to seal the record to state "why alternatives are inadequate"); D.S.D. L.R. 7.1 (motion must include "an explanation why alternatives to sealing would not provide sufficient protection"); W.D.N.C. L. Civ. R. 6.1 ("motion must include "statement indicating . . . why there are no alternatives"); M.D.N.C. L.R. 5.4 (brief must "explain for each document or group or documents why less drastic alternatives to sealing will not afford adequate protection"); D. Mont. R. 5.2 (motion must "state why it is not feasible to

redact"); D.Md. R. 105.11 ("motion shall include . . . an explanation of why alternatives will not provide sufficient protection"); D. Colo. L. Civ. R. 7.2 (motion must "explain why alternatives aren't practicable")

[21] S.D. W.Va. L.R. Civ. P. 26.4 ("requested duration of proposed seal"); *see also* E.D. Va. L.R.5 (requiring time period for which seal is requested); W.D.N.C. L. Cv. R. 6.1 (requiring "statement indicating how long it should be sealed"); M.D.N.C. L.R. 5.4 (brief must "state whether permanent sealing is sought, and if not, state time period"); D.N.H. 83.12 (motion must "propose[] a duration"); N.D. Miss. R. 79.4 (must state "time period sought for sealing"); D. Me. R. 7(A) ("motion shall propose specific findings as to . . . the duration the document(s) should be sealed"); E.D. La. L.R. 5.6 (requiring "statement of the period of time the party seeks to have the matter maintained under seal"); E.D. Cal. (requiring motion to set forth "the requested duration")

[22] D. Colo. L. Civ. R. 7.2 (motions shall be posted on court website the day after they are filed); *see also* E.D. La. L.R. 5.6 ("the clerk must provide public notice by docketing the motion as set forth in the non-confidential description")

[23] 4th Cir. R. 25(c)(2)(C) ("A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 days before the Court rules on the motion"); *see also* D.Md. R. 105.11 ("the court will not rule upon the motion until at least 14 days after it is entered on the public docket to permit the filing of objections by interested parties"); E.D. Va. L. Civ. R. 5 ("notice shall inform parties and non-parties that they may submit memoranda in support or opposition within (7) days"); D. Colo. L. Civ. R. 7.2 (3-day rule); The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 170 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) ("The court should hear and decide motions to seal admitted trial exhibits after other parties have had time to oppose the request, or non-parties have had time to request leave to intervene to oppose the request. Absent the most exigent circumstances, trial courts should deny any request for denial of access that is not made in time to allow such notice"); *Doe v. Public Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) ("the law in this Circuit requires a judicial officer to . . . provide public notice of the sealing request and a reasonable opportunity for the public to voice objections")

[24] W.D.N.C. L. Civ. R.6.1; *see also* The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 165 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) ("The trial court should also make findings of fact and conclusions of law adequate to justify the closure").

[25] *See* The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 165 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf) ("Any restriction on public access ordered by the Court should be narrowly tailored").

[26] E.D. Cal. L.R. 141(d) ("the Court will file in the publicly available case file an order granting or denying the Request" to seal); *see also* W.D. Va. L.R. 9 (requiring that any order to seal must be docketed).

[27] C.D. Cal. LR 79-6; *see also* S.D. Ind. L.R. 5-11; D.R.I. LR Gen. 102(b); D.U.Civ.R. 5-3 ("the court may direct the unsealing of a document, with or without redactions, after notice to all parties and an opportunity to be heard")

[28] W.D. Va. R. 9 ("any person or entity, whether a party or not, may object to a motion to seal a document or may file a motion to unseal a document previously sealed"); *see also* W.D. Wash. L. Civ. R. 5(g) ("A non-party seeking access to a sealed document may intervene in a case for the purpose of filing a motion to unseal the document"); W.D.N.C. L. CvR 6.1 ("nothing in this rule limits the right of a party, intervenor, or non-party to file a motion to unseal"); S.D. Ind. L.R. 5-11 ("A member of the public may challenge at any time the maintenance of a document filed under seal"); D.Conn. R. 5(3)(e) ("Any non-party who either seeks to oppose a motion to seal or seeks to unseal a case or document subject to a sealing order, may move for leave to intervene in a civil action for the limited purpose of pursuing that relief. Motions for leave to intervene for purposes of opposing sealing, objections to motions to seal, and motions to unseal shall be decided expeditiously by the Court"); C.D. Cal. L.R. 79-

7 ("a nonparty seeking access may intervene in a case for the purpose of filing an application for disclosure of the document"); S.D. Ala. L.R. 5.2 ("Any person or entity, whether a party or not, may object to a motion to seal a document or may file a motion to unseal a document previously sealed"); The Sedona Conference, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 162 (2007) (https://thesedonaconference.org/sites/default/files/publications/141-188%20WG2_0.pdf)("Nonparties may seek leave to intervene in a pending case to oppose a motion to seal, to have an existing sealing order modified or vacated, or to obtain a sealing order")

[29] *See, e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (allowing intervention three years after a case settled because "intervention was not on the merits, but for the sole purpose of challenging a protective order"); *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1354 (9th Cir. 2013) (five years); *EEOC v. Nat'l Children's Ctr.*, 146 F.3d 1042, 1047 (2d Cir. 1998) (two years); *Mokhiber v. Davis*, 537 A.2d 1100, 1105 (D.C. 1988) (four years, interpreting the D.C. equivalent of Fed. R. Civ. P. 24).

[30] N.D. Tex. L.R. 79.3 ("all sealed documents maintained on paper will be deemed unsealed 60 days after the final disposition of a case"); *see also* E.D. Pa. R. 51.5 (providing for unsealing "two years after the conclusion of the civil action"); W.D.N.C. L. Civ. R. 6.1 ("unless permanent sealing was ordered by the court, any sealed case file or documents may be subject to unsealing by the Court upon the closing of the case"); D. Kan. R. 79.4 (unsealing "10 years after entry of a final judgment or dismissal unless the court otherwise ordered at the time of such judgment or dismissal"); S.D. Flor. R. 5.4 ("[u]nless otherwise ordered by the Court for good cause shown, no order sealing any item pursuant to this section shall extend beyond one year"); N.D. Cal. R. 79-5 (automatic unsealing after 10 years); 3d Cir. R. 106.0(c)(2) (presumption of unsealing "without notice to the parties[] five years after the conclusion of the case")

[31] D. Kan. R. 79.4 ("any party may seek to renew the seal for an additional 10 years or less by filing a motion within 6 months of the time the seal is to be lifted")

[32] D. Kan. R. 79.4 ("There is a rebuttable presumption that the seal will not be renewed. The moving party bears the burden to establish an appropriate basis for renewing the seal.")

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
327 SOUTH CHURCH STREET
ROCKFORD, ILLINOIS 61101

21-CV-D

CHAMBERS OF
IAIN D. JOHNSTON
UNITED STATES JUDGE

(779) 772-8607

February 8, 2021

The Honorable Robert Dow, Jr.
United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, IL 60604

Re: Proposed Amendment to Rule 37(e)

Dear Bob:

Thank you for talking to me the other week about contacting the Advisory Committee on Civil Rules concerning Rule 37(e) as amended in 2015. This letter addresses one of those issues; namely, whether attorney's fees are available under Rule 37(e). This question relates to both the availability of attorney's fees as a or part of a curative measure under Rule 37(e)(1) as well as the availability under Rule 37(e)(2). I freely—and perhaps, proudly—admit that I may be the only person struggling with this issue. *DR Distribs. LLC v. 21 Century Smoking, Inc.*, No. 12 CV 50324, 2021 U.S. Dist. LEXIS 9513, at *251 n.54 (N.D. Ill. Jan. 19, 2021). My friend, Tom Allman, thinks the issue is clear: attorney's fees are available. Thomas Y. Allman, *Dealing with Prejudice: How Amended Rule 37(e) has Refocused ESI Spoliation Measures*, 26 Rich. J. L. & Tech. 1, 64-66 (2020). But, if the Advisory Committee will humor me, please let me explain my thinking.

Let's start with some basic construction. The Federal Rules of Civil Procedure are construed using the same canons as construing statutes. *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017). One rule of construction is that courts cannot read language into a statute. *Bates v. United States*, 522 U.S. 23, 29 (1997). Another rule is that if a term or phrase is used elsewhere in the same statute but not included in another section of the statute, the presumption is that the absence was intentional. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452 (2002).

Every other section of Rule 37 specifically authorizes attorney's fees as a remedy. Fed. R. Civ. P. 37(a)(5)(A); Fed. R. Civ. P. 37(b)(2)(C); Fed. R. Civ. P. 37(c)(1)(A),(2); Fed. R. Civ. P. 37(d)(3). But Rule 37(e) is silent as to the availability of attorney's

fees. *Snider v. Danfoss*, 15 CV 4748, 2017 U.S. Dist. LEXIS 107591, at *12 (N.D. Ill. July 12, 2017). And even the extremely extensive and helpful Advisory Committee Notes to the 2015 amendments say nothing at all about the availability of attorney's fees. *Id.*; *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (clear legislative history weighs against *expression unius et exclusion alterius*). Applying the rules of construction, a reasonable jurist—hopefully I fall within that description—may conclude that because attorney's fees are specifically provided for in all of the other sections of Rule 37 but not in section (e), that they are unavailable under Rule 37(e). The silence is deafening, at least to me.

Personally, I think the amendments to Rule 37(e) may have swung the pendulum a little to far against sanctions for spoliation. But I don't want to fight that battle now. If attorney's fees are unavailable, an innocent party that should have obtained ESI, but did not, would be left without a complete remedy. So, despite my belief that attorney's fees are unavailable under Rule 37(e), I think they should be.

Before courts and litigants expend more time and money litigating this issue, I recommend Rule 37(e) be amended as follows:

"If electronically stored information that should have been preserved in anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice, such as the payment of reasonable expenses, including attorney's fees; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may, in addition to the payment of reasonable expenses, including attorney's fees:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment."

If the Advisory Committee has any questions about this issue, I'd be happy to discuss them.

Thanks for your consideration of this matter.

Sincerely,

Iain D. Johnston

20-CV-GG

Date: November 13, 2020

To: Advisory Committee on Federal Civil Procedure Rules (Rules Committee_Secretary@ao.uscourts.gov)

From: Professor Emeritus Jeffrey A. Parness, Northern Illinois University College of Law

Re: Proposed Amendment to Rule 27(c)

I write to ask the Committee to consider an amendment to Rule 27(c) which would expand opportunities for presuit discovery orders related to possible later civil actions in federal district courts. The proposed language (underlined) is as follows:

> "This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action."

I have included a memorandum in which I outline the rationales and some guidelines for an amended Rule 27(c).

Thanks for the consideration. You can reach me at 815-753-0340 or jparness@niu.edu.

# Proposed Amendment to Federal Civil Procedure Rule 27(c): Federal Presuit Information Preservation Orders

**Jeffrey A. Parness**[1]

## Introduction

Federal civil procedure laws allowing presuit information preservation orders by district courts should be expanded in order to promote greater uniformity across the country and greater compliance with current substantive and procedural laws on the preservation duties involving civil litigation information. These new laws are best placed in Federal Civil Procedure Rule (FRCP) 27(c). Following are the rationales, some guidelines, and suggested language for a new FRCP 27(c). A Comment accompanying any new rule should indicate its justification and expected utility.

## A. Situs

New presuit information preservation laws are best located within amendments to FRCP 27, the rule on perpetuating witness testimony via deposition. The goals behind presuit information preservation orders mirror the goals behind presuit orders to perpetuate testimony. They both promote assurance that information important for accurate factfinding during later civil litigation will be available.

Unlike presuit witness deposition orders, however, newly-recognized presuit information preservation orders should be able to address both the lack of a duty to preserve and the duty to preserve. Thus, those who have been asked presuit to preserve certain information should be

[1] Professor Emeritus, Northern Illinois University College of Law. B.A., Colby College; J.D., he University of Chicago. The article follows up on Parness and Theodoratos "Expanding Pre-Suit Discovery Production and Preservation Orders," 2019 Michigan State Law Review 652.

able to obtain court orders that preservation is not legally compelled or on how preservation duties can be satisfied.

Without an express rule on presuit information preservation beyond depositions, federal courts might now consider presuit preservation orders founded on their inherent equitable powers.[2] New written norms within Rule 27 will promote the procedural law uniformity generally sought by the FRCP.

### B. Petitioners and Respondents

#### (i) Petitioners

Petitioners eligible for presuit information preservation orders should be limited to potential parties in later federal civil actions. Petitioners should not soley be, however, those who presently cannot bring civil actions.[3] The allowance of presuit information preservation petitions even when civil actions could be filed serve several important purposes. They include allowing petitioners to better meet their presuit "reasonable inquiry" duties under FRCP 11; avoiding litigation over the current ability to sue; promoting more informed presuit settlements; and, most

[2] See FRCP 27(c) (the rule on presuit depositions "does not limit a court's power to entertain an action to perpetuate testimony").

[3] In his FRCP 37(e) proposal, Professor Spencer urged that a petition for presuit discovery should only be pursued by one expecting to be a party in a civil action "cognizable in a United States court" who "cannot presently bring it or cause it to be brought." A. Benjamin Spencer, "The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court," 79 Fordham L. Rev. 2005, 2023 (2011) [hereinafter Spencer] (proposed FRCP 37(e)(3)(A)(i)). Yet petitioners should sometimes be able to proceed even where any future claim may now be brought. Presuit settlements founded on accurate factual assessments would be encouraged. Both federal and state civil procedure laws on presuit information preservations via depositions to perpetuate testimony have no requirements on the current inability to bring a civil action or cause a civil action to be brought. See, e.g., FRCP 27(a)(1) and Montana Civil Procedure Rule 27(a)(1).

importantly, promoting compliance with preexisting information preservation duties, which may or may not be tied to foreseeable litigation.[4]

### (ii) Respondents

A broad range of people and entities should be subject to presuit information preservation orders. Thus, orders should be able to reach beyond an expected adverse party. Yet any potential party, when known, should usually be notified of any presuit preservation petition. Presuit discovery often is not more burdensome on respondents than postsuit discovery wherein parties and nonparties alike can be summoned through depositions. Of course, presuit discovery is necessarily more speculative as there is no guarantee of a later civil action. Thus, respondents should be less available for presuit discovery than for postsuit discovery, as with Rule 27 depositions.

## C. Petition Contents

Petitions seeking presuit information preservation orders, given their pleas for extraordinary relief, generally should be quite detailed, as well as certified and verified. Lawyers should certify reasonable inquiry, which might include earlier meet and confers and proportionality assessments. Their clients should at times need to verify the factual circumstances prompting their requests for presuit judicial assistance, perhaps as well as allegations of a statutory, common law, procedural rule, or contractual duty to preserve. Petition

[4] Duties tied to foreseeable litigation arise, for example, under FRCP 37(e) on irreplaceable electronically stored information (esi). Duties untethered to foreseeable litigation arise, for example, under statutes on medical record maintenance.

requirements thus should track somewhat the dictates on lawyers and parties who file complaints[5] or who seek provisional remedies.[6]

A petition for a presuit information preservation order should contain the possible subject matter of a later action; the facts a petitioner wishes to learn through the preserved information when it is revealed; and the expected adverse party or parties, if then known. A petition for a presuit information nonpreservation order should, at the least, contain the problems arising from the legal uncertainties and potential costs arising when presuit demands for information preservation have been made.

Presuit preservation orders should sometimes be permitted even where the information can otherwise be obtained. Reasonable inquiry dictates, however, should compel potential presuit petitioners to engage first in efficient information gathering and storage outside of discovery. Yet very burdensome information gathering should not be expected when it can be fairly avoided through judicial action.

### D. Proportionality

As with many postsuit discovery requests, a presuit information preservation request should only be made after the petitioner's assessment of proportionality. For postsuit discovery in a federal district court, one seeking discovery must certify that the request is "neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the

[5] See, e.g., FRCP 11(b)(2) (lawyers must certify that "legal contentions are warranted by existing law" or by a nonfrivolous argument for a change in the law) and FRCP 11(c)(1) (parties "responsible for" Rule 11 violations, typically involving "factual contentions" without "evidentiary support," per FRCP 11(b)(3) and (4), may be sanctioned).

[6] See, e.g., FRCP 65 (requests for temporary restraining orders must be supported by "specific facts in an affidavit or a verified complaint clearly" showing the need for immediate relief).

action."[7] In ruling, a district judge must consider whether the request is "proportional to the needs of the case, considering the importance of the issues at stake…the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits."[8]

Clearly, proportionality assessments will differ for the same requested information in presuit and postsuit settings. Given the more speculative nature of the need for the information, proportionality relating to presuit requests should be more difficult to demonstrate. Yet, an irreparable harm standard is unwarranted, especially where petitioners rely on the clear preexisting duties of the respondeats to preserve and claim that court orders are needed in order to insure compliance which otherwise will likely (or may) not occur.

### E. Meet and Confer

Presuit information preservation petitions should normally be preceded by "meet and confer" encounters between potential petitioners, respondents, and other possible parties in future litigation.[9] Reasonable efforts should be made to agree on information preservation (and

[7] FRCP 26(g)(1)(B)(iii).

[8] FRCP 26(b)(1).

[9] Professor Hoffman found in Texas that a lack of an express notice requirement covering future litigants led to instances of no notice given, prompting changes to the Texas presuit discovery rule. Lonny Sheinkopf Hoffman, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery," 40 Univ. Mich. J.L. Reform 217, 270-272 (2007).

sometimes access). Similar compelled encounters are commonplace under the FRCP before discovery begins[10] and when postsuit discovery disputes arise.[11]

### F. Available Forms of Relief Beyond Preservation

Presuit information preservation orders should, at times, be available to prompt information disclosures to petitioners together with information preservations by respondents. So, at times, copies of documents will be ordered to be revealed to petitioners while the originals will be ordered to be preserved by the respondents.

Presuit information preservation orders may sometimes prompt preservation for a time, followed by disclosures necessitating information destruction. For example, a machine involved in an accident might be ordered to be preserved and then tested even if the testing will result in complete destruction, or permanent alteration, of the machine. Such a presuit testing order is particularly appropriate when the machine is key evidence in a likely future lawsuit and will naturally spoil over time.

As noted, available forms of relief should also include protective orders on behalf of petitioners. Thus, at least some who receive presuit information preservation demand letters should have standing to seek declaratory relief on whether or not there is a preservation duty, as well as on the parameters of any such duty. Standing to seek a presuit declaration is easily

[10] See, e.g., FRCP 26(f) (good faith effort to formulate discovery plan) and FRCP 26(d)(1) (no discovery until conferral required by FRCP 26(f) regarding a discovery plan).

[11] See, e.g., FRCP 26(c)(1) (good faith effort to resolve discovery dispute before a motion for a protective order may be filed). Local court rules sometimes extend such dispute resolution obligations following private meet and confers which do not resolve discovery disputes. See, e.g., U.S. Dist. Ct., S.D. of Indiana, Local Rule 37-1(a) (before district judge involvement in a "formal discovery motion," counsel must confer with "assigned Magistrate Judge" in order to see if dispute resolution is possible).

justified, for example, where the relevant information is quite costly to maintain; where the facts in any later lawsuit will likely be generally undisputed; and, where an explicit statute or an express contract calls for the petitioner to have no preservation obligation.

### G. Cost Shifting and Sanctions

The costs of compliance with presuit information preservation orders directing that certain information be preserved by the respondent should be able to be shifted from the respondent to the petitioner, not unlike compliance costs for certain postsuit discovery orders.[12]

Sanctions for discovery violations should be available and track the sanctions available for similar (or somewhat similar) postsuit discovery violations.[13] Of course, there will be no perfect overlap. For example, sanctions involving future jury instructions might generally be out of place in presuit discovery settings. Some individual or entity liability for sanctions due to failures by agents should also be expressly recognized in the Comment to the new FRCP 27.[14]

### H. Choice of Law

Vexing choice of law issues can arise with presuit orders on information preservation. For some presuit preservation requests, the information might be found in one state while the

[12] See, e.g., FRCP 26(b)(4)(E) (party seeking discovery involving an adversary's expert must pay some fees and expenses).

[13] See, e.g., Illinois Supreme Court Rule 224(b) (sanctions available for postsuit discovery violations "may be utilized by a party initiating" an independent action for presuit discovery or by a respondent in such an action).

[14] Liability for principals due to any agent actions is sometimes unwarranted. Compare FRCP 11 (on law firm liability for only some pleading failures by their attorneys). Thus, entity liability should normally arise when an agent's failure was caused, wholly or in significant part, by the entity's deficient system on litigation holds. But no entity liability should be grounded on an agent's purposeful destruction of information solely geared to shielding the agent from personal liability, where the entity directed there should be no such destruction.

holder of the information and the potential civil litigants are in other states. Without a preservation order, spoliation torts, as well as spoliation sanctions, perhaps can be pursued in later federal district court cases. But opportunities for FRCP presuit information preservation orders are also needed. And when justified, the court hearing the presuit petition will need to consider at times not only federal procedural common law duties on information preservation, but also varying state laws -- substantive and procedural -- on information preservation.

## I. Appeals

As there are no claims in the traditional sense, appeals of orders on presuit information preservation petitions cannot be grounded on the traditional final judgment rule. Appellate standards should be comparable to the standards for interlocutory reviews of formal discovery orders during civil litigation. Appeals will thus sometimes follow the precedents on friendly contempts by respondents. When petitioners are denied, appeals should sometimes be available, as when the dispute is ripe and cannot await any future lawsuit because the information, in the interim, will likely be lost.

## J. Later Effects

Because presuit discovery is more speculative than postsuit discovery, denials of presuit information preservation petitions should not always foreclose similar discovery requests postsuit. Further, grants of presuit petitions should not foreclose follow-up, related postsuit discovery requests since new information may have been created or old information may have become unreliable. Further, presuit orders that require continuing preservation should be amenable to modification, including in later related civil actions.

## Conclusion

A new FRCP 27 should, at the least, authorize certain presuit court orders involving information preservation when the information, relevant to possible later litigation, will likely spoil otherwise and/or is already subject to a preservation duty, as under FRCP 37(e) on esi. The new rule should authorize both presuit information preservation orders and presuit protective orders declaring a lack of any preservation duty, especially where a presuit information preservation demand has been made, is disputed, and warrants immediate judicial attention. The availability of more expansive presuit information preservation orders will promote greater uniformity among district courts and enhance accuracy in later civil litigation factfinding. The new rule (additions underlined) should read: "This rule does not limit a court's power to entertain an action to perpetuate testimony and an action involving presuit information preservation when necessary to secure the just, speedy, and inexpensive resolution of a possible later federal civil action."

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# TAB 11

## 11. RULE 9(b): GENERAL PLEADING OF MALICE, INTENT, ETC.

*Suggestion 20-CV-Z*

Committee member Dean and Professor A. Benjamin Spencer has submitted a proposal to amend the second sentence of Rule 9(b) to restore the meaning it enjoyed up to the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 686-687 (2009). The proposal, 20-CV-Z, is supported by an article, A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by* Iqbal," 41 Cardozo L. Rev. 1015 (2020). The article is appended below.

Because the Court interpreted the second sentence of Rule 9(b) against the first sentence, the entire subdivision is important:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

The proposed amendment would revise the second sentence:

> Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

This proposal was presented to the October 2020 meeting as an information item rather than an item for action. The aim was to provide an introduction to a challenging topic and to invite engaged study over a period longer than the time available before the October meeting.

The article that explains the proposal is tightly constructed. The summary that follows is designed to guide careful reading, not to substitute for it. The conclusion presents three choices. The preferred choice is to recommend the proposed amendment to correct the "errant construction" in *Iqbal*. The next preferred choice is to amend the rule text to clearly express the Court's interpretation, "unless we want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice." The last choice, "doing nothing," "should not be an option" — but is feared to be "precisely the most likely thing that we will do."

The overall approach reflects deep dissatisfaction with the general "plausibility" pleading standard that has evolved over the last 14 years, but does not argue for an attempt to restore whatever muddled standards might be identified in the practice of "notice pleading" before *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544 (2007).[10] The focus on Rule 9(b) and allegations of malice, intent, knowledge, and other conditions of a person's mind leads to a proposal that could be accepted without a frontal attack on *Twombly* and *Iqbal*, and might be accepted by those who have become comfortable with the current general approach to pleading a claim for relief under Rule 8(a)(2). At the same time, as illustrated in the many examples of decisions that would be superseded by an amended Rule 9(b), there would be a dramatic reduction of pleading burdens across a broad range of contemporary litigation.

Dean Spencer's article proceeds through three main blocks to a fourth section that repeats the proposed new rule text, accompanied by a committee note "crafted to ensure that there is no room for courts — including the Supreme Court — to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*."

The first block describes *Iqbal* and lower court decisions that have followed it in assessing pleadings of purpose, knowledge, intent, or malice. The decisions are described as "the epitome of what plausibility pleading requires."

The second block challenges the Court's interpretation of Rule 9(b), first on the face of the rule text as it relates to other pleading rules, and then on an exploration of the intent of the original rules committee that drafted Rule 9(b). Rule 8(a)(2), applied by the Court to determine what it means to allege conditions of mind "generally," relates to stating a claim. Rule 9(b) relates to alleging a particular part of a claim. Ambiguous allegations are to be challenged by moving for a more definite statement under Rule 12(e), not by moving to dismiss. Rule 8(d)(1), further, directs that each allegation in a pleading "must be simple, concise, and direct"; it does not require supporting facts. Looking further in the immediate vicinity, Rule 9(a)(2) requires a party that challenges an allegation of capacity or authority to do so by a specific denial "which must state any supporting facts that are peculiarly within the party's knowledge." This requirement is an explicit exception to an assumed general rule that knowledge can be pleaded without supporting facts. Former Form 21, tracing back to the original rules, further demonstrates the intended pleading standard by providing a simple statement in a complaint for fraudulent conveyance that a conveyance of described property was made to a named defendant "for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."

Going beyond the integrated analysis of rules texts, the article explores the original understanding. The 1937 committee

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[10] *See* p. 1054, n. 145: "[T]he Court's interpretation of Rule 8(a)(2) — like its interpretation of Rule 9(b) — diverges from the meaning supported by all relevant textual and historical evidence. . . . Unfortunately, it appears that ship has sailed."

note for the 1938 Rule 9(b) refers simply to English practice. Examination of the English practice, tracing well back into the Nineteenth Century, shows that it permitted allegations of "malice, fraudulent intention, knowledge, or other condition of the mind of any person" "as a fact without setting out the circumstances from which the same is to be inferred." Several examples of decisions under this English rule are offered. One of them is particularly intriguing because it illustrates that allegations of knowledge are appropriate across a wide range of actions. The court in that 1884 case accepted an allegation in an action for negligence that the defendant "knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door."

The third block goes directly to the controlling concern. It is unfair to require a pleader to provide the particulars of another person's condition of mind without the benefit of discovery. Wrongful intentions are likely to be obscured from external view. Invoking the general test of plausibility pleading that invokes "judicial experience and common sense," and that looks to the court to draw the inference that the defendant is liable, invites stereotypical reasoning, requires pleaders "to overcome the categorical schemas dominant within the judicial class." The Court in *Iqbal* relied on preconceptions that shaped the conclusion that the allegations of intent were implausible. Employment discrimination cases are offered as a leading example. Requiring a complaint to articulate facts to substantiate an alleged state of mind, indeed, may run afoul of the First Amendment's prohibition of any law prohibiting the right of the people to petition the Government for the redress of grievances. The risk of "decisions based on various biases and categorical or stereotypical reasoning," is aggravated when lacking complete information about an individual or a situation. "A civil claim is all about deviation from the norm"; pleaders should not be obliged "to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible."

With this inadequate summary, some further observations may be helpful, beginning with a reminder of the *Iqbal* decision itself.

The *Iqbal* opinion elaborated now-familiar general Rule 8(a)(2) standards for pleading "a short and plain statement of the claim showing that the pleader is entitled to relief." The details of the *Iqbal* complaint deserve a brief summary to pave the way for the Rule 9(b) ruling. The plaintiff, "a citizen of Pakistan and a Muslim," was arrested on fraud charges, pleaded guilty, served a term of imprisonment, and was removed to Pakistan. He did not challenge the arrest or the confinement as such. But he did claim that he was designated a "person of high interest" in connection with the terrorist attacks of September 11, 2001, and placed in administrative maximum confinement, "on account of his race, religion, or national origin." The Court accepted the prospect that he had pleaded claims against some of the many defendants. The case came to it on qualified immunity appeals by two of the defendants — John Ashcroft, the former Attorney General, and Robert Mueller,

the Director of the FBI. He alleged that Ashcroft was the principal architect of the unconstitutional policy, and that Mueller was instrumental in its adoption. He further alleged that they "knew of, condoned, and willfully and maliciously agreed to subject" him to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

The Court found these allegations failed to push the claim beyond mere possibility into plausibility. It applied a legal standard that "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' * * * It instead involves a decisionmaker's undertaking a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'" Knowledge of, and acquiescence in, discriminatory acts by their subordinates would not suffice to hold the Attorney General and the Director of the FBI liable. The allegations of these defendants' purpose "are conclusory, and not entitled to be assumed true." "It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." The allegations were "consistent with" an unlawful discriminatory purpose, but did not plausibly establish this purpose "given more likely explanations." Lower-ranking government officials may have designated the plaintiff a person of high interest and subjected him to unlawful conditions of confinement for unlawful reasons, but nothing more could be inferred against these two defendants than seeking "to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity."

The Court addressed Rule 9(b) after setting the general pleading requirements. It characterized the plaintiff's argument to be that by allowing discriminatory intent to be pleaded "generally," Rule 9(b) permits a conclusory allegation without more. This argument was rejected on the face of the rule text. "Generally" is used to distinguish allegations of malice, intent, knowledge, or other conditions of a person's mind from the particularity standard established for fraud or mistake. "Generally" "does not give [a party] license to evade the less rigid — although still operative — strictures of Rule 8. * * * And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."

There is much more in the article than this bald introduction. It provides a comprehensive study that illuminates the simpler reaction of those who were surprised by the Court's reading of Rule 9(b). At least some procedure mavens had continued to believe that "generally" allowed pleading of a state of mind as if a fact, just as the English rule said more explicitly. On this view, sufficient notice was given by pleading the facts whose legal consequences are measured by the defendant's state of mind. And the difficulty of pleading more, particularly without an opportunity to

discover facts and circumstances available only to the defendant or uncooperative witnesses, is neatly expressed in the aphorism that "The devil himself knoweth not the thought of men."[11]

Pursuing this invitation toward actual proposal of an amendment for publication will require careful development.

One task might be to examine the development of Rule 9(b) practices in the lower courts before the *Iqbal* decision. The story of general "notice" pleading practices before the *Twombly* and *Iqbal* decisions was decidedly mixed, not only in the lower courts but in the Supreme Court itself. Broad and frequent repetitions of the "no set of facts" phrase retired by the *Twombly* opinion were interspersed with decisions that not only departed from any (and improbable) literal meaning, but went well into the realm of fact pleading. The story of Rule 9(b) may prove to have been similar, offering an example of hard-earned judicial experience that, whether or not aware of the intentions communicated only by citing a mid-late Nineteenth Century British practice, found a need for more detailed pleading. A standard suited to pleading common-law claims and such statutory claims as existed then in England might well prove inadequate in the civil-action environment of the Twentieth and Twenty-First Centuries.

An initial exploration of earlier cases turns up evidence of an interpretation quite at odds with the assumption that the second sentence in Rule 9(b) is an independent provision for pleading under Rule 8(a)(2). A starting point would be that it is puzzling to insert a qualification of Rule 8(a)(2) as a second sentence in Rule 9(b), without even a cross-reference to Rule 8. Instead, the second sentence is no more than an amelioration of the particular pleading requirement in the first sentence, allowing the condition-of-mind elements of a claim of fraud or mistake to be pleaded generally. On this view, Rule 8(a)(2) has all along governed allegations of malice, intent, knowledge, and other conditions of a person's mind outside the realm of fraud and mistake. Variations in the general Rule 8(a)(2) standard over time apply to such allegations as intent to discriminate or actual malice in defaming a public figure, but that is a direct consequence of Rule 8(a)(2) fashions, not a departure from the second sentence of Rule 9(b).

Apart from the evolution of substantive law, the procedural framework also has evolved. In the general pleading part of the *Iqbal* opinion, the Court observed that while Rule 8 departs from "the hypertechnical, code-pleading regime of a prior era, * * * it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." The Committee has frequently wrestled with the prospect that at least some guided discovery should be permitted to support an amended complaint based on information not available to the plaintiff but often available to

[11] Justice Frankfurter, dissenting, in *Leland v. Oregon*, 343 U.S. 790, 803 (1952), quoting "Brian, C.J., in the fifteenth century."

the defendant, or perhaps to nonparties. Writing into the rules a provision for discovery in aid of pleading has not proved an easy task.

A more pointed set of questions about the role of substantive law is illustrated by the Committee's deliberations about enhanced pleading during the period from the *Leatherman* decision in 1993, when the Supreme Court ruled that heightened pleading can be required only as specifically provided in rule text, and 2007, when the *Twombly* opinion was announced. The issue began with qualified official immunity cases. That example expanded into questions about the difficulty of identifying which substantive theories might be required to satisfy heightened pleading requirements. Those questions in turn led both to abstract concerns about transsubstantivity and to practical concerns about the need to have a solid grasp of litigation realities in any substantive area that might be captured in a specific pleading rule. The present proposal recognizes this possibility by suggesting that a desire to protect defendants who may be entitled to official immunity could be vindicated by a pleading rule specific to immunity cases, "not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b)." p. 1052 n. 137.

The official immunity example finds parallels in the examples recounted by the proposal. What elements of underlying substantive law, and what realities of litigation practice, might distinguish the pleading standards appropriate for actual malice in an action for defamation of a public figure? For discrimination in employment, under RLUIPA, or as a "class of one" equal protection claim? For malicious prosecution? For "fraudulent" conveyances? Rule 9(b), as some had understood it from 1938 to 2009, and as it might be revised, covers a wide universe of substantive law. And its reach may be uncertain.

The uncertain reach of the proposed amendment is illustrated by an observation toward the close that it would not "entirely undo the *Twombly* and *Iqbal* regime." *Twombly* would not be affected "because the allegation of an unlawful agreement is not a condition of mind * * *. Rather, it is an allegation pertaining to something that the defendants have done." pp. 1050-1051. But *Twombly* involved a claim of "conspiracy" under § 1 of the Sherman Act, a concept often translated as "agreement" but without any coherent concept to identify the line between "conscious parallelism" and some more closely convergent states of competitors' minds. The basis for decision commonly is a detailed set of facts of behavior in the marketplace, not any direct evidence of collusion. Time and again, "agreement" is no more than an inference from such facts. But it is an inference that looks to the state of mind of two or more actors, as inferred from the facts. The *Twombly* complaint included detailed statements of facts, and explicit allegations of conspiracy, but the Court did not find plausible support for the required inference. But unless the antitrust question is answered by ruling that "agreement" requires explicit offer and acceptance, how is an allegation of intent — for example, an intent to exclude

competition by rivals for incumbent carriers — not an allegation of a condition of mind? How should a new rule for pleading conditions of mind be framed to avoid overruling *Twombly*?

One approach to the general proposal might be to examine multiple areas of the law where a claim depends on proving malice, intent, knowledge, or other conditions of a person's mind, seeking to develop an appropriate pleading standard for each. But if that task seems as unmanageable as a parallel task seemed from 1993 to 2007, which general rule would be better? Whatever practices emerge from adapting the general and highly variable standards of Rule 8(a)(2) as mandated by the Supreme Court? Or a return to a practice that treats as a sufficient allegation of fact a direct averment of "malice," "intent," "knowledge," or some other condition of a person's mind as required by the substantive claim asserted in the pleading?

These are difficult questions. Any potential revision of the second sentence of Rule 9(b) will inevitably be highly contentious. Many will find the proposal fully persuasive in its own terms, particularly those who are dissatisfied with current pleading standards in general. Even those who have come to accept current pleading standards may believe that Rule 9(b) can be amended in ways that will improve access to justice, saving worthy claims that otherwise would fail at the pleading stage without opportunity for discovery, and in ways that support flexible administration that accommodates the reasonable variations in pleading standards that best fit different substantive areas of the law. Much work will be required to elaborate and justify any proposed amendment. This is the first meeting that may present a good opportunity to begin the work.

WILLIAM & MARY
LAW SCHOOL

OFFICE OF THE DEAN

August 28, 2020

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

Re: Proposed Amendment to Rule 9(b)

Dear Judge Bates:

Please find attached a copy of an article in which I propose an amendment to Rule 9(b) of the Federal Rules of Civil Procedure. In brief, the proposal is to amend the rule as follows:

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

Although a full explanation of the motivations and justifications for this proposed amendment are reflected in the attached article, the following draft proposed committee note aptly summarizes the design of the change:

> **Subdivision (b).** Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media*, LLC, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
>
> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against

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> the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [year], defendant [name of defendant 1] conveyed all of defendant's real and personal property to defendant [name of defendant 2] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
>
> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

As I point out in the attached article, Rule 9(b) was based on an English rule that manifestly did not require the pleading of facts in support of allegations pertaining to conditions of the mind. Justice Kennedy's interpretation of Rule 9(b) in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), has unfortunately been taken to mean the exact opposite of that, which is unfortunate given the inordinate difficulty of factually substantiating condition-of-the-mind allegations at the pleading stage.

I urge you to review the article in its entirety to fully appreciate the complete set of arguments in favor of revising Rule 9(b) as I propose. I look forward to being able to discuss this item at one of our next meetings and am hopeful that the committee will determine that the proposal warrants further consideration, perhaps by a newly formed subcommittee.

Best regards,

A. Benjamin Spencer
Dean & Chancellor Professor

Cc: Hon. Robert M. Dow, Jr.
Prof. Ed Cooper
Prof. Rick Marcus
Ms. Rebecca A. Womeldorf, Esq.

# PLEADING CONDITIONS OF THE MIND UNDER RULE 9(b): REPAIRING THE DAMAGE WROUGHT BY *IQBAL*

*A. Benjamin Spencer*†

*"There is certainly no longer reason to force the pleadings to take the place of proof, and to require other ideas than simple concise statements, free from the requirement of technical detail."*

—Charles E. Clark, 1937[1]

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† Bennett Boskey Visiting Professor of Law, Harvard Law School; Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law. I would like to thank those who were able to give helpful comments on the piece.

1 Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

## INTRODUCTION

In 2009, the Supreme Court decided *Ashcroft v. Iqbal*,[2] in which it pronounced—among other things[3]—that the second sentence of Rule 9(b) of the Federal Rules of Civil Procedure—which permits allegations of malice, intent, knowledge, and other conditions of the mind to be alleged "generally"—requires adherence to the plausibility pleading standard it had devised for Rule 8(a)(2) in *Bell Atlantic Corp. v. Twombly*.[4] That is, to plead such allegations sufficiently, one must offer sufficient facts to render the condition-of-the-mind allegation plausible. This rewriting of the standard imposed by Rule 9(b)'s second sentence—which came only veritable moments after the Court had avowed that changes to the pleading standards could only be made through the formal rule amendment process[5]—is patently unsupportable for two reasons.

First, the *Iqbal* Court's interpretation of Rule 9(b) is at odds with a proper text-based understanding of the Federal Rules: (1) The plausibility pleading obligation purports to be derived from the Rule 8(a)(2)

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2 556 U.S. 662 (2009).

3 To view a fuller discussion of the *Iqbal* decision, see A. Benjamin Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) [hereinafter Spencer, Iqbal *and the Slide Towards Restrictive Procedure*].

4 550 U.S. 544, 555 (2007).

5 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); Hill v. McDonough, 547 U.S. 573, 582 (2006) ("Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts."). The Supreme Court has never indicated that rules promulgated pursuant to the Rules Enabling Act may be interpreted more loosely by the Court because of the Court's unique role in promulgating such rules; to the contrary, the Court has steadfastly adhered to the notion that it is not free to revise such rules through judicial interpretation. *See, e.g.*, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("The text of a rule thus proposed and reviewed [through the Rules Enabling Act process] limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'" (quoting 28 U.S.C. § 2072(b) (2000))); Harris v. Nelson, 394 U.S. 286, 298 (1969) ("We have no power to rewrite the Rules by judicial interpretations. We have no power to decide that Rule 33 applies to habeas corpus proceedings unless, on conventional principles of statutory construction, we can properly conclude that the literal language or the intended effect of the Rules indicates that this was within the purpose of the draftsmen or the congressional understanding.").

obligation to "show[]" entitlement to relief,[6] an obligation that reflects the standard for sufficiently stating claims, not the standard for sufficiently stating the individual component allegations thereof—which is found in Rule 8(d)(1), not Rule 8(a)(2); (2) text from elsewhere in the Federal Rules and from the Private Securities Litigation Reform Act (PSLRA) reveals that the *Iqbal* interpretation of Rule 9(b) is unsound; and (3) evidence from the now-abrogated Appendix of Forms—in effect at the time of *Iqbal*—contradicts any attempt to place a plausibility pleading gloss on Rule 9(b).

Second, the Court's alignment of Rule 9(b)'s second sentence with the 8(a)(2) plausibility pleading standard runs counter to the original understanding of Rule 9(b), which was borrowed from English practice extant in 1937. A review of the English rule that formed the basis of Rule 9(b), as well as the English jurisprudence surrounding that rule at the time, make clear that Rule 9(b) cannot be faithfully interpreted as requiring pleaders to set forth the circumstances from which allegations pertaining to conditions of the mind may be inferred.

Beyond reflecting an errant interpretation of Rule 9(b), the *Iqbal* understanding has resulted in tremendous harm to litigants seeking to prosecute their claims. Lower courts have embraced the *Iqbal* revision of Rule 9(b) with zeal, dismissing claims for failure to articulate facts underlying condition-of-mind allegations left, right, and center. This is undesirable not only because it turns on its head a rule that was designed to facilitate rather than frustrate such claims, but also because it contributes to the overall degradation of the rules as functional partners in the larger civil justice enterprise of faithfully enforcing the law and vindicating wrongs. In light of these ills arising from *Iqbal*'s adulteration of Rule 9(b), it should be amended to make the original and more appropriate understanding of the condition-of-mind pleading requirement clear, or at least revised to conform its language to the *Iqbal* Court's reimagining of it. What follows is an exploration of these points.

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[6] *Twombly*, 550 U.S. at 555 n.3 ("Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief."); *see also Iqbal*, 556 U.S. at 679 ("But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" (quoting FED. R. CIV. P. 8(a)(2))).

## I. THE ADULTERATION OF RULE 9(b)

### A. Iqbal *and Pleading Conditions of the Mind*

Although there are multiple aspects of the *Iqbal* decision worthy of critique,[7] our focus here will be on its perversion of the standard applicable to alleging conditions of the mind found in Rule 9(b). Rule 9(b) reads, in its entirety, as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.[8]

The question is what pleading standard does the second sentence of Rule 9(b)—which I will refer to as the conditions-of-the-mind clause—impose?

According to Justice Kennedy—the author of the *Iqbal* opinion—the conditions-of-the-mind clause should be read to mean that allegations of malice, intent, knowledge, and other conditions of mind must be pleaded consistently with the plausibility pleading standard of Rule 8(a)(2). Justice Kennedy made this pronouncement in the following way:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—

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[7] *See, e.g.*, Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–201 (criticizing *Iqbal* for its endorsement of a subjective approach to scrutinizing pleading that will permit courts to restrict claims by members of social outgroups). I have criticized the *Twombly* decision as well. *See, e.g.*, A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710 (2013) [hereinafter Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*]; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431 (2008) [hereinafter Spencer, *Plausibility Pleading*].

[8] FED. R. CIV. P. 9(b).

> though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.[9]

In this passage, Justice Kennedy declared that in pleading conditions of the mind, one must apply the "still operative strictures of Rule 8." Those strictures require "well-pleaded factual allegations"—not mere legal conclusions—that "show[]" plausible entitlement to relief:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." FED. RULE CIV. PROC. 8(a)(2).[10]

In *Iqbal*, the condition of the mind being pleaded was discriminatory intent: that the defendants undertook the challenged course of action—the detention of certain individuals and subjugation of them to harsh conditions of confinement—"solely on account of" the plaintiff's race, religion, or national origin.[11] Justice Kennedy declared that this was a "bare" assertion, amounting to nothing more than a "'formulaic recitation of the elements' of a constitutional discrimination claim."[12] He acknowledged, however, that "[w]ere we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[13] But, alas, they (the *Iqbal* majority) could not accept it as true because the allegations' "conclusory nature . . . disentitle[d] them to the presumption of truth"[14] and "the Federal Rules do not require courts to

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[9] *Iqbal*, 556 U.S. at 686–87.

[10] *Id.* at 678–79.

[11] *Id.* at 680.

[12] *Id.* at 681 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[13] *Id.* at 686.

[14] *Id.* at 681.

credit a complaint's conclusory statements without reference to its factual context."[15] Thus, the plaintiff's claims against Ashcroft and Mueller were dismissed.[16] Although this was an adverse outcome for Mr. Iqbal's individual case, the consequences of this view of Rule 9(b) have reverberated throughout the lower courts, facilitating the dismissal of a countless number of claims involving condition-of-mind allegations.[17]

### B. *Lower Courts and Rule 9(b) after* Iqbal

By interpreting Rule 9(b) in a way that subsumed it within the pleading standard applicable to stating claims, the *Iqbal* Court empowered lower courts to apply the "still operative strictures of Rule 8"—the plausibility requirement—to the determination of whether an allegation pertaining to a condition of the mind is sufficient, thereby infusing fact skepticism into an analysis in which the Court purports that alleged facts are assumed to be true.[18] What this has meant operationally

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15 *Id.* at 686.

16 *Id.* at 687.

17 *See infra* Section I.B. A perhaps unexpected distinct consequence of the *Iqbal* Court's interpretation of the term "generally" in Rule 9(b) has been that lower courts have adopted and applied that interpretation to the use of the term "generally" in Rule 9(c), which permits the satisfaction of conditions precedent to be pleaded generally. *See, e.g.*, Dervan v. Gordian Grp. LLC, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017) ("This Court agrees, and holds that the occurrence or performance of a condition precedent—to the extent that it need be pled as a required element of a given claim—must be plausibly alleged in accordance with Rule 8(a)."); Chesapeake Square Hotel, LLC v. Logan's Roadhouse, Inc., 995 F. Supp. 2d 512, 517 (E.D. Va. 2014) ("The fact that these adjacent subsections within Rule 9 contain virtually indistinguishable language suggests that the pleading requirements should likewise be indistinguishable."); Napster, LLC v. Rounder Records Corp., 761 F. Supp. 2d 200, 208 (S.D.N.Y. 2011) (deeming the allegation that plaintiff "has performed all of the terms and conditions required to be performed by it under the 2006 Agreement" an insufficient "legal conclusion," and recognizing that the cited cases suggesting that such "general statement[s]" are sufficient under Rule 9(c) "all predate *Twombly* and *Iqbal*"). This interpretation of Rule 9(c) is as inappropriate as, I will endeavor to show, the *Iqbal* Court's interpretation of Rule 9(b). However, this Article will maintain a focus on the erroneousness and implications of the *Iqbal* Court's misinterpretation of Rule 9(b). For a discussion of the history and purpose of Rule 9(c), as well as coverage of post-*Iqbal* cases interpreting it, see 5A CHARLES A. WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE §§ 1302–1303 (4th ed. 2018).

18 *See* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 192 ("[T]he *Iqbal* Court's rejection of Iqbal's core allegations as too conclusory to be entitled to the assumption of truth reflects a disturbing extension of the *Twombly* doctrine in the direction of increased fact skepticism.").

is that lower courts require what Justice Kennedy called "well-pleaded facts"[19] in support of their allegations: Pleaders must offer specific facts plausibly showing an alleged condition of the mind.[20] Many examples of

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[19] *Iqbal*, 556 U.S. at 679.

[20] Lower courts have also expanded the *Twombly* and *Iqbal* interpretation of Rule 8(a)(2) into Rule 8(a)(1), requiring the pleading of facts sufficient to support the plausible inference that there are grounds for the court to exercise subject matter jurisdiction, notwithstanding the fact that Rule 8(a)(1) does not impose a requirement to "show" that there is jurisdiction and that abrogated Form 7 did not reflect any such requirement. *See, e.g.*, Wood v. Maguire Auto., LLC, 508 F. App'x 65, 65 (2d Cir. 2013) (complaint failed to properly allege subject matter jurisdiction because allegation of amount in controversy was "conclusory and not entitled to a presumption of truth" (citing *Iqbal*, 556 U.S. 662)); Norris v. Glassdoor, Inc., No. 2:17-cv-00791, 2018 WL 3417111, at *7 n.2 (S.D. Ohio July 13, 2018) ("To establish diversity jurisdiction, a complaint must allege facts that could support a reasonable inference that the amount in controversy exceeds the statutory threshold. . . . Here, the Amended Complaint leaves the amount in controversy to pure speculation. Therefore, 28 U.S.C. § 1332 does not provide a basis for the Court's jurisdiction over Mrs. Norris's breach of contract and fraud claims."); Weir v. Cenlar FSB, No. 16-CV-8650 (CS), 2018 WL 3443173, at *12 (S.D.N.Y. July 17, 2018) ("[J]urisdictional [dollar] amount, like any other factual allegation, ought not to receive the presumption of truth unless it is supported by facts rendering it plausible."); Lapaglia v. Transamerica Cas. Ins. Co., 155 F. Supp. 3d 153, 156 (D. Conn. 2016) (plaintiff required to "allege facts sufficient to allow for a plausible inference that the amount in controversy meets the jurisdictional threshold").

this practice abound both at the circuit[21] and district court levels[22] and are too numerous to list in full.[23] A few examples will illustrate the point.

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21 *See, e.g.*, Ibe v. Jones, 836 F.3d 516, 525 (5th Cir. 2016) ("The complaint must thus set forth specific facts supporting an inference of fraudulent intent." (citing Melder v. Morris, 27 F.3d 1097, 1102 (5th Cir. 1994))); Biro v. Condé Nast, 807 F.3d 541, 544–45 (2d Cir. 2015) ("*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent."); Pippen v. NBCUniversal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013) ("States of mind may be pleaded generally, but a plaintiff still must point to details sufficient to render a claim plausible."); Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc., 674 F.3d 369, 377 (4th Cir. 2012) ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated."); Schatz v. Republican State Leadership Comm., 669 F.3d 50, 58 (1st Cir. 2012) ("[T]o make out a plausible malice claim, a plaintiff must still lay out enough facts from which malice might reasonably be inferred."). Although particularity is required for allegations of *fraud*, alleging fraudulent *intent* may be done generally. *See, e.g.*, *In re* Cyr, 602 B.R. 315, 328 (Bankr. W.D. Tex. 2019) ("As previously explained, [Bankruptcy] Rule 7009(b) [the counterpart to Rule 9(b) in the bankruptcy context] distinguishes between pleading the circumstances of the alleged fraud and the conditions of the defendant's mind at the time of the alleged fraud. Thus, the heightened standard requiring the specifics of the 'who, what, when, where, and how' of the alleged fraud applies to the circumstances surrounding the fraud, not the conditions of the defendant's mind at the time of the alleged fraud.").

22 *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients' indebtedness made by Samaritan Hospital. . . . Indeed, the Amended Complaint provides no facts . . . from which the Court could draw a reasonable inference that ORDD and O'Brien knew or should have known that Plaintiff did not owe the debt."); Rovai v. Select Portfolio Servicing, Inc., No. 14-cv-1738-BAS-WVG, 2018 WL 3140543, at *13 (S.D. Cal. June 27, 2018) ("Although th[e] general averment of intent and knowledge may be sufficient for Rule 9(b), '*Twombly* and *Iqbal*'s pleading standards must still be applied to test complaints that contain claims of fraud.' This means that '[p]laintiffs must still plead facts establishing *scienter* with the plausibility standard required under Rule 8(a).'" (citations omitted)); Mourad v. Marathon Petroleum Co., 129 F. Supp. 3d 517, 526 (E.D. Mich. 2015) ("Plaintiffs have also failed to sufficiently allege facts in support of their claim that Defendant's acts, though lawful, were malicious. This is because Plaintiffs have not alleged facts from which this Court can reasonably infer that Defendant acted with the requisite state of mind. Although Plaintiffs correctly point out that Federal Rule of Civil Procedure 9(b) permits '[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally[,]' this Rule does not, as Plaintiffs insist, permit a party to simply parrot the state of mind required by a particular cause of action. Rather, to withstand dismissal, factual allegations corroborating Defendant's malicious intent are necessary." (citation omitted)); United States *ex rel.* Modglin v. DJO Glob. Inc., 114 F. Supp. 3d 993, 1024 (C.D. Cal. 2015) (dismissing allegations "that defendants 'knew that they were falsely and/or fraudulently claiming reimbursements' and 'knew [their devices] were being unlawfully sold for unapproved off-label cervical use'" because "[n]one of the facts relators plead[ed] . . . support[ed] their conclusory allegation that defendants knowingly submitted false claims," and therefore, notwithstanding "that Rule 9(b) does not require particularized

The Second Circuit fully embraced the *Iqbal* interpretation of Rule 9(b) in *Biro v. Condé Nast*, a defamation case involving a public figure.[24] After noting the requirement of showing "actual malice" to prevail on a defamation claim in the public figure context, the court rebuffed the plaintiff's claim that Rule 9(b) absolved him of the duty "to allege facts sufficient to render his allegations of actual malice plausible" with the following retort: "*Iqbal* makes clear that, Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent. . . . It follows that malice must be alleged plausibly in accordance with Rule 8."[25] The Seventh Circuit similarly cited *Iqbal* in imposing a requirement that allegations of bad faith be backed up with allegations of substantiating facts:

> Bare assertions of the state of mind required for the claim—here "bad faith"—must be supported with subsidiary facts. *See Iqbal*, 556 U.S. at 680–83, 129 S. Ct. 1937. The plaintiffs offer nothing to support their claim of bad faith apart from conclusory labels—that the unnamed union officials acted "invidiously" when they failed to process the grievances, or simply that the union's actions were "intentional, willful, wanton, and malicious." They supply no factual detail to support these conclusory allegations, such as (for example) offering facts that suggest a motive for the union's alleged failure to deal with the grievances.[26]

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allegations of knowledge," the complaint "f[e]ll short of plausibly pleading scienter under Rule 8, *Twombly*, and *Iqbal*"), *aff'd*, 678 F. App'x 594 (9th Cir. 2017).

[23] A more comprehensive citation to the relevant cases illustrating this trend may be found in WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301. An example of a case in which this trend was bucked is *United States ex rel. Dildine v. Pandya*, in which the court accepted the government's bald allegations of state of mind as sufficient to plead scienter. 389 F. Supp. 3d 1214, 1222 (N.D. Ga. 2019) ("Since Federal Rule of Civil Procedure 9(b) provides '[m]alice, intent knowledge, and other conditions of a person's mind may be alleged generally' and since the Complaint alleges Defendants submitted false claims with actual knowledge, reckless indifference, or deliberate ignorance to the falsity associated with such claims, the Government satisfies the scienter element.").

[24] *Condé Nast*, 807 F.3d 541.

[25] *Id.* at 544–45; *see also* Krys v. Pigott, 749 F.3d 117, 129 (2d Cir. 2014) (indicating that based on *Iqbal*, one must plead nonconclusory facts that give rise to an inference of knowledge).

[26] Yeftich v. Navistar, Inc., 722 F.3d 911, 916 (7th Cir. 2013) (citing Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009)).

The Eleventh Circuit too, confronting this issue in 2016, concluded that the *Iqbal* approach to Rule 9(b) with respect to allegations of malice had to carry the day:

> Indeed, after *Iqbal* and *Twombly*, every circuit that has considered the matter has applied the *Iqbal/Twombly* standard and held that a defamation suit may be dismissed for failure to state a claim where the plaintiff has not pled facts sufficient to give rise to a reasonable inference of actual malice. Joining that chorus, we hold that the plausibility pleading standard applies to the actual malice standard in defamation proceedings.[27]

District courts are imposing *Iqbal*'s condition-of-mind particularity requirement with respect to allegations of malice as well.[28] For example, in *Moses-El v. City and County of Denver*[29] the court wrote:

> [W]here Mr. Moses-El must plead a defendant's malicious intent, coming forward with a set of facts that permit the inference that the defendant instead acted merely negligently will not suffice; rather, Mr. Moses-El must plead facts that, taken in the light most favorable to him, dispel the possibility that the defendant acted with mere negligence. As noted in *Iqbal*, Fed. R. Civ. P. 9(b)'s allowance that facts concerning a defendant's *mens rea* may be "alleged generally" does not alter this analysis.[30]

As a result of embracing this stringent view of the second sentence of Rule 9(b) in light of *Iqbal*'s interpretation of it, the court in *Moses-El* dismissed

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[27] Michel v. NYP Holdings, Inc., 816 F.3d 686, 702 (11th Cir. 2016) (citations omitted).

[28] *See, e.g.*, Diehl v. URS Energy & Constr., Inc., No. 11-cv-0600-MJR, 2012 WL 681461, at *4 (S.D. Ill. Feb. 29, 2012) ("Although paragraph 18 of Count V establishes that Plaintiff Diehl is proceeding against Defendant Walls under the theory that Walls was acting in his own self-interest when he terminated Diehl's employment, like paragraph 17, paragraph 18 is merely a conclusory statement. Count V (and the Complaint as a whole), does not set forth any factual content from which the Court can reasonably draw the inference that Diehl was acting maliciously and in his own self-interest."); Ducre v. Veolia Transp., No. CV 10-02358 MMM (AJWx), 2010 WL 11549862, at *5-6 (C.D. Cal. June 14, 2010) ("Ducre alleges that her supervisors at Veolia knew she had a disability that required her to wear a leg brace, and that they unjustly discriminated against her because of this disability by reassigning her to 'light duty' work and eventually terminating her. She asserts that she lost income and suffered hardship as a result of these actions. These factual allegations adequately allege malice and oppression under Rule 8(a) and *Iqbal*.").

[29] 376 F. Supp. 3d 1160 (D. Colo. 2019).

[30] *Id.* at 1172.

the plaintiff's malicious prosecution claim—in the face of an express allegation of malice—on the ground that the substantiating facts did not *rule out* the possibility of negligence as an alternate explanation of the defendant's actions:

> The sole allegation in the Amended Complaint that purports to demonstrate that malice is Paragraph 118, which reads "[g]iven [Dr. Brown's] qualifications and experience, as well as her previous testimony where she recognized the significant inferences that could be deduced by results such as those described above, her gross mischaracterization of the serological evidence in this case as inconclusive . . . was malicious." But the conclusion—maliciousness—does not necessarily flow from the facts: that Dr. Brown was experienced and qualified and that she recognized that inferences about the perpetrator could be drawn from the blood test results. Although malice is one inference that might be drawn from these facts, other equally (if not more likely) permissible inferences are that Dr. Brown was mistaken in her testing or analysis or that she conservatively chose not to ignore the (admittedly) small possibility that the test did *not* exclude Mr. Moses-El. Once again, *Iqbal* requires Mr. Moses-El to plead facts that establish a *probability*, not a *possibility*, that Dr. Brown acted with malice against him, and describing a set of facts that could readily be consistent with mere negligence does not suffice. Accordingly, the malicious prosecution claim against Dr. Brown is dismissed.[31]

This is a truly remarkable decision: although Rule 9(b) states that "Malice . . . may be alleged generally," and the plaintiff in this instance alleged that the actions were "malicious"—and the court acknowledged that "malice is one inference that might be drawn from these facts"—the claim was still dismissed for insufficiency under the *Iqbal* Court's perverse interpretation of Rule 9(b).[32]

Moving beyond allegations of malice for defamation claims, the Sixth Circuit has shown that it is on board with the *Iqbal* interpretation of Rule 9(b) as well. In the context of a claim under the Family and Medical Leave Act (FMLA), a Sixth Circuit panel wrote as follows:

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[31] *Id.* at 1173–74.

[32] *Id.* at 1174.

> [A]fter the Supreme Court's decisions in *Iqbal* and *Twombly*, a plaintiff must do more than make the conclusory assertion that a defendant acted willfully. The Supreme Court specifically addressed state-of-mind pleading in *Iqbal*, and explained that Rule 9(b) . . . does not give a plaintiff license to "plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 679 (2009). As we have explained in a non-FMLA context, although conditions of a person's mind may be alleged generally, "the plaintiff still must plead facts about the defendant's mental state, which, accepted as true, make the state-of-mind allegation 'plausible on its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).[33]

Imposing a requirement to "plead facts" that "make the state-of-mind allegation 'plausible on its face,'" the court concluded that the "complaint contains no facts that allow a court to infer that [the defendant] knew or acted with reckless disregard of the fact that it was interfering with [the plaintiff's] rights."[34]

The Third Circuit offers yet another instance of this trend, here in the context of an allegation of knowledge. In *Kennedy v. Envoy Airlines, Inc.*, a New Jersey district court reflected *Iqbal*'s heightened intent pleading requirement when it wrote, "Plaintiff has not alleged any particularized facts which, if true, would demonstrate that Ms. Fritz or any other Envoy employee actually *knew* that the positive test results were false."[35] The court went on to indicate that it could not accept the plaintiff's allegation of the defendant's knowledge of falsity because "such generalized and conclusory statements are insufficient to establish knowledge of falsity."[36] On appeal to the Third Circuit, the court questioned the district court's conclusion, but not because it disagreed with the standard the district court applied.[37] Instead, the Third Circuit

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33 Katoula v. Detroit Entm't, LLC, 557 F. App'x 496, 498 (6th Cir. 2014).

34 *Id.* (quoting Republic Bank & Tr. Co. v. Bear Stearns & Co., 683 F.3d 239, 247 (6th Cir. 2012)).

35 Kennedy v. Envoy Airlines, Inc., No. 15-8058 (JBS/KMW), 2018 WL 895871, at *5 (D.N.J. Feb. 14, 2018).

36 *Id.*

37 Kennedy v. Am. Airlines, Inc., 760 F. App'x 136 (3d Cir. 2019).

embraced the standard but concluded that the plaintiff arguably satisfied it by offering additional facts showing the basis for the allegation of the defendant's knowledge:

> However, we conclude that this is a closer question than the District Court's opinion postulates. Here, while Kennedy does generally assert Appellee "should have known" of the falsity, he also offers several reasons *why* Appellee should have known. In addition to his assertion that Appellee has "administered thousands of tests and is aware of the uniform and constant rate at which alcohol is metabolized," he also references Judge Ferrara's findings on the matter in an exhibit to his complaint .... These facts, perhaps, lend themselves to a reasonable inference that Appellee knew, or should have known, the results from the breathalyzer were inaccurate—at least for purposes of surviving a Rule 12(b)(6) motion.[38]

Thus, we have here the endorsement of a requirement to offer "particularized facts" that "would demonstrate"[39] the defendant's knowledge or "lend themselves to a reasonable inference"[40] that the defendant had the requisite knowledge.

Again, district courts are requiring the allegation of substantiating facts in support of allegations of knowledge as well, citing *Iqbal*'s interpretation of Rule 9(b).[41] For instance, in *United States ex rel. Morgan v. Champion Fitness, Inc.*,[42] although the court recognized the tension between the language of Rule 9(b) and the *Iqbal* Court's interpretation of it, the district court felt it was bound to adhere to that interpretation, finding that the plaintiff in the case before it could survive a motion to dismiss only because "the Complaint's representative examples have sufficient detail to support a reasonable inference providing the necessary factual support for the assertion of Defendants' knowledge."[43]

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[38] *Id.* at 140–41.

[39] *Kennedy*, 2018 WL 895871, at *5.

[40] *Kennedy*, 760 F. App'x at 141.

[41] *See, e.g.*, DeWolf v. Samaritan Hosp., No. 1:17-cv-0277 (BKS/CFH), 2018 WL 3862679, at *4 (N.D.N.Y. Aug. 14, 2018) ("[T]he Amended Complaint does not allege nonconclusory facts from which the Court could infer that ORDD and O'Brien were 'aware of the great number of mistakes regarding patients indebtedness made by Samaritan Hospital.'").

[42] No. 1:13-cv-1593, 2018 WL 5114124 (C.D. Ill. Oct. 19, 2018).

[43] *Id.* at *7.

## II. ASSESSING THE *IQBAL* VIEW OF RULE 9(b)

Certainly, as a matter of common sense, one would be hard pressed to suggest that the pleading requirements that have been outlined above are faithful reflections of what it means to permit conditions of the mind to be "alleged generally." As we have seen, courts are imposing a requirement for "well-pleaded facts," "specific facts," or "particularized facts" that "demonstrate," "show," or "establish" an alleged condition of the mind, which is the epitome of what plausibility pleading requires.[44] But does Justice Kennedy's analysis of Rule 9(b)—which has wrought all of this—stand up to scrutiny?

### A. *Textual Evidence*

Justice Kennedy's determination that the conditions-of-the-mind clause must be read to incorporate the pleading standard of Rule 8(a)(2) was a facile—if not thoughtless—conclusion based on apparent logic: If "with particularity" in the first sentence of Rule 9(b) means a heightened pleading standard, "generally" in the second sentence of Rule 9(b) must mean the ordinary pleading standard of Rule 8(a)(2), which now—post *Twombly*—requires plausibility pleading. This "reasoning" represents an abject failure of statutory interpretation for multiple reasons,[45] three of which are text-based and the fourth of which is historical.[46]

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[44] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level . . . .").

[45] *See, e.g.*, McCauley v. City of Chicago, 671 F.3d 611, 622 (7th Cir. 2011) (Hamilton, J., dissenting in part) ("*Iqbal* is in serious tension with these other decisions [Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); Erickson v. Pardus, 551 U.S. 89 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)], rules, and forms, and the Court's opinion fails to grapple with or resolve that tension.").

[46] See *infra* Section II.B for a discussion of historical evidence demonstrating the erroneous nature of Justice Kennedy's interpretation of Rule 9(b).

*First.* The object of the admonitions of Rule 9(b)—and its close cousin, Rule 9(c)[47]—are distinct from that of Rule 8(a)(2). Rule 8(a)(2)—the provision the Court was interpreting and applying in *Twombly* and *Iqbal*—supplies a standard for sufficiently stating a *claim for relief*, which requires making a "showing" of entitlement to relief,[48] and which, according to the Court, requires the satisfaction of the plausibility pleading standard.[49] Rule 9(b), on the other hand, supplies a standard for sufficiently stating *allegations*,[50] which are the building blocks of claims. In other words, when the *allegations* of a complaint are joined with one another and viewed as a whole, one asks whether they amount to a *claim*, i.e., do they show entitlement to relief under the applicable law.[51] The plausibility pleading standard of Rule 8(a)(2) applies to an assessment of the latter question—whether the allegations add up to *a claim*—not to the assessment of whether *an allegation* has been properly stated. This distinction tracks the intended distinction between a motion to dismiss for failure to state a claim under Rule 12(b)(6)—which challenges *claims* based on the plausibility standard of *Twombly*—and a motion for a more

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47 FED. R. CIV. P. 9(c) ("In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.").

48 FED. R. CIV. P. 8(a)(2) ("CLAIM FOR RELIEF. A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."); *see also Claim*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.—Also termed *claim for relief*.").

49 Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("[*Twombly* and *Iqbal*] concern the *factual* allegations a complaint must contain to survive a motion to dismiss. A plaintiff, [*Twombly* and *Iqbal*] instruct, must plead facts sufficient to show that her claim has substantive plausibility.").

50 Prior to the restyling of the Rules in 2007, references to "allegation" and "allege" in the rules were to variations of the term "averment" instead. *Compare* FED. R. CIV. P. 9(b) (2006) ("In all *averments* of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be *averred* generally." (emphasis added)), *with* FED. R. CIV. P. 9(b) (2007) ("In *alleging* fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be *alleged* generally." (emphasis added)); *see also Allegation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("1. A declaration that something is true; esp., a statement, not yet proved, that someone has done something wrong or illegal. 2. Something declared or asserted as a matter of fact, esp. in a legal pleading; a party's formal statement of a factual matter as being true or provable, without its having yet been proved; AVERMENT.").

51 FED. R. CIV. P. 8(a)(2).

definite statement under Rule 12(e)[52]—which challenges *allegations* as being "so vague or ambiguous that the party cannot reasonably prepare a response."[53] Thus, in *Iqbal*, Justice Kennedy carelessly conflated the standard for articulating allegations—the province of Rule 9(b)—with the standard for judging the sufficiency of entire claims.

In fact, the Federal Rules of Civil Procedure do set forth the general standard for stating *an allegation* in a pleading, but not in Rule 8(a)(2). Rather, one finds the standard applicable to stating allegations in Rule 8(d)(1), which reads as follows: "(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required."[54] This provision was meant to solidify the notion that the Federal Rules of Civil Procedure—which took effect in 1938—were intended to be a departure from the highly technical pleading requirements of the past.[55] Indeed, the

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52 *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 11 (2009) [hereinafter *Hearing*] (statement of Professor Stephen B. Burbank) ("The architecture of *Iqbal*'s mischief . . . is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e).").

53 FED. R. CIV. P. 12(b)(6); FED. R. CIV. P. 12(e). I have previously argued that a complaint containing insufficient factual details to render a claim plausible under *Twombly* should be the target of a motion for a more definite statement under Rule 12(e), not dismissal under Rule 12(c). *See* Spencer, *Plausibility Pleading*, *supra* note 7, at 491 ("[When faced with] a complaint with insufficient detail . . . [t]he appropriate remedy for such defects is the grant of a motion for a more definite statement, not dismissal of the claim. The defendant . . . is entitled to look to the pleadings for notice, but must rely on seeking more information rather than a dismissal when such notice is lacking.").

54 FED. R. CIV. P. 8(d)(1). Prior to the restyling of the Rules in 2007, this provision was found in Rule 8(e)(1) and read, "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." FED. R. CIV. P. 8(e)(1) (2006) (amended 2007).

55 Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458 (1942) (indicating that subsection (e) (now subsection (d)) of Rule 8 was designed "to show that ancient restrictions followed under certain more technical rules have no place"); Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976 (1937) ("Since the time when towards the end of the eighteenth century the long struggle for procedural reform commenced in England, the movement away from special pleadings and from emphasis on technical precision of allegation has been steady."); *see also* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1281 (3d ed. 2004 & Supp. 2019) ("By including a provision such as Rule 8(d)(1) the draftsmen of the original federal rules undoubtedly sought to simplify pleading and free federal procedure from the type of unrewarding battles and motion practice over the technical form of pleading statements that had plagued English and American courts under common law

Supreme Court—prior to *Iqbal*—cited this provision as evidence of the simplified notice pleading regime ushered in by the Federal Rules.[56] Why Justice Kennedy did not cite Rule 8(d)(1) when attempting to understand what Rule 9(b)'s second sentence required is unclear. What is clear, however, is that Rule 8(d)(1) does not require pleaders to state supporting facts to make a proper factual allegation.[57] Neither does the conditions-of-the-mind clause of Rule 9(b) impose such a requirement.

*Second.* Evidence from elsewhere in the Federal Rules and from the PSLRA reveals that the *Iqbal* interpretation of Rule 9(b) is not sound from a textualist perspective. Requiring facts that make state-of-mind allegations plausible amounts to a requirement for particularity, which the first sentence of Rule 9(b) only requires for allegations of fraud and mistake.[58] Further, it is only in an adjacent provision—Rule 9(a)(2)—that one finds an express obligation to state supporting facts; a party who wants to raise the issues of capacity or authority to sue or be sued, or the legal existence of an entity, must do so "by a specific denial, which must *state any supporting facts* that are peculiarly within the party's knowledge."[59] If Rule 9(a)(2) imposes a special obligation to state supporting facts in the narrow context to which it is confined, it cannot

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and code practice."). This provision has also been applied to curtail overly lengthy or convoluted allegations. *See, e.g.*, Gordon v. Green, 602 F.2d 743 (5th Cir. 1979) (verbose pleadings of over four thousand pages violated the rule).

56 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) ("Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that '[n]o technical forms of pleading or motions are required.'").

57 Abrogated Form 15 provided an illustration of pleading in conformity with Rule 8(d)(1): "On *date*, at *place*, the defendant converted to the defendant's own use property owned by the plaintiff. The property converted consists of *describe*." FED. R. CIV. P. Form 15 (2014) (abrogated 2015). No facts supporting the allegation of conversion are supplied in the form, which was authoritative at the time *Iqbal* was decided. *See also* Johnson v. City of Shelby, 574 U.S. 10, 11 (2014) ("Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." (citing FED. R. CIV. P. 8(d)(1))).

58 *See* FED. R. CIV. P. 9(b); *see also* Brief for Respondent at 33, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4734962, at *33 ("If Rule 9(b) means anything, it must be that allegations regarding state of mind can be alleged without reference to specific facts. After all, if allegations of fraud must be pleaded with 'particularity,' that must mean that allegations related to knowledge, intent, or motive, need not be pleaded with particularity.").

59 FED. R. CIV. P. 9(a)(2) (emphasis added); *see also* WRIGHT, MILLER & SPENCER, *supra* note 17, § 1294 (discussing Rule 9(a)(2)).

be that the general standard applicable to allegations found in Rule 8(d)(1) and alluded to in the second sentence of Rule 9(b) also requires the statement of supporting facts sub silentio. *Expressio unius est exclusio alterius.*[60] Interpreting the general standard for stating allegations to require the statement of supporting facts would render Rule 9(a)(2)'s express imposition of a requirement redundant surplusage.[61] Finally, in the PSLRA Congress imposed a requirement for plaintiffs to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[62] If Rule 9(b)'s second sentence imposes a requirement to plead facts that support an inference of intent and other conditions of the mind, Congress's move to impose a particularity requirement with respect to state of mind in the PSLRA would have been largely unnecessary.[63]

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[60] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)."); *see also Swierkiewicz*, 534 U.S. at 513 ("[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))); *cf.* Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1064 (2019) (Thomas, J., dissenting) ("The absence of a textual foundation for the majority's rule is only accentuated when § 1608(a)(3) is compared to § 1608(a)(4), the adjacent paragraph governing service through diplomatic channels. . . . Unlike § 1608(a)(3), this provision specifies both the person to be served *and* the location of service. While not dispositive, the absence of a similar limitation in § 1608(a)(3) undermines the categorical rule adopted by the Court."); Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("*Zadvydas*'s reasoning is particularly inapt here because there is a specific provision authorizing release from § 1225(b) detention whereas no similar release provision applies to § 1231(a)(6). . . . That express exception to detention implies that there are no *other* circumstances under which aliens detained under § 1225(b) may be released.").

[61] *See* Jay v. Boyd, 351 U.S. 345, 360 (1956) ("We must read the body of regulations . . . so as to give effect, if possible, to all of its provisions."); *see also* Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

[62] 15 U.S.C. § 78u-4(b)(2)(A) (2018).

[63] Retirement Bd. of Policemen's Annuity & Benefit Fund of Chicago v. FXCM Inc., 767 F. App'x 139, 141 (2d Cir. 2019) ("While Federal Rule of Civil Procedure 9(b) provides that 'conditions of a person's mind may be alleged generally,' under the Private Securities Litigation Reform Act ('PSLRA'), a securities plaintiff must nevertheless allege facts that suggest a 'strong inference' of scienter.").

*Third.* What used to be Official Form 21—now conveniently abrogated,[64] but in force at the time *Iqbal* was decided—provided the definitive and authoritative[65] illustration of what both sentences of Rule 9(b) permit and require. It read, in pertinent part, as follows:

> 4. On *date*, defendant *name* conveyed all defendant's real and personal property *if less than all, describe it fully* to defendant *name* for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt.[66]

In this example we have both an allegation of fraud and two allegations of intent, each of which must look to Rule 9(b) for the applicable standard of sufficiency. Regarding the allegation of fraud—the "circumstances" of which must be stated "with particularity"—Form 21 taught that offering the "who, what, when, where and how" of the fraud is sufficient, an understanding innumerable courts have recognized.[67] When we turn to the two allegations relating to intent—(1) that the aforementioned actions by the defendant were undertaken "for the purpose of defrauding the plaintiff" and (2) that those same actions were done "for the purpose of . . . delaying the collection of the debt"—Form 21 taught that bald,

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[64] FED. R. CIV. P. 84 (2014) (abrogated 2015); *see also* COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 276 (2013) ("[T]he pleading forms live in tension with recently developing approaches to general pleading standards."); *see generally* A. Benjamin Spencer, *The Forms Had a Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L.J. 1113 (2015) [hereinafter Spencer, *The Forms Had a Function*] (discussing the significance of the abrogated Official Forms and the motivation behind their abandonment).

[65] Prior to its abrogation in 2015, Rule 84 provided: "The forms in the Appendix of Forms suffice under these rules and illustrate the simplicity and brevity that these rules contemplate." FED. R. CIV. P. 84 (2014) (abrogated 2015). That the forms were sufficient under the rules was an important component of the rule that was added in a 1946 amendment for the very reason that courts were treating the forms as merely illustrative rather than authoritative. *See* Spencer, *The Forms Had a Function*, *supra* note 64, at 1122–24.

[66] FED. R. CIV. P. Form 21 (2014) (abrogated 2015).

[67] WRIGHT, MILLER & SPENCER, *supra* note 17, § 1297 ("A formulation popular among courts analogizes the standard to 'the who, what, when, where, and how: the first paragraph of any newspaper story.'"); *see, e.g.*, OFI Asset Mgmt. v. Cooper Tire & Rubber, 834 F.3d 481, 490 (3d Cir. 2016) (applying the formulation to a securities fraud class action); Zayed v. Associated Bank, N.A., 779 F.3d 727, 733 (8th Cir. 2015) (applying the formulation to a claim of aiding and abetting fraud); United States *ex rel.* Heineman-Guta v. Guidant Corp., 718 F.3d 28, 36 (1st Cir. 2013) (applying the formulation to a qui tam action under False Claims Act).

conclusory, and factless statements suffice to allege intent properly.[68] What we undeniably do not have in Form 21 is the slightest support for Justice Kennedy's homespun, improvised diktat that allegations of intent and other conditions of the mind must be supported by facts that render the allegations plausible. That such lawless imperialism—which would be derided as judicial activism if it came from another quarter—was endorsed by the sometimes textualists Antonin Scalia[69] and Clarence Thomas[70] is a dismaying but unsurprising instance of the inconsistency that has too often characterized their purported interpretive commitments.[71]

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68 FED. R. CIV. P. Form 21 (2014) (abrogated 2015); *see* Sparks v. England, 113 F.2d 579, 581 (8th Cir. 1940) ("The appendix of forms accompanying the rules illustrates how simply a claim may be pleaded and with how few factual averments."); Spencer, *Plausibility Pleading*, *supra* note 7, at 474 ("The allegation [in Form 21], however, remains fairly conclusory and factless in character. It contains a bald assertion that the conveyance was for fraudulent purposes without offering any factual allegations in support of this assertion. Nevertheless, the rulemakers felt that the information offered sufficed even under the heightened particularity requirement of Rule 9(b) because it achieves notice—the defendant has a clear idea of the circumstances to which the plaintiff refers in alleging fraud and can prepare a defense characterizing the cited transaction as legitimate.").

69 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16, 22 (1997) ("[W]hen the text of a statute is clear, that is the end of the matter. . . . The text is the law, and it is the text that must be observed.").

70 *See, e.g.*, Carter v. United States, 530 U.S. 255 (2000) (Thomas, J.) ("[O]ur inquiry focuses on an analysis of the textual product of Congress' efforts, not on speculation as to the internal thought processes of its Members.").

71 Justice Thomas's inconstancy is manifestly self-evident on this score, having admonished in *Swierkiewicz v. Sorema N.A.* that the pleading requirements imposed by Rule 8(a)(2) cannot be amended by the Court outside the rule amendment process but then signing on to two opinions doing just that in *Twombly* and *Iqbal*. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that different pleading standards "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))). For an example of Justice Scalia's fair-weather textualism, one can consult *Walmart Stores, Inc. v. Dukes*, in which Justice Scalia abandoned a faithful application of the plain text of Rule 23(a)—which requires questions "common to the class"—to impose his own wished-for requirements that there be a common injury among class members and that the common issues must be central to the dispute. 564 U.S. 338 (2011); *see also* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 464 (2013) ("Justice Scalia, who often touts his fealty to the written text of enacted rules and statutes, displays none of that discipline in *Dukes*. The language of Rule 23(a)—that 'there are questions of law or fact common to the class'—expresses no need for class members to have suffered the 'same injury.'"); *id.* at 474 ("Rather than follow his own textualist diktats, Justice Scalia pronounces efficiency as the objective policed by the commonality rule, then uses that to banish those common questions that do little to further

### B. *The Original Understanding of Rule 9(b)*

Although the textual arguments against the *Iqbal* Court's interpretation of Rule 9(b) provide compelling evidence of its waywardness, and the review of the caselaw on this point above demonstrates that this erroneous interpretation of Rule 9(b) has real world negative implications for claimants, there is historical support for the view that *Iqbal* got the interpretation of Rule 9(b) terribly wrong. When Rule 9(b) was originally promulgated in 1938, the drafters of the rule provided helpful guidance as to its meaning in the committee notes. The note pertaining to Rule 9(b) read as follows: "See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 22."[72] What this citation refers to is Order 19, Rule 22 of the English Rules of the Supreme Court (the English Rules) that were promulgated under the Judicature Acts of 1873 and 1875.[73] That rule—which the Advisory Committee indicated was the source of Rule 9(b)—read as follows:

> 22. Wherever it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.[74]

Here we see that the lineage of the second sentence of our Rule 9(b)—the conditions-of-mind clause—is an English rule that provides that conditions of the mind may be alleged "as a fact without setting out the circumstances from which the same is to be inferred."[75] Given that the 1938 rulemakers cited to Order 19, Rule 22 as their source—or at least as their inspiration—for Rule 9(b),[76] it is reasonable to suspect that "averred generally" (now "alleged generally") must have been intended to mean something akin to "without setting out the circumstances from which the

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efficiency from its ambit, without regard to the fact that commonality, not efficiency, is the unambiguous requirement of Rule 23(a)(2).").

72 FED. R. CIV. P. 9 advisory committee's note to 1937 adoption.

73 Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, *as amended by* Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77.

74 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

75 *Id.*

76 *See, e.g.*, Love v. Commercial Cas. Ins. Co., 26 F. Supp. 481, 482 (S.D. Miss. 1939) ("This rule [Rule 9(b)] very probably was adopted from the rules of the Supreme Court of England, Order XIX, Rule 22.").

same is to be inferred."[77] What did this language mean and how was it interpreted at the time the 1938 rules of procedure were first crafted?

*Commentator's Notes and Official Forms Accompanying the English Rules.* As the notes that appear following Order 19, Rule 22, in the 1937 edition of the Rules of the Supreme Court explain, to plead knowledge under the rule, "[i]t is sufficient to plead, 'as the defendant well knew,' or 'whereof the defendant had notice,' without stating when or how he had notice, or setting out the circumstances from which knowledge is to be inferred."[78] Respecting allegations of malice, the notes remark, "But he [the plaintiff] need not in either pleading [the statement of the claim or the reply] set out the evidence by which he hopes to establish malice at the trial."[79] The same was said of allegations of fraudulent intent; although under the English Rules allegations of fraud had to be specified by stating the acts alleged to be fraudulent,[80] the notes to Rule 22 indicated that "from these acts fraudulent intent may be inferred; and it is sufficient to aver generally that they were done fraudulently."[81]

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77 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22. The Supreme Court has employed similar reasoning when interpreting other Federal Rules of Civil Procedure. For example, in seeking to understand the meaning of Rule 42(a), the Court wrote the following:

> [This case is] about a term—consolidate—with a legal lineage stretching back at least to the first federal consolidation statute, enacted by Congress in 1813. Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals. Rule 42(a), promulgated in 1938, was expressly based on the 1813 statute. The history against which Rule 42(a) was adopted resolves any ambiguity regarding the meaning of "consolidate" in subsection (a)(2). It makes clear that one of multiple cases consolidated under the Rule retains its independent character, at least to the extent it is appealable when finally resolved, regardless of any ongoing proceedings in the other cases.

Hall v. Hall, 138 S. Ct. 1118, 1125 (2018) (internal citation omitted).

78 English Rules Under the Judicature Act (The Annual Practice, 1937), O. 19, r. 22 (note).

79 *Id.*

80 *Id.* O. 19, r. 6 ("In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence . . . particulars (with dates and items if necessary) shall be stated in the pleading . . . .").

81 *Id.* O. 19, r. 22 (note).

Reference to the forms in Appendix C of the English Rules[82] confirms the view set forth in the notes discussed above. For example, one finds there the following model allegation of the defendant's knowledge:

> 3. The wilful default on which the plaintiff relies is as follows:—
>
> *C.D.* owed to the testator 1000*l.*, in respect of which no interest had been paid or acknowledgment given for five years before the testator's death. *The defendants were aware of this fact,* but never applied to *C.D.* for payment until more than a year after testator's death, whereby the said sum was lost.[83]

No facts from which it might be inferred that the defendants had such knowledge are offered anywhere within this model form. In another instance of pleading knowledge—this time within a complaint for a "fraudulent prospectus"—Appendix C offered the following example:

> 4. The prospectus contained misrepresentations, of which the following are particulars :—
>
> (a) The prospectus stated ". . . . " whereas in fact . . . .
>
> (b) The prospectus stated ". . . . " whereas in fact . . . .
>
> (c) The prospectus stated ". . . . " whereas in fact . . . .
>
> 5. *The defendant knew of the real facts* as to the above particulars.
>
> 6. The following facts, *which were within the knowledge of the defendants,* are material, and were not stated in the prospectus . . . .[84]

The next form in Appendix C, which is for a "fraudulent sale of a lease," similarly contained an unadorned and unsupported allegation of the defendant's knowledge. It read as follows: "The plaintiff has suffered damage from the defendant inducing the plaintiff to buy the goodwill and lease of the George public-house, Stepney, by fraudulently representing

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[82] *Id.* O. 19, r. 5 ("The forms in Appendices C., D., and E., when applicable, and where they are not applicable forms of the like character, as near as may be, shall be used for all pleadings . . . .").

[83] The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § II, No. 2 (emphasis added).

[84] *Id.* § VI, No. 13 (emphasis added).

to the plaintiff that the takings of the said public-house were £40 a week, whereas in fact they were much less, *to the defendant's knowledge.*"[85]

Allegations of malice—like allegations of knowledge—were protected from particularized pleading by Order 19, Rule 22;[86] thus, it is helpful to find an example of such pleadings in Appendix C as well. The malicious prosecution form read as follows: "The defendant *maliciously* and without reasonable and probable cause preferred a charge of larceny against the plaintiff before a justice of the peace, causing the plaintiff to be sent for trial on the charge and imprisoned thereon . . . ."[87] Here, consistent with Order 19, Rule 22, we find no greater specificity than was presented in the context of the allegations of the defendant's knowledge outlined above.

*English caselaw.* The scant but available contemporaneous decisions of English courts interpreting and applying the pleading rules confirm that they did not require the pleading of any facts substantiating the basis for condition-of-the mind allegations. *Glossop v. Spindler*[88] is particularly illustrative. In that case, the plaintiff alleged—in paragraph one—that the defendant maliciously printed and published in a newspaper certain defamatory matter and—in paragraph two—that "the defendant, on previous occasions, and in furtherance of malicious motives on his part towards the plaintiff, maliciously printed and published of the plaintiff various statements and paragraphs in the said newspaper, and these, for convenience of reference, are set forth in the appendix hereto."[89] The defendant sought to have paragraph two and the appendix stricken as a violation of the pleading rules.[90] The court ruled that the allegation of paragraph two itself was sufficient, in that "it contained a statement of material facts upon which the plaintiff would rely at trial as constituting malicious motives."[91] However, the court also ruled that the appendix must be stricken because "it contained the evidence to prove the alleged

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85 *Id.* § VI, No. 14 (emphasis added).

86 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

87 The Judicature Acts, Rules of the Supreme Court, 1883, Appx. C., § VI, No. 15 (emphasis added).

88 (1885) 29 SJ 556 at 556 (Eng.).

89 *Id.*

90 *Id.* at 557.

91 *Id.*

facts in paragraph 2, and was, therefore, a violation of ord. 19, r. 4."[92] Two things are worth noting here. First, Rule 4, which was cited by the Court, supplied the ordinary pleading standard, which required "only, a statement in a summary form of the material facts on which the party pleading relies for his claim . . . but not the evidence by which they are to be proved . . . ."[93] Providing additional details beyond the allegation of malicious intent violated that rule. Second, when the plaintiff went above and beyond what was required, offering (in an appendix) additional facts from which malicious intent could be inferred, that was not lauded as helpful to the presentation of the case but was challenged by the defendant as a pleading offense and thrown out by the court as inappropriate. Thus, not only were facts from which malice might be inferred not required of pleaders under Order 19, Rule 22, the pleading of such factual detail appears to have been affirmatively prohibited by Order 19, Rule 4.[94]

*Herring v. Bischoffsheim*[95] offers similar insight into the minimal pleading burden under the English Rules in the context of an allegation of fraudulent intent. There, the plaintiff's claim was that the prospectus issued by the defendant was fraudulent to the knowledge of the defendant company; the plaintiff offered extensive evidentiary details in support of that allegation. The court, in response to a motion to strike these details

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92 *Id.*

93 English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4. A "material fact" might be described as what in the United States previously was referred to an "ultimate fact" under code pleading, as opposed to evidentiary facts. *See, e.g., In re* Dependable Upholstery Ltd (1936) 3 All ER 741 at 745–46 (Eng.) (holding an allegation that dividends were paid from an improper source to be a "material fact" under Rule 4 and that plaintiffs would not be ordered to give particulars of that fact, which would merely disclose the evidence by which that fact was intended to be proved). *But see* Millington v. Loring (1880) 6 CPD 190 at 190, 194 (Eng.) ("[I]n my opinion those words ['material facts'] are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial."). Thus, in *Glossop v. Spindler* the "material fact" is that the publication was with malicious intent, while the evidentiary facts are those details on which the ultimate fact of malicious intent is based. Glossop v. Spindler (1885) 29 SJ 556 at 557 (Eng.). An innovation of the Federal Rules of Civil Procedure was to avoid distinguishing between ultimate and evidentiary facts by abandoning any reference to pleading facts altogether. *See* CHARLES CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 38, at 242 (2d ed. 1947).

94 *See also* Gourard v. Fitzgerald (1889) 37 W.R. 265 (Eng.) (rejecting a lower court's order for particulars pertaining to the plaintiffs' allegation that statements were maliciously published by the defendants).

95 [1876] WN 77 (Eng.).

from the statement of the claim, agreed with the defendant that the pleading violated Order 19, Rule 4, and permitted the plaintiff to amend.[96] In doing so, the court wrote,

> It is unnecessary for the statement of claim to state the motives which led to the issuing of the prospectus, or the scheme of which it is a part. It is sufficient to state generally that the prospectus was, to the knowledge of the defendants, fraudulent, without specifying the particulars.[97]

Finally, we have some evidence of how allegations of knowledge generally were permitted under these rules. In *Sargeaunt v. Cardiff Junction Dry Dock & Engineering Co.*,[98] the court rejected a request for particulars setting out how certain knowledge on the part of the defendant came to exist, citing and relying on Order 19, Rule 22 in the process. In *Griffiths v. The London & St. Katharine Docks Co.*,[99] the court reported that the plaintiff alleged that the defendant company "knew or ought to have known of the defective, unsafe, and insecure condition of the said iron door" without further elaborating the facts supporting the allegation.[100] No fault was found with this allegation; the claim only failed because the plaintiff failed to allege also that he was unaware of the said defective condition, a critical element of stating the negligence claim asserted in the case.[101]

From the previous discussion, it is readily apparent that the progenitor of Rule 9(b)'s conditions-of-the-mind clause—Order 19, Rule 22 of the English Rules (and the English cases that applied that rule)—give lie to the notion that Rule 9(b) may properly be interpreted to require the pleading of facts that make state-of-mind allegations plausible. That the 1938 rulemakers cited to the English rule in the notes accompanying Rule 9(b) can reasonably be read as evidence of their intent to embrace the associated English practice of not requiring pleaders to allege facts from which conditions of the mind might be inferred. But Rule 9(b)'s

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96 *Id.*

97 *Id.*

98 [1926] WN 263, 264 (Eng.) ("[T]he plaintiff had no right under the rule [Order 19, Rule 22] to obtain the particulars asked for, and they must be refused.").

99 (1884) 12 QBD 493 (Eng.).

100 *Id.* at 494.

101 *Id.* at 496.

admonition must also be understood in the wider context of the liberal general pleading ethos of the English Rules embraced by the drafters of the 1938 rules.[102] As Charles Clark, reporter to the original rules committee, noted at the Cleveland Institute on Federal Rules:

> I think there is no question that the rules can not [sic] be construed to require the detailed pleading that was the theory, say, in England in 1830 .... About the only time when this specialised detailed pleading was really tried was in England in the 1830's, after the adoption of the Hilary Rules. The Hilary Rules were the first step in the procedural reform in England, and they got the expert Stephen to write the rules. He went on the theory, which many experts have, that what you want is more and better and harsher rules, and never at any time in the history of English law was pleading so particularised, and never were the decisions so strict and technical, and never was justice more flouted than in that short period in the '30's, ... which led immediately to greater reform, finally culminating in the English Judicature Act and the union of law and equity.[103]

In other words, the pleading reforms brought about by the English Judicature Acts, which were a response to the highly particularized pleading regime of the Hilary Rules, were the inspiration for much of what Charles Clark and the 1938 drafters were trying to do with their new pleading rules. But the result of the *Iqbal* revision of Rule 9(b)—and the antecedent rewriting of the ordinary pleading standard of Rule 8(a)(2) in *Twombly*—is that we have regressed very nearly to the state of affairs that the 1938 rule reformers sought to save us from. That this was done without due regard for the previously-reviewed evidence of Rule 9(b)'s proper meaning is problematic. Equally (if not more) disconcerting,

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[102] A.B.A., FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY 40 (Edward H. Hammond ed., 1938) ("I would say this, that I think you will see at once these pleadings follow a general philosophy which is that detail, fine detail, in statement is not required and is in general not very helpful.").

[103] A.B.A., RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO 220–22 (William W. Dawson ed., 1938); *see also* JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 97–98 (5th ed. 2019) (discussing the Hilary Rules and their development).

however, is that the *Iqbal* interpretation of Rule 9(b) is at variance with the policies that underlie the rule, a topic to which we now turn.

## III. THE AFFRONT TO THE POLICY BEHIND RULE 9(b)

By applying the plausibility fact-substantiation standard to allegations of conditions of the mind, this heightened pleading standard is being applied to the very kinds of allegations Rule 9(b)'s second sentence was quite obviously crafted to protect.[104] Requiring pleaders to provide the particulars of a person's state of mind is not something that all pleaders will be able to do without the benefit of discovery,[105] making the imposition of such a requirement at the pleading stage unfair.[106] This is particularly true for plaintiffs asserting discrimination claims, who are more likely (than fraud plaintiffs or public figure defamation plaintiffs, for example) to lack the resources to overcome the information asymmetry that exists at the pleading stage.[107] Wrongful conduct is already something not likely to be broadcast; wrongful intentions—which lurk within a person's mind—are even more likely to be obscured from external view. The drafters of Rule 9(b) understood this, agreeing with the English system that requiring complainants to articulate facts

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104 WRIGHT, MILLER & SPENCER, *supra* note 17, § 1301 ("[T]he trend seems to be an embrace of the more rigid pleading requirements for conditions of mind that the second sentence of Rule 9(b) was designed to suppress.").

105 *Id.* ("The concept behind this portion of Rule 9(b) is an understanding that any attempt to require specificity in pleading a condition of the human mind would be unworkable and undesirable. It would be unworkable because of the difficulty inherent in ascertaining and describing another person's state of mind with any degree of exactitude prior to discovery.").

106 *See* A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 160 (2008) ("[T]o the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal. It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain . . . .").

107 *See, e.g.*, Means v. City of Chicago, 535 F. Supp. 455, 460 (N.D. Ill. 1982) ("We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff's claim, *i.e.*, that there was an official policy or a de facto custom which violated the Constitution.").

substantiating an alleged condition of the mind would be unreasonable.[108] In a system in which the right to petition courts for redress is constitutionally protected by the Petition Clause of the First Amendment,[109] the pleading standard must be one that avoids blocking potentially legitimate claims solely based on the inability of claimants to articulate supporting facts—such as those pertaining to conditions of the mind—that it would be nearly impossible for them to know.[110] As we have seen, Rule 9(b)'s second sentence was designed with this concern in mind, as was Rule 11(b)'s allowance of making "factual contentions [that] will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."[111] The *Iqbal* fact-substantiation interpretation of Rule 9(b) thus has pushed the system over the line that the Petition Clause was designed to protect, something that a reparative revision to Rule 9(b) could address.[112]

An additional consideration suggesting that imposing a heightened burden for condition-of-the-mind pleading is problematic from a policy perspective derived from the *Iqbal* Court's endorsement of the use of "judicial experience and common sense" to inform judges' plausibility assessments.[113] Research has shown that people make decisions based on various biases and categorical or stereotypical reasoning, particularly when they lack complete information about an individual or a situation.

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108 *See supra* Part II.

109 U.S. CONST. amend. I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (stating that the First Amendment serves as the constitutional basis for the right of access to courts).

110 *See* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 29–30 (2009) [hereinafter Spencer, *Understanding Pleading Doctrine*] ("[R]equiring particularized pleading in these types of cases [e.g. discrimination cases] effectively prevents some claimants from seeking redress for what could be legitimate grievances. If the constitutional line is drawn at permitting procedural rules to bar 'baseless' claims that lack a 'reasonable basis'—a line that admittedly has not been definitively drawn by the Court—then the line drawn by contemporary pleading doctrine is inapt in certain cases." (quoting Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 743 (1983))).

111 FED. R. CIV. P. 11(b)(3).

112 *See* Spencer, *Understanding Pleading Doctrine*, *supra* note 110, at 30 ("Reforming the doctrine to relieve plaintiffs of the obligation to allege the specifics underlying subjective motivations or concealed conditions or activities might be one way to remedy the imbalance.").

113 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

Jerry Kang and his collaborators explained this phenomenon in the context of the 12(b)(6) motion to dismiss after *Iqbal*:

> [W]hen judges turn to their judicial experience and common sense, what will this store of knowledge tell them about whether some particular comment or act happened and whether such behavior evidences legally cognizable discrimination? Decades of social psychological research demonstrate that our impressions are driven by the interplay between categorical (general to the category) and individuating (specific to the member of the category) information. For example, in order to come to an impression about a Latina plaintiff, we reconcile general schemas for Latina workers with individualized data about the specific plaintiff. When we lack sufficient individuating information—which is largely the state of affairs at the motion to dismiss stage—we have no choice but to rely more heavily on our schemas.
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> . . . .
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> Social judgeability theory connects back to *Iqbal* in that the Supreme Court has altered the rules structuring the judgeability of plaintiffs and their complaints. Under *Conley*, judges were told not to judge without the facts and thus were supposed to allow the lawsuit to get to discovery unless no set of facts could state a legal claim. By contrast, under *Iqbal*, judges have been explicitly green-lighted to judge the plausibility of the plaintiff's claim based only on the minimal facts that can be alleged before discovery—and this instruction came in the context of a racial discrimination case. In other words, our highest court has entitled district court judges to make this judgment based on a quantum of information that may provide enough facts to render the claim socially judgeable but not enough facts to ground that judgment in much more than the judge's schemas.[114]

The "judicial experience and common sense" that the Court empowered judges to rely upon in assessing claims necessarily complicates the now-imposed duty to offer facts substantiating

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[114] Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1160, 1162 (2012).

conditions of the mind because pleaders will have to overcome the categorical schemas dominant within the judicial class.[115] Thus, we see Justice Kennedy himself providing exhibit number one: In *Iqbal*, he found insufficient facts to substantiate the allegation that Ashcroft was the "principal architect" of the discriminatory policy, "and that Mueller was 'instrumental' in adopting and executing it," but credited the allegation that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11" and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER . . . ."[116] Because both sets of allegations were articulated with the same level of specificity, it cannot be—as Justice Kennedy suggested—that the difference between them is that the former are conclusory and the latter are factual.[117] Rather, Justice Kennedy is applying a schema that tells him that it is plausible for the FBI Director to have directed the arrests and detention of thousands of Arab Muslim men, and for the FBI Director and the Attorney General to have "cleared" the policy of holding those men in restrictive conditions, while it is not plausible to believe—without substantiating facts—that the same

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115 Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 197–98 ("Beyond constituting a violation of the assumption-of-truth rule and interfering with the jury right, the *Iqbal* majority's new fact skepticism is problematic because it derives from, and gives voice to, what appears to be the institutional biases of the Justices, as elite insiders with various presumptions about the conduct and motives of other fellow societal elites."); *Hearing*, *supra* note 52, at 13 ("Judgments about the plausibility of a complaint are necessarily comparative. They depend in that regard on a judge's background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual's cultural predispositions as are judgments about adjudicative facts.").

116 *Iqbal*, 556 U.S. at 681.

117 *Id.* at 699 (Souter, J., dissenting) ("[T]he majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."); *see also* Spencer, Iqbal *and the Slide Towards Restrictive Procedure*, *supra* note 3, at 193 ("These are not conclusory assertions but rather plain-English descriptions of the phenomena they attempt to describe. There can be no question that if I were to say 'Mr. Smith was the "principal architect" of the Chrysler building,' that would be a non-conclusory factual claim, as would the statement that 'Ms. Smith "approved" the design plans for the Chrysler building.' These statements are factual because they make claims about what transpired and who took certain actions.").

men designed and had a hand in the execution of a discriminatory arrest and detention policy.[118]

Because it is well documented that the use of categorical thinking and explicit and implicit biases infect all of us[119]—including judges[120]—and because among those biases are background assumptions about the behaviors and tendencies of members of various groups—whether those groups are public officials, racial,[121] ethnic,[122] or religious groups,[123]

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118 *See Iqbal*, 556 U.S. at 682 (indicating that because "Arab Muslims" were responsible for the September 11 attacks, an "obvious alternative explanation" for the arrests in question was Mueller's "nondiscriminatory intent" to detain aliens "who had potential connections to those who committed terrorist acts").

119 *See, e.g.*, JERRY KANG, NAT'L CTR. FOR STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS (2009), https://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/kangIBprimer.ashx [https://perma.cc/WYQ3-4X27].

120 *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) ("Little has been said of the role of the way judges perceive these fundamental issues and the actors involved: how individual lives are automatically valued, how corporations are implicitly perceived, and how fundamental legal principles are unconsciously intertwined with group assumptions. This Article suggests, and the empirical study supports the idea, that automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered."); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1210–11 (2009) (finding among judges a strong implicit bias favoring Caucasians over African Americans); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson, *and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) ("I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. . . . Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.").

121 *See, e.g.*, Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004) (showing biases connecting African-American faces with perceptions of the presence of a weapon).

122 *See, e.g.*, Levinson, Bennett & Hioki, *supra* note 120, at 89–92 (discussing implicit bias against Asians).

123 *See, e.g.*, *id.* at 110–11 ("The results of the study, for example, showed that federal district judges (the very judges who make sentencing determinations for the federal crime we presented) were more likely (of marginal statistical significance) to sentence a Jewish defendant to a longer sentence than an otherwise identical Christian defendant.").

cultural minorities,[124] or women[125]—allegations of discriminatory intent (for example) will run up against judicial presumptions of non-discrimination, which research has proven are unwarranted.[126] Nevertheless, because of the presumption of non-discrimination, a pleader will be under a particularly stringent burden to offer facts that dislodge judges from this presumption if it is hoped that they will accept an allegation of discrimination as plausible. As I have previously argued,

> [o]nce we make normalcy in the eyes of the judge the standard against which allegations of wrongdoing are evaluated, we perversely disadvantage challenges to the very deviance our laws prohibit. A civil claim is all about deviation from the norm, which has happened many times in history—even at the hands of good capitalist enterprises and high-ranking government officials. While businesses and government officials may normally not do the wrong thing, sometimes (or perhaps often) they do. When that happens, they certainly are not going to leave clear breadcrumbs for outsiders to expose them. All we may see are the fruits of their wrongdoing, which in turn will be all that can be alleged in a complaint. Without the opportunity to initiate an action that asserts deviance in the context of seemingly normal behavior, such wrongdoing will go undiscovered and unpunished.[127]

Freeing pleaders from the obligation to offer sufficient facts to convince normatively biased judges that an allegation of deviant intent is plausible is necessary if we wish to give such claimants the opportunity to access a judicial process in which they can employ the tools of discovery to further substantiate and vindicate legitimate claims.

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[124] Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455 (2010); Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

[125] *See, e.g.*, Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 475 (2005) (finding study participants shifted their valuation of the worth of various credentials to preference a male in selecting a police chief).

[126] *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004) (showing that identical applicants with White-sounding versus Black-sounding names received fifty percent more callbacks for interviews).

[127] Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7, at 1734.

More broadly, an interpretation of Rule 9(b) that obligates pleaders to substantiate condition-of-mind allegations with supporting facts is inconsistent with any sound theory of what worthwhile procedural rules should be designed to accomplish. If we want rules that promote the classic law enforcement objectives of general and specific deterrence, as well as the reification of abstract legal rules and the pacification of the governed that comes from its perception of systemic legitimacy and efficacy, then those rules must be—or at least must be seen to be—facilitative of efforts to vindicate transgressions of the law. No rule—or interpretation thereof—that by design shields many wrongdoers from culpability on the basis of the inability of their accusers to perform the metaphysical task of mind reading will succeed at permitting the translation of our laws as written into meaningful prohibitions that would-be transgressors will be inclined to respect.

## IV. RESTORING RULE 9(b)

We have seen that the *Iqbal* majority's interpretation of Rule 9(b)—and the lower courts' subsequent application of it—are inconsistent with the proper and original understanding of Rule 9(b). Further, we have seen that the more faithful understanding of the rule laid out in this Article has the benefit of reflecting a wiser approach to the kind of pleading obligations that are sensible to impose with respect to state-of-mind allegations. Rule 9(b) should thus be restored to its intended meaning, which can happen in one of two ways. The first would be for the Supreme Court to correct its error in *Iqbal* in a future case concerning the application of Rule 9(b). Lower courts, equipped with the insight it is hoped this Article will provide, could (and should) make an effort to interpret and apply Rule 9(b) in ways that honor the language, history, and intent behind it. However, because both of these responses seem unlikely, a second approach—a restorative amendment to Rule 9(b)—should be pursued.

To revise Rule 9(b) to eliminate *Iqbal*'s requirement that sufficiently alleging conditions of the mind requires the statement of well-pleaded facts that render the allegation plausible, the rule should be amended as follows:

> (b) FRAUD OR MISTAKE; CONDITIONS OF MIND. In alleging fraud or mistake, a party must state with particularity the

> circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ without setting forth the facts or circumstances from which the condition may be inferred.

This revised language borrows directly from Order 19, Rule 22—the original source of the admonition that was promulgated as the second sentence of Rule 9(b) in 1938. It also has the benefit of directly and unambiguously addressing what has become problematic about lower court application of Rule 9(b)—the imposition of a requirement to state facts that provide the basis for condition-of-the-mind allegations.

An accompanying committee note for this revision would need to be crafted to ensure that there is no room for courts—including the Supreme Court—to interpret Rule 9(b) in a way that reverts towards the contemporary interpretation of the rule that has taken hold since *Iqbal*. The following may be a possible approach:

> *Subdivision (b).* Rule 9(b) is being revised to abate a trend among the circuit courts of requiring litigants to state facts substantiating allegations of conditions of the mind in the wake of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *See, e.g., Ibe v. Jones*, 836 F.3d 516, 525 (5th Cir. 2016); *Biro v. Condé Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015); *Pippen v. NBCUniversal Media, LLC*, 734 F.3d 610, 614 (7th Cir. 2013); *Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012); *Schatz v. Republican State Leadership Comm.*, 669 F.3d 50, 58 (1st Cir. 2012); *see also Moses-El v. City & Cty. of Denver*, 376 F. Supp. 3d 1160 (D. Colo. 2019). In *Iqbal*, the Supreme Court indicated that the term "generally" in Rule 9(b)'s second sentence referred to the ordinarily applicable pleading standard, which it had interpreted to require the pleading of facts showing plausible entitlement to relief. Unfortunately, lower courts took this to mean that they were to require pleaders to state facts showing that allegations of conditions of the mind were plausible. Regardless of whether such an understanding was intended by the Supreme Court, such an interpretation is at odds with the original intended meaning of Rule 9(b); with Rule 8(d)(1)'s controlling guidance for the sufficiency of allegations as opposed to claims; with the text of Rule 9(b)—which omits any requirement to "state any supporting facts" as is found in

> Rule 9(a)(2); and with a reasonable expectation of what pleaders are capable of stating with respect to the conditions of a person's mind at the pleading stage.
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> To sufficiently allege a condition of the mind under revised Rule 9(b), a pleader may—in line with Rule 8(d)(1)—simply, concisely, and directly state that the defendant, in doing whatever particular acts are identified in the pleading, acted "maliciously" or "with fraudulent intent" or "with the purpose of discriminating against the plaintiff on the basis of sex," or that the defendant "had knowledge of X." For example, to sufficiently allege intent in a fraudulent conveyance action, a pleader would be permitted to state, "On March 1, [*year*], defendant [*name of defendant 1*] conveyed all of defendant's real and personal property to defendant [*name of defendant 2*] for the purpose of defrauding the plaintiff and hindering or delaying the collection of the debt."
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> Responding parties retain the ability—under Rule 12(e)—to seek additional details if the allegations are so vague or ambiguous that they cannot reasonably prepare a response. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). However, a pleader's failure to offer facts from which a condition of the mind may be inferred cannot form the basis for a dismissal for failure to state a claim under the revised rule.

Were Rule 9(b) to be revised in this manner, one might argue that it would entirely undo the *Iqbal* and *Twombly* regime, permitting conclusory legal allegations to receive credit that permits claims to proceed without having to demonstrate plausibility. Not so. Take *Twombly* itself, for instance. There the key allegation was that the defendants entered into an unlawful agreement to exclude certain players from the market; the Court's beef was that there were not sufficient facts to which one could point that would assure courts that that allegation was more than mere speculation.[128] The proposed revision of Rule 9(b) would not alter this result because the allegation of an unlawful agreement is not

[128] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 566 (2007) ("We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy.").

a condition of the mind that would be covered by Rule 9(b). Rather, it is an allegation pertaining to something that the defendants have done.[129] Thus, the Court would have still been able to hold (under its plausibility pleading approach) that the complaint fell short under Rule 8(a)(2).

Amended Rule 9(b) would comport with the result that the Court produced in *Swierkiewicz v. Sorema N.A.*,[130] a result the Court endorsed in *Twombly*. In *Swierkiewicz*, the plaintiff alleged that he had been discriminated against in employment based on his nationality but—in the district court's words—"ha[d] not adequately alleged circumstances that support an inference of discrimination."[131] The Court disagreed and found the complaint to be sufficient.[132] As the *Twombly* Court explained it, "Swierkiewicz's pleadings 'detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination'" and indicated that "[w]e reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege 'specific facts' beyond those necessary to state his claim and the grounds showing entitlement to relief."[133] The proposed revision of Rule 9(b) simply honors the approach to pleading discrimination endorsed by the Court in *Swierkiewicz* and *Twombly*—specific facts substantiating an allegation of discrimination are not necessary; the sufficiency of a discrimination complaint will rest on whether the facts alleged beyond those pertaining to conditions of the mind plausibly show entitlement to relief. In the context of Swierkiewicz's discrimination claim, by alleging that he had been fired and replaced with a younger person of a different nationality, coupled with his allegations of negative age-based comments from his supervisor,[134] Swierkiewicz crafted a complaint that satisfied the Rule 8(a)(2) standard without having to provide the substantiation of

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129 *Id.* at 551 (reporting that the plaintiff alleged that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another").

130 534 U.S. 506 (2002).

131 *Id.* at 509.

132 *Id.* at 515.

133 *Twombly*, 550 U.S. at 570 (quoting *Swierkiewicz*, 534 U.S. at 508, 514).

134 *Swierkiewicz*, 534 U.S. at 508–09.

discriminatory intent that the defendants and lower courts had demanded.

That said, amending Rule 9(b) as proposed would alter the outcome in *Iqbal*. A key requirement for being able to state a claim against the government officials in *Iqbal* was that their conduct was done with discriminatory intent. Justice Kennedy declared that a bald allegation of discriminatory intent was not entitled to the assumption of truth because it was conclusory and not supported by well-pleaded facts.[135] He reached this conclusion by interpreting Rule 9(b)'s second sentence as imposing a plausibility requirement as described above.[136] However, Justice Kennedy acknowledged that a rule obligating the Court to accept an allegation of discriminatory intent as true would require a different result: "Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss."[137] Allegations of discriminatory intent, like all allegations pertaining to a defendant's state of mind, are factual contentions because they pertain to experienced reality rather than to the legal consequences that flow therefrom. Thus, once conditions of the mind are permitted to be simply stated under revised Rule 9(b), those allegations of fact will be entitled to benefit from the accepted assumption-of-truth rule that the Court continues to endorse.[138]

Similarly, revised Rule 9(b) would undo the position that the circuit courts have taken in this field, abrogating the decisions in which they have dismissed claims based on a determination that substantiating facts must

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135 Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009) ("These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim, namely, that petitioners adopted a policy '"because of," not merely "in spite of," its adverse effects upon an identifiable group.' As such, the allegations are conclusory and not entitled to be assumed true." (citations omitted)).

136 *See supra* Section I.A.

137 *Iqbal*, 556 U.S. at 686. Were there to be an interest in providing a greater degree of protection against litigation for defendants who are potentially entitled to qualified immunity (as may have characterized the defendants in *Iqbal*), it would be appropriate to vindicate that interest through an amendment to the Federal Rules (or via a legislative enactment) tailored to such cases, not through a wholesale judicial reinterpretation of the generally applicable rule found in Rule 9(b).

138 *Id.* at 678 (referring to "the tenet that a court must accept as true all of the allegations contained in a complaint"); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (citation omitted)).

be offered to support allegations pertaining to conditions of the mind. This, of course, is by design and is the principal purpose behind the revision. Thus, in a case like *Biro*,[139] in which the Sixth Circuit required the plaintiff to offer facts substantiating the allegation of actual malice,[140] the result would be different. There, the plaintiff alleged as follows regarding actual malice:

> Biro generally alleged that each of the New Yorker defendants "either knew or believed or had reason to believe that many of the statements of fact in the Article were false or inaccurate, and nonetheless published them," and that they "acted with actual malice, or in reckless disregard of the truth, or both."[141]

Malice and knowledge are conditions of the mind protected from particularized pleading by Rule 9(b). As revised, Rule 9(b) would treat the quoted allegations as sufficient. As in *Iqbal*, crediting these allegations as true would result in rendering the complaint sufficient under Rule 8(a)(2). Indeed, there are certainly a great many cases in which crediting allegations of condition of the mind as true will render them impervious to attack under Rule 8(a)(2). If such a result is not desired, then making the *Iqbal* interpretation of Rule 9(b) explicit or abrogating the second sentence of Rule 9(b) altogether would be the appropriate course to pursue.[142]

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139 807 F.3d 541 (6th Cir. 2015).

140 *Id.* at 542.

141 *Id.* at 543.

142 Codifying the *Iqbal* interpretation of Rule 9(b)'s second sentence could be achieved by revising it to read as follows: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged ~~generally~~ by setting forth the circumstances from which the condition may be inferred." Codification might also be achieved by deleting the second sentence of Rule 9(b).

## CONCLUSION

Revising promulgated federal rules through judicial decision making is a perilous[143] and illegitimate[144] business. After *Twombly* and *Iqbal*, one cannot know what Rule 8(a)(2)'s "short and plain statement of the claim showing entitlement to relief" is, nor can one know what Rule 9(b) means when it permits a party to allege conditions of the mind "generally," without consulting the judicial interpretation of those rules by courts, notwithstanding the divergence of the latter from the text of the former.[145] If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another,[146] then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation. Stated differently, given that the *Iqbal* interpretation of Rule 9(b) and that which it has spawned among lower courts is manifestly

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143 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting) ("The implications of the majority's opinion today require every lawyer who relies upon a Federal Rule of Evidence, or a Federal Rule of Criminal, Civil, or Appellate Procedure, to look *beyond* the plain language of the Rule in order to determine whether this Court, or some court controlling within the jurisdiction, has adopted an interpretation that takes away the protection the plain language of the Rule provides.").

144 Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) ("A requirement of greater specificity . . . 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation'" (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))).

145 My view, as expressed extensively in previous work, is that the Court's interpretation of Rule 8(a)(2)—like its interpretation of Rule 9(b)—diverges from the meaning supported by all relevant textual and historical evidence. *See* Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, *supra* note 7; Spencer, *Plausibility Pleading*, *supra* note 7. Restoring the intended meaning of Rule 8(a)(2) could be achieved by revising it as follows: "a short and plain statement of the claim ~~showing that~~ articulating the pleader's grounds ~~is entitled to~~ for relief . . . ." Other approaches have been put forward as well. *See, e.g.*, Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955, 979–83 (2012) (providing multiple suggestions for revising Rule 8(a)(2) to restore it to its pre-*Twombly* meaning). Unfortunately, it appears that ship has sailed. Hopefully, however, there remains the possibility that the misinterpretation of Rule 9(b) can be repaired.

146 *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80–81 (2006) ("[T]he rich context of common law procedural rules . . . function in conjunction with the 1938 Rules to determine the actual function of the federal district courts . . . . These Other Federal Rules of Civil Procedure . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.").

counter to the intended meaning of Rule 9(b) and to all available textual evidence, the rulemakers have a duty *to at least consider* whether the rule should be revised in a way that better tracks how courts interpret and apply the rule, or be revised to correct the errant construction. Doing nothing, though, should not be an option—unless we[147] want to be complicit in the duplicity that permits liberal-sounding rules to be restrictive in practice.[148] None of us should want that, although I fear that doing nothing is precisely the most likely thing that we will do.[149]

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147 I currently serve as a member of the Judicial Conference Advisory Committee on Civil Rules, which bears responsibility for considering proposals to amend the Federal Rules of Civil Procedure. The views expressed in this piece are my own and do not reflect the position of the Committee or its members.

148 *See* A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 369 (2010) ("[P]rocedure's central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure's overarching, unified goal is to facilitate and validate the substantive outcomes desired by society's dominant interests; procedure's veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social out-groups and ensure desired results.").

149 This sentiment arises from my experience as a member of the Rules Committee. Whether it be due to the prioritization that necessarily arises in the context of limited deliberative capacity and bandwidth, the institutional conservatism that comes from being a committee dominated by members of the judiciary, or the awkwardness associated with rebuffing the work of the Court (and the Chief Justice) under whose aegis we operate, the Rules Committee in modern times has shied away from undertaking liberalizing, access-promoting reforms in response to interpretive drift in a restrictive direction. *See* Brooke Coleman, *Janus-Faced Rulemaking*, 41 CARDOZO L. REV. 921, 927 (2020) ("The second theme—institutional actor timidity—demonstrates how the Committee is quite timid of its role in the Rules Enabling Act process. That process requires the work of other institutional actors, and one of the most fraught relationships is between the Supreme Court and the Committee. After all, the Committee's members are appointed by the Chief Justice, the work of the Committee is delegated from the Court to the Committee, and the Court is part of the process as its approval is required for an amendment to be adopted."). As Charles Clark pointed out long ago, it is not surprising that the judiciary will constantly turn back to restrictive pleading, but it is our job to periodically press for corrective measures that will maintain the access-facilitating ethos that the rules were originally intended to institutionalize. *See* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459–60 (1941, 1942, 1943) ("With the development of code pleading, from the Field Code first adopted in New York in 1848 to the present time, the emphasis was shifted from the detailed issue-pleading of the common law to a statement of the facts, so simple, it was said at the time, that even a child could write a letter to the court telling of its case. Notwithstanding this history, however, courts recurrently turn back to the course of requiring details. Such a return, on the whole, is not surprising, for all rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment. Moreover, the pressure from one side to force admissions from the opponent and the court's desire to hurry up adjudication and avoid lengthy trials tend somewhat to push in this same direction. It is

necessary, however, always to bear in mind that nowadays we are not willing to enforce harsh rules or to sacrifice a party for his lawyer's mistake, induced perhaps by technical ignorance or even by lack of clarity of the decisions.").

# TAB 12

## 12. APPEAL FINALITY AFTER CONSOLIDATION JOINT CIVIL-APPELLATE SUBCOMMITTEE PROGRESS REPORT

The Joint Civil-Appellate Subcommittee was appointed to study the effects of the final judgment rule for consolidated actions announced in *Hall v. Hall*, 138 S. Ct. 1118 (2018). Implicitly choosing among the four approaches that had been taken by the courts of appeals, the Court ruled that complete disposition of all claims among all parties to what began as a separate action is a final judgment no matter that other parties and claims asserted in originally independent actions remain undecided. The Court also suggested that if this rule creates problems, solutions may be found in the Rules Enabling Act process.

Subcommittee work began with an extensive and elaborate Federal Judicial Center study of appeals in consolidated actions filed in 2015, 2016, and 2017 that was described in the report to the October 2020 meeting. Further work by the Federal Judicial Center does not seem warranted now. The subcommittee's next efforts will be informal while it continues to debate whether the abstract reasons to question the *Hall v. Hall* rule may justify rule amendments even without clear lessons from practice.

The subcommittee has begun its informal efforts by asking judges in the Second, Third, Seventh, Ninth, and Eleventh Circuit Courts of Appeals about experience with *Hall v. Hall*. Each circuit routinely screens incoming appeals for timeliness. No occasion to dismiss appeals as untimely under the *Hall v. Hall* rule was recalled in the Third, Seventh, Ninth, or Eleventh Circuits, either on staff screening or on motion to dismiss.

The Second Circuit did find occasion to dismiss appeals in *McCullough v. World Wrestling Ent., Inc.*, 827 F.Appx. 3 (2d Cir. 2020). The setting was complicated. Seven actions were originally filed in several districts. All were consolidated for all purposes in the District of Connecticut under a forum selection clause in the underlying contracts. After all claims in two of the actions were dismissed, the Second Circuit dismissed appeals for want of a final judgment, employing its pre-*Hall* rule that there is a strong presumption against appealability when a judgment in a consolidated action does not dispose of all parts of all consolidated actions. *McCullough v. World Wrestling Ent. Inc.*, 838 F.3d 210 (2d Cir. 2016). Two other of the seven actions were completely resolved after that, one before the decision in *Hall v. Hall* and the other one day after the decision. Eventually four appeals were taken, two by the two plaintiffs whose first appeals had been dismissed, and two by the later two plaintiffs. The circumstances with respect to the other three actions in the consolidation are not clearly described. The result, however, is clear. All four appeals were dismissed as untimely, with an explanation that any arguments as to the applicability of the new rule or "work-arounds" had been waived. The appeal problems in this case may not provide much ground for predicting like contretemps in other cases.

The informal survey also revealed that the Seventh and Ninth Circuits appeals handbooks include advice about appealability in light of *Hall v. Hall*.

The subcommittee will meet again to weigh the competing values of extending its informal surveys, waiting developments in practice for awhile, or considering the arguments sketched in the October 2020 report that the parties, trial courts, and appellate courts might be better served by restoring one of the alternative approaches previously taken in the courts of appeals as a clear and uniform but different rule of finality.

# TAB 13

## 13. E-FILING DEADLINE JOINT SUBCOMMITTEE PROGRESS REPORT

*Suggestion 19-CV-U*

This progress note borrows the memorandum prepared by Professor and Reporter Edward Hartnett for the Appellate Rules Committee.

Information continues to be gathered to help inform whether to propose any change to the midnight deadline for electronic filing.

In particular, the Federal Judicial Center is continuing to analyze data regarding what time of day filings are made in federal courts. This process is now more than half complete. In addition, the Federal Judicial Center is looking at both local rules of federal courts and states' rules for topics such as filing times and whether pro se litigants can use electronic filing.

A survey of attorneys, clerks, and judges is on hold for now due to the pandemic.

Later, the Federal Judicial Center may undertake a comparison of filing patterns for a few courts pre- and post-pandemic to get a sense of whether the pandemic changed time-of-day patterns.

# TAB 14

## 14. RULE 12(a)(2) & (3): FILING TIMES & STATUTES

*Suggestion 19-CV-O*

Rule 12(a) begins like this:

> (a) TIME TO SERVE A RESPONSIVE PLEADING.
>
> (1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:
>
> (A) A defendant must serve an answer:
>
> (I) within 21 days after being served with the summons and complaint; or
>
> * * *
>
> (2) *United States and its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.
>
> (3) *United States Officers of Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later. * * *

The problem is simply stated. The deference to a statute that sets a different time is limited to paragraph (1). But there are federal statutes that set 30 days to answer a complaint addressed by paragraph (2), not the 60 days specified in paragraph (2). A survey failed to turn up any statute that sets a time different than the 60 days specified by paragraph (3), but it remains possible that there is such a statute now or that one may be enacted in the future.

This item was discussed at the October 2020 meeting and dissolved into an equal division of opinion, to be carried forward for further discussion at this meeting. The draft October Minutes summarize the competing concerns, and are duplicated here for convenience:

> Rule 12(a) establishes the times for serving a responsive pleading. Paragraph 12(a)(1) begins by deferring to statutes that set different times: "Unless another time is specified by this rule or a federal statute * * *." This qualification does not appear in either of the next paragraphs, (2) and (3). It is clear,

however, that there are federal statutes that set different times than paragraph (2) for some actions brought against the United States or its agencies or officers or employees sued in an official capacity. No statutes have yet been uncovered that set a different time than paragraph (3) for an action against a United States officer or employee sued in an individual capacity.

Although it might be argued that the provision in paragraph (1) that recognizes different statutory times carries over to paragraphs (2) and (3), that is not the way the rule is structured. Nor is it wise to rely on this argument. Reading Rule 12(a) in this way to achieve a sound result would pave the way for disregarding clear drafting in other rules.

It is easy to draft a correction. The provision for federal statutes could be moved into subdivision (a) so that it applies to all of paragraphs (1), (2), and (3):

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

Discussion of this question at the April meeting came to a close balance. The present text is wrong at least as to paragraph 2. The Freedom of Information Act and Government in the Sunshine Act both establish a 30-day time to respond, not the general 60-day period set out in paragraph 2. There is no reason to supersede these statutes. It is better to make rule text as accurate as it can be made.

The question is somewhat different as to paragraph (3) because no statutes that set a different time have been found. But such statutes may exist now, or may be enacted in the future. Here too, there is no reason to supersede these statutes, nor to encounter whatever risks that might arise from the rule that a valid rule supersedes an earlier statute while a valid rule is superseded by a later statute. Including paragraph (3) in the general provision will do no harm if there is not, and never will be, an inconsistent statute. And including it is desirable in the event of any inconsistent statute.

The counter consideration is the familiar question whether it is appropriate to address every identifiable rule mishap by corrective amendment. A continuous flow of

minor or exotic amendments may seem a flood to bench and bar, and distract attention from more important amendments. This consideration conduces to proposing changes only when there is some evidence that a misadventure in rule text causes problems in the real world.

This topic was brought to the agenda by a lawyer who encountered difficulty in persuading a court clerk to issue a summons providing a 30-day response time in a Freedom of Information Act action. The clerk was ultimately persuaded. The Department of Justice said in April that it is familiar with the statutes, and honors them, but that it often asks for an extension, and particularly seeks an extension in actions that involve both FOIA claims and other claims that are not subject to a 30-day response time. From their perspective, paragraph (2) does not present a problem.

Discussion began with the observation that Rule 15(a)(3) also governs the time to respond to an amended pleading. But this does not seem to conflict with the federal statute question presented by Rule 12(a). Rule 15(a)(3) simply calls for a responsive pleading "within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." If more than 14 days remain in the time set by Rule 12(a), including its incorporation of different statutory times, Rule 15(a)(3) makes no difference. If fewer than 14 days remain, Rule 15(a)(3) extends the time.

The Department of Justice renewed the observations made at the April meeting. There is no need to fix this minor break in the rule text. There is a risk that if the change is made, a court might be misled as to its discretion to extend the time to respond to a FOIA claim in cases that combine FOIA claims with other claims that are subject to the 60-day response time. The committee note to an amended rule could say that the amendment merely fixes a technical problem and does not affect the court's discretion, but "we welcome the chance for a longer period in resource-constrained cases." Another committee member agreed with this view.

The contrary view was expressed. If there is a chance that this is tripping people up, why not fix it? It does seem a mistake in the rule text that deserves correction.

This view was questioned by suggesting that the problem described by the Department of Justice is a bigger one than the inconvenience described by the lawyer who brought this problem to us. It is nice to make the

rules as perfect as can be, but “I don’t like to create problems for the Department of Justice to fix what may be a rare problem for plaintiffs.”

A proponent of amending Rule 12(a) suggested that the question is close. But the problem described by the Department of Justice does not seem real. The Department position was renewed in reply. “Inherently, it’s a prediction. We have no experience with the proposed rule.” But a number of career Department lawyers are concerned. “Hybrid” cases do arise with both a shorter statutory period and the longer Rule 12(a)(2) period. This is a “predictive point.”

The proposed amendment failed of adoption by an equally divided vote of 6 committee members for, and 6 against. The proposal will be carried forward for further consideration at the March meeting.

# TAB 15

## 15. RULE 4(f)(2): HAGUE CONVENTION SERVICE

*Suggestion 20-CV-FF*

Theodore J. Folkman submitted 20-CV-FF to suggest that Rule 4(f)(2) is ambiguous and to suggest a drafting cure.

The suggestion requires consideration of Rule 4(f)(1) as well as (f)(2). With some exceptions, Rule 4(f) provides for service on an individual:

> . . . at a place not within any judicial district of the United States:
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;
> (2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice: * * *

Subdivision (f)(2) provides several examples, and (3) authorizes "other means not prohibited by international agreement, as the court orders."

Article 1 of the Hague Convention directs that it "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." If a forum in the United States wants to make service in a country party to the Convention, the Convention provides the exclusive means. The central feature of Convention service is establishment by each contracting state of a "Central Authority." The appropriate authority under the law of the State in which the documents to be served originate forwards them to the Central Authority of the "State addressed." The Central Authority of the state addressed then serves the document as directed in Article 5. The Convention, however, also permits service by other means, see Articles 8-12 and 19. Some of these means seem open-ended. Article 8, for example, permits a contracting state "to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents," although any state may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State within which the documents originate.

This superficial description of the Convention is provided as background for the submission. The submission says that while "the Convention does *allow* alternate methods of service, * * * it also *specifies* the alternate methods of service it permits." The Inter-American Convention on Letters Rogatory is offered as a contrast, as an optional but non-exclusive method of service that does not forbid the use of other methods.

The language of Rule 4(f)(2), according to the submission, fits the Inter-American Convention but not the Hague Convention. The Inter-American Convention "allows but does not specify other means." The Hague Convention, on the other hand, allows but also specifies the only means." This misfit could be corrected by amending (f)(2): "allows but does not ~~specify~~ itself authorize other means * * *."

There are two problems with the suggested revision. First, it seems to respond to a nonproblem. Rule 4(f)(1) expressly authorizes "any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention * * *." (f)(2) does not impede any means of service "authorized" by the Hague Convention, no matter that all of the means are specified by the Convention.

Second, the specific revision is opaque. It might even seem to contradict itself — "allows but does not itself authorize" is difficult to unravel.

In short, (f)(1) covers any mode of service authorized by the Hague Convention, and (f)(2) provides for any other international agreement that allows but does not specify other means. Current drafting seems appropriate.

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BY EMAIL

November 5, 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: *Proposed Amendment to Fed. R. Civ. P. 4(f)(2)*

Dear Ms. Womeldorf:

I am writing to propose an amendment to Rule 4(f)(2) to bring the text into better alignment with the practice of the courts and the apparent intent of the drafters in cases involving service of process by the alternate channels permitted by Article 10 of the Convention of 15 Nov. 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Service Convention"). My proposed amendment, redlined against the existing rule, is as follows:

> (f) SERVING AN INDIVIDUAL IN A FOREIGN COUNTRY. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:
>
> * * *
>
> (2) if there is no internationally agreed means, or if an international agreement allows but does not ~~specify~~ itself authorize other means, by a method that is reasonably calculated to give notice:

The United States is party to two treaties on the service of process abroad: the Hague Service Convention, and the Inter-American Convention on Letters Rogatory (and its

Additional Protocol). The Inter-American Convention is non-exclusive: it provides an optional method of service that plaintiffs may use if they choose, but it does not forbid the use of other methods. *See Kreimerman v. Casa Veerkamp, S.A. de C.V.,* 22 F.3d 634 (5th Cir. 1994). The Hague Service Convention, though, is exclusive: when it applies, the parties must use one of the methods it permits. *See Volkswagenwerk AG v. Schlunk,* 486 U.S. 694, 699 (1988).

The Inter-American Convention provides for a single method of service, namely, a letter rogatory transmitted from the U.S. central authority to the central authority of the state of destination, which then executes the request in the manner prescribed by local law. *See generally* Additional Protocol arts. 2-4. The Convention does not specify any other methods of service. Thus the existing language of Rule 4(f)(2) is a good fit for the Inter-American Convention. Since the Convention is non-exclusive, the methods of service listed in Rule 4(f)(2)(A), (B), and (C) are methods of service that the Inter-American Convention "allows but does not specify," as are methods that a District Court might authorize under Rule 4(f)(3).

The Rule is not a good fit, however, for the Hague Service Convention. The Convention authorizes service via a central authority mechanism, *see* Hague Service Convention art. 5. Service via the central authority mechanism is plainly within the scope of Fed. R. Civ. P. 4(f)(1), which authorizes service "by any internationally agreed means that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." But it also provides for alternate channels of transmission that a plaintiff can use when the state of destination has not objected, including, for example, service by postal channels. *See id.* art. 10. And it provides for other channels of transmission in cases where the state of destination has provided for other methods under its internal law. *See id.* art 19. In *Water Splash, Inc. v. Menon,*137 S. Ct. 1504, 1513 (2017), the Court distinguished between those methods that the Convention affirmatively authorizes and those it merely permits, e.g., service by postal channels.

The current rule is problematic because the Convention does *allow* alternate methods of service, but it also *specifies* the alternate methods of service that it permits. A literal reading of the rule, therefore, suggests that service by mail under Rule 4(f)(2)(C)(ii) is never available as a method of service when the Hague Service Convention applies, because the Convention allows *and specifies* service by mail as a method of service. Such a reading is at odds with the cases, which routinely approve of service by mail or by other

methods permitted by Article 10 of the Convention (e.g., service via a solicitor in England and Wales, which is permitted under Article 10(c)). *See, e.g., Water Splash, supra* (approving service by postal channels in Canada).

The amendment I am proposing would, in my view, clarify the applicability of Rule 4(f)(2) to service under the alternative channels of transmission permitted—but not affirmatively authorized—by the Service Convention and would be helpful to courts and litigants.

Sincerely,

Theodore J. Folkman

# TAB 16

## 16. RULE 65(e)(2): PRELIMINARY INJUNCTIONS IN INTERPLEADER

*Suggestion 21-CV-A*

Rule 65(e)(2)has persisted in substantially the same form since 1938, surviving the need to cite the interpleader statute by its 1948 codification number and the Style Project:

> (e) OTHER LAWS NOT MODIFIED. These rules do not modify the following: * * *
> (2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions in interpleader or in the nature of interpleader; or * * *

In her suggestion, Judge Patricia Barksdale notes that § 2361 relates to permanent injunctions as well as preliminary injunctions, and asks whether 65(e)(2) means that the rules do not modify all of § 2361. If it means to extend beyond preliminary injunctions under § 2361, it should say so.

Rule 65 has addressed preliminary and permanent injunctions from the beginning. On the face of it, there is a strong presumption that the original Advisory Committee understood that it was addressing only preliminary injunctions in 65(e)(2).

This acceptance of the plain meaning of the rule text finds some modest support in the structure of § 2361. The first paragraph provides that in any civil action of interpleader or in the nature of interpleader a district court may "enter its order restraining [all claimants] from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court." "[U]ntil further order of the court" seems to look toward preliminary relief. This interpretation is bolstered by the second paragraph, which provides that the court "may make the injunction permanent." The statute distinguishes between interlocutory and permanent injunctions. Rule text that focuses on preliminary injunctions alone seems to reflect this distinction in a purposeful way.

This reading leaves the question: Why should the rules be set aside for preliminary but not for permanent injunctions? The apparent explanation relies on the occasional need for prompt injunctive relief before all claimants can be notified and heard. An account can be found in 7 Fed. Prac. & Pro.: Civil § 1717 (4th ed. 2019). The Interpleader Act provides nationwide personal jurisdiction. An interpleader action may involve many and widely dispersed claimants. Delay in issuing a preliminary injunction to provide notice and a hearing may result in partial or complete defeat of the purpose to achieve a single and coherent disposition of all competing claims. But courts remain sensitive to the importance of notice and a hearing, and will act without notice and an opportunity for a hearing for all claimants only when urgent need appears.

Means of notice and hearing have evolved substantially since 1938. Experience with remote hearings during the pandemic has accelerated the pace of change. But the present submission seems to reflect curiosity, not any sense of actual problems caused by the Rule 65(e)(2) distinction. If problems are to be found, further, they are not in the full application of Rule 65 to permanent injunctions issued under the second paragraph of § 2361. Instead, they would be in the permission to disregard the protections of Rule 65 when issuing a preliminary interpleader injunction.

This item might well be removed from the agenda. An alternative would be to improve the style. Section 2361 relates to both preliminary and permanent injunctions. "[W]hich relates to" is an inaccurate description. It would be more accurate to say "as it relates to * * *." If we were embarked on a new style project, this change seems worthy. Practice ever since the Style Project, however, has been to resist the temptation to go back to adopt style amendments here and there as they come to mind.

**From:** Patty Barksdale
**To:** RulesCommittee Secretary
**Cc:** Julie Wilson
**Subject:** RE: Suggested Correction to Fed. R. Civ. P. 72(b)
**Date:** Tuesday, January 05, 2021 4:27:12 PM

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Hello Ms. Wilson.

Here is another rule matter for consideration.

Federal Rule of Civil Procedure 65 addresses injunctions and restraining orders.

Rule 65(e)(2) states, "These rules do not modify the following … (2) 28 U.S.C. § 2361, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader."

Because 28 U.S.C. § 2361 also relates to permanent injunctions, the statement in Rule 65(e) is somewhat confusing. Does Rule 65(e) mean the rules do not modify all of 28 U.S.C. § 2361 or just the aspect concerning preliminary injunctions? If the former, consider eliminating "preliminary injunctions in."

Thank you for your consideration.

**Patricia D. Barksdale**
United States Magistrate Judge
Bryan Simpson United States Courthouse
300 North Hogan Street
Jacksonville, FL 32202

# TAB 17

## 17. RULES 6, 60: TIMES FOR FILING

*Suggestion 21-CV-B*

A single submission addresses both the Civil and Appellate Rules Committees. It suggests clarifying amendments of Civil Rules 6 and 60, framed from the perspective of a "disabled layperson."

The Rule 6 proposal is aimed at Rule 6(d) and asks that it be expanded to add three additional days to the time to act after entry of judgment when notice of the judgment is made by mail, leaving with the clerk, or other means consented to:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served <u>or after entry of judgment</u> and service is made under Rule 5(b)(2)(C)(mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The framework begins with Rule 77(d). Paragraph (d)(1) provides that "immediately after entering an order or judgment, the clerk must serve notice of the entry, as provided in Rule 5(b), on each party who is not in default for failure to appear." Paragraph (d)(2) provides that "Lack of notice of the entry does not affect the time for appeal or relieve — or authorize the court to relieve — a party for failing to appeal within the time allowed, except as allowed by Federal Rule of Appellate Procedure 4(a)."

Rule 6(d) as it now stands does not help a party confronting the deadlines that run from entry of judgment in Rules 50, 52, and 59. They run from entry of judgment, not after being served. These are the same time limits that cannot be extended, *see* Rule 6(b)(2). Appellate Rule 4(a)(5) is a general provision for extending appeal time. Rule 4(a)(6) is more pointed. It allows the district court to "reopen" appeal time if the moving party did not receive the Rule 77(d) notice within 21 days after entry of judgment; the motion to reopen is filed within 180 days after the judgment is entered or within 14 days after receiving Rule 77(d) notice, whichever is earlier; and the court finds that no party would be prejudiced.

The integrated framework of Rules 50, 52, and 59, 6(b)(2), 77(d), and Appellate Rule 4(a) shows that careful attention has been paid to the time to make post-judgment motions and the time to appeal after they are resolved. That provides a first caution.

Another consideration is that ordinarily the clerk will serve notice through CM/ECF. Mail, leaving with the clerk, or other means agreed to by the parties will be used mostly for pro se litigants. Still, in some districts that will involve a substantial number of cases and parties. Often enough, some parties will be served through CM/ECF and others by one of the enumerated alternative

means. Thought would have to be given to framing any new rule in a way that establishes a single uniform appeal time for all parties.

The "3 added days" provision has been retained, but it is not universally popular.

All of this leaves an open choice. If it seems desirable to add another wrinkle to the tightly woven times to make post-judgment motions and to appeal, it can be done. The sample draft will require some further work, and — even apart from the fact that the same suggestion has been made to the Appellate Rules Committee — close consultation with that Committee.

The other suggestion made in this submission is to amend Civil Rule 60 to provide notice that a motion to vacate made under Rule 60(b) falls within the appeal time provisions of Appellate Rule 4(a)(4)(A)(vi) only "if the motion is filed no later than 28 days after the judgment is entered." Such a motion, along with the Rule 50, 52, and 59 post-judgment motions, sets the time to appeal running "for all parties from the entry of the order disposing of the last such remaining motion."

The suggested amendment would add a new subparagraph (B) to present Rule 60(c)(1): "A motion under Rule 60(b) [A] * * *; or (B) within 28 days to toll the time for filing an appeal."

This drafting does not integrate fully with Appellate Rule 4(a)(4)(A)(vi), which applies to all Rule 60 motions, including motions to correct errors arising from clerical mistake or a mistake arising from oversight or omission. The drafting could be improved.

A more important question arises from the reasons for including Rule 60(b) motions made within 28 days in Appellate Rule 4(a)(4)(A). At least historically, and likely still today, a great many motions captioned under Rule 60(b) seek relief that should properly be sought on the different terms available under Rules 50, 52, and 59. It has seemed harsh to cast all motions captioned under Rule 60(b) out of the appeal-time provisions established for good reasons by Rule 4. It also has been wise to avoid any attempt to divide a 28-day motion captioned under Rule 60(b) into parts that could properly be sought under Rules 50, 52, or 59, and thus suspend appeal time, and — if they exist in the outer reaches of theory — other parts that reach beyond those rules and can be brought only under Rule 60(b).

The question seems to boil down to the value of providing a cross-reference to Appellate Rule 4 in Civil Rule 60(c). Rule 77(d)(2) already provides one, as discussed with the Rule 6(d) proposal. Is another desirable here?

Good morning Rules Committee Secretary,

Whether FRCP 6(d) requires clarification as to its application in calculating the 28 period for filing posttrial motions.

Whether FRCP 60 should be amended to remove the 'trap' currently set in FRAP 4(a)(4)(A)(vi).

Because of the constraints on the judiciary the improvements suggested will:

- Increase judicial efficiencies
- Reduce the number of resources devoted to certain 'jurisdictional' issues
- Create additional amity and comity
- Improve consistency and clarity
- Preserve the style and integrity of the rules

I. FRCP 6(d) and entry of judgment

In keeping with the Guidelines for Drafting and Editing Court Rules and honoring the command of FRCP 1 to "secure the just, speedy, and inexpensive determination of every action and proceeding", I respectfully submit a simplification of FRCP 6(d) by adding a phrase already contained elsewhere in the FRCP. By adding the phrase "or after entry of judgment" will simplify the rule, comports with the style of the rules, and removing any remaining doubt that FRCP 6(d) applies to entry of judgment mentioned elsewhere in these rules.

To me, as a disabled layperson, FRCP 6 is ambiguous, cumbersome, and confusing. Specifically, the interplay between FRCP 6(d) and FRCP 6(a) when involving the required service of the notice of entry of judgment under FRCP 77. "That should have been clear to any federal litigator, and to read it the way McCarty's attorney has constitutes inexcusable neglect." *McCarty v. Astrue*, 528 F.3d 541, 545 (7th Cir. 2008).

Currently FRCP 59(e) and FRCP 60 (via FRAP 4(a)(4)(A)(vi) require a motion be filed within 28 days of the entry of judgment (FRCP 58) in order to "toll the time" for filing a notice of appeal.

Here is how the mental model I built looks:

The court enters judgment (58), which is a 'paper' (5). The Clerk then makes service (77) to the parties according to the method the parties consented to (5) and records service on the docket (79).

Because time, 28 days, starts the day after the event (6(a)(1)(A) the period is then calculated. (Day of event + 1 day) + 28 days

Because local rules (83) allow a pro se to be served by mail (5(b)(2)(c) and 6(d) requires additional time after certain kinds of service be added after the expiration of the time calculated in 6(a). That would give us:

Calculation of period in FRCP 6(a):

(Day of event + 1) + 28 days + 3 days.

From the 2018 calendar:

Day of entry: Wednesday, June 13, 2018
Day to start counting: Thursday, June 14, 2018
Days to count: 28 days

June 14 + 28 = July 11, 2018 (Wednesday) = 28 days as calculated in FRCP 6(a). Because notice of entry was served by mail, 3 days are added per 6(d). July 11 + 3 days = Saturday, July 14, 2018. Because July 14, 2018 is a Saturday, the filing day becomes the non-Saturday, non-Sunday, non-Holiday, which is Monday, July 16, 2018.

Because 6(d) is an 'automatic' calculation and requires neither action nor discretion by the court, rule 6(b) is inapplicable.

In 2005 the rules committee wrote "Rule 6(e) is amended to remove any doubt as to the method for extending the time…" When viewed together with Fed. R. Civ. P. 5(d)(4) "Acceptance by the Clerk. The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice" that means the service by mail of the notification of entry of judgment adds 3 days to the 28-day period one must file a posttrial motion for the tolling of time. Compare with " Fed.R.Civ.P. 6(e) applies only to documents `served' on opposing counsel, not to documents such as complaints or notices of appeal that must be filed in court."" *McCarty v. Astrue*, 528 F.3d 541, 545 (7th Cir. 2008).

I propose adding "or after entry of judgment" to FRCP 6(d):

> (d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served or <u>after entry of judgment</u>

and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

The application of Rule 6(d) to the calculation of time for the filing of posttrial motion(s) and a notice of appeal has no effect on the finality of the judgment/order and opinion nor does the additional 3 days cause a disadvantage to the appellee.

II. FRCP 60 and the FRAP trap.

FRAP 1(a) limits the scope of the rules to the United States courts of appeals. FRAP 1(b) goes on discuss the filing of motions or other document in the district court, the procedure must comply with the practice of the district court. The FRCP refers to 'paper(s)' and FRAP diverges by use of 'document.' Perhaps, that difference between the two sets of rules should be reconciled as well.

To toll the time for filing a Notice of Appeal, the FRCP requires posttrial motions to be filed within 28 days, except FRCP 60. The 28-day limitation for FRCP 60 appears in FRAP 4(a)(4)(A)(vi).

This minor language tweak will result in greater amity and comity amongst the districts and their circuits. For purposes of continuous improvement and consistency between the sets of rules FRCP Rule 60 should be amended to include the 28-day limitation and the reference to 28-days should be simultaneously removed from FRAP 4(a)(4)(A)(vi).

I propose amending FRCP Rule 60(c):

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—

(A) no more than a year after the entry of the judgment or order or the date of the proceeding for reasons (b)(1), (b)(2), and (b)(3)

(B) within 28 days to toll the time for filing an appeal.

I propose the following amendment to FRAP Rule 4(a)(4)(A)(vi):

(vi) for relief under Rule 60 ~~if the motion is filed no later than 28 days after the judgment is entered.~~

Thank you for your time, attention, and consideration of the analysis, and proposed amendments to the FRCP and FRAP. Because a litigant can lose important appeal rights, I beg you to fast-track these items. Alternatively, if my analysis is erroneous, I ask that you point out any errors in a compassionate manner.

Sincerely,

Greg Patmythes

Totally and permanently disabled

# TAB 18

## 18. *IN FORMA PAUPERIS* PRACTICES & STANDARDS

*Suggestion 21-CV-C*

Professors Zachary D. Clopton and Andrew Hammond have submitted a suggestion that the Committee should renew its consideration of the standards and procedures for granting petitions to proceed *in forma pauperis*.

Similar issues were considered by the Advisory Committee in October 2019 and April 2020, and briefly in October 2020.

The most extensive discussion occurred at the October 2019 meeting, prompted by an extensive submission by Sai and informed by Professor Hammond's article, *Pleading Poverty in Federal Court*, 128 Yale L.J. 1478 (2019). Three main issues were discussed: the great variations in standards employed to qualify for i.f.p. status, both as among different districts and as among judges in the same district; the ambiguity of the terms that shape the disclosures required by the Administrative Office forms, AO 239 and AO 240; and the intrusiveness and asserted irrelevance of much of the requested information. Committee members agreed that "these are big problems," in large part because many factors enter into the determination, too many to capture in any formula of the sort that might exert much pressure toward uniformity. Doubts also were expressed as to the role of the Rules Enabling Act process in addressing questions that at least veer close to matters of substance under the *in forma pauperis* statute. Some comfort was found in information that the Court Administration and Case Management Committee had taken an interest in these issues, and that the Department of Justice would inquire into the possibility that some other groups might be found to address some of these questions. The topic was removed from the agenda.

A new submission by Sai brought i.f.p. issues back to the agenda at the April 2020 meeting. This suggestion elaborated the argument that the AO forms and Appellate Rules Form 4 demand information that not only is irrelevant and intrusive, but is so intrusive as to invade the constitutional rights of nonparties whose information is required. Examples include a spouse's income from diverse sources, gifts, alimony, child support, public assistance, and still others; spouse's employment history; spouse's cash and money in bank accounts or in "any other financial institution"; a spouse's other assets; and persons who owe money to the spouse and how much. These questions were held for further consideration as advised by the Appellate Rules Committee's examination of Appellate Rules Form 4.

The new submission adds further details to support the proposition that seems to be accepted on all sides: there are wide variations in the information gathered to support decision of petitions to proceed *in forma pauperis*, and few courts provide any guidance to individual judges. Nor are uniform standards to be found. The result is wide variation in the results, both between districts and within districts.

The most important part of the new submission is the challenge: "IFP procedure should be on this Committee's agenda." The Committee could craft a Civil Rule. Or it could provide "guidance." The goal should be national i.f.p. standards. The standards "should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts."

*In forma pauperis* standards have been carried forward on the agenda for some time now. This submission renews the familiar questions. The most likely question for present discussion is whether the time has come to undertake development of a new Civil Rule, or, failing or postponing that, to search more vigorously for other bodies that might advance the cause of uniform and good practices to guide judges facing petitions for leave to proceed

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January 19, 2021

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

Dear Ms. Womeldorf,

We write to recommend that the Advisory Committee on Rules of Civil Procedure consider adding to its agenda the issue of petitions to proceed *in forma pauperis* (IFP).

This letter makes three points. First, there is wide variation in the procedures used by the 94 federal districts with respect to IFP petitions. Second, there is wide variation in the grant rates for IFP petitions across and within districts. Third, IFP is a proper subject of study for this committee.

**[1] There is wide variation in IFP procedures.**

In *Pleading Poverty in Federal Court*, 128 YALE L. J. 1478 (2019), Professor Andrew Hammond at the University of Florida cataloged IFP procedures for the 94 district courts. At the time of writing, Hammond found that 22 districts accept form AO 239, 37 districts accept AO 240, and 46 districts have developed their own forms. *Id.* at 1496. Among the bespoke forms, there is substantial variation in information requested and depth required. Simple explanations such as geography do not account for this variation. *Id.* at 1496-1500.

Federal judges receive little guidance on how to evaluate the data included on these forms. According to Hammond, "All the forms currently in use in the federal courts—the AO 239 form, the AO 240 form, and the district-court-specific forms—leave judges with no benchmark for deciding how much income is sufficiently low, how many expenses or debts are sufficiently high, and how many assets are sufficiently few. With no articulated threshold on any in forma pauperis form, judges must identify some means test (such as the federal poverty guidelines) or create their own. Few federal courts provide any guidance for judges presented with an in forma pauperis motion." *Id.* at 1500 (internal notes omitted). This status quo makes IFP determinations labor intensive for judges and unpredictable for litigants.

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**[2] There is wide variation in IFP results.**

Professor Adam Pah and colleagues have used data-science algorithms to evaluate the IFP grant rates for districts and judges. Two findings merit attention here.

First, Pah and colleagues found wide variation in the grant rate for IFP petitions across districts. Looking at cases filed in 2016, Pah and colleagues found that federal district courts that received at least 25 IFP petitions had a mean grant rate of 78%, with a standard deviation of 15% and a range of 68 percentage points. *See* Email from Pah to Clopton, Jan. 15, 2021 (on file). This inter-district variation could be justified on any number of bases. We present it without judgment for this Committee's information.

Second, Pah and colleagues also found wide variation in the IFP grant rate *within districts*. According to their recent article, "At the 95% confidence level, nearly 40% of judges—instead of the expected 5%—approve fee waivers at a rate that statistically significantly differs from the average rate for all other judges in their same district. In one federal district, the waiver approval rate varies from less than 20% to more than 80%." *See* Adam R. Pah, et al., *How to Build a More Open Justice System*, SCIENCE (July 10, 2020), https://science.sciencemag.org/content/369/6500/134.full.

**[3] IFP procedure should be on this Committee's agenda.**

The ability to have one's day in court is a fundamental aspect of the American justice system. Filing fees put a price tag on that right, but the right to petition to proceed *in forma pauperis* should ensure that those who cannot pay can still access our federal courts.

The administration of the IFP procedure is within the mandate of this committee. First, this Committee could propose a Federal Rule of Civil Procedure related to IFP, consistent with the Rules Enabling Act of 1934. Second, without adopting a rule amendment, this Committee could offer guidance to local rules committees in hopes of encouraging convergence on a consistent approach. Third, this Committee could work with the Administrative Office to revise the existing forms to provide guidance to federal judges.

When considering these tasks, we would encourage this Committee to keep in mind two sets of considerations. First, we think there is value is standardization across and within districts. A Federal Rule or guidance from this Committee would go a long way in that direction. Second, we encourage this committee to consider the procedural and substantive values at stake when proposing national IFP standards. IFP standards should be respectful of the dignity and privacy of litigants; they should be clear and easy for litigants to understand; they should be administrable for judges; and they should reflect the importance of access to the federal courts. *See generally* Hammond, *supra* (describing these values and offering potential standards).

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* * *

For the foregoing reasons, we encourage this committee to add IFP to its agenda. If we can be helpful, we would be delighted to assist this Committee on its work on this and other important issues. Please direct any correspondence to Professor Clopton at zclopton@law.northwestern.edu.

Sincerely,

Zachary D. Clopton
Professor of Law
Northwestern Pritzker School of Law

Andrew Hammond
Assistant Professor of Law
University of Florida Levin College of Law

cc: Hon. Robert M. Dow, Civil Rules Committee Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter

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Supplemental Meeting Materials

## REVISED RULE 87

Several revisions have been proposed for Rule 87 as other committees have reacted to the version in the agenda materials for the April 23 meeting.

A revised version of Rule 87 and the Committee Note are attached, showing changes from the agenda book version in conventional over- and underlining. The Committee Note is intended to explain the revisions in rule text. One important test will be how well it does that job as you read through it and compare the new rule text.

Some further explanation of choices considered and abandoned may provide a useful foundation for discussion on April 23.

Rule 87(b)(2) is changed to overstrike the provision shown in brackets that would have authorized the Judicial Conference to modify an emergency declaration. No other advisory committee wanted this provision, and the Criminal Rules Committee strongly opposes it. It was included in earlier Rule 87 drafts on the theory that an initial declaration, perhaps for one court or one emergency rule, may be quickly followed by changed circumstances that require an extension to include other courts or additional emergency rules. Or the opposite may happen. An initial declaration may be followed by changed circumstances that justify excluding some courts or emergency rules that were originally included. For that matter, both expansion and contraction may prove important at the same time. The other committees recognize these possibilities, but believe that greater care will be taken if changes can be made only by an additional declaration. They believe that whenever a change is warranted, it can be accomplished as readily by an additional declaration as by modifying an earlier declaration. The strong pressures toward uniformity counsel that we abandon "or modify" as it appeared in the agenda book draft.

Discussion of uniformity also led to a clear improvement in the provision governing the effects of the end of a declaration while an act authorized under an emergency rule remains incomplete. Subdivision 87(d) allowed completion of the act "when complying with the rule would be infeasible or work an injustice." That standard was borrowed from the Rule 86(a)(2)(B) provision for retroactive application of a rule amendment. The question of uniformity first arose from the decision by the Criminal Rules Committee to place their corresponding provision in their Rule 62(c). Further consideration suggested that the "infeasible or work an injustice" standard is an unsatisfactory choice, not only because it is inherently vague but also because the test should be different for emergency orders for serving process than for emergency orders governing the time to make post-judgment motions. The revised draft separates former subdivision (d) into new provisions at the end of Emergency Rule 4 and Emergency Rule 6(b)(2). For Rule 4, the standard recognizes that the end of the emergency may justify falling back on ordinary Rule 4 methods

of serving process, or modification of the methods permitted by the emergency order, or completion of a method permitted by the order. For Rule 6(b)(2), the revised provision carries an emergency order forward after the emergency ends. The complicated interdependence with appeal time is too difficult to address by any other means.

Emergency Rule 4 is unchanged from the agenda book version, apart from the new provision governing the end of an emergency declaration.

Emergency Rule 6(b)(2) generated a lengthy and increasingly complex series of exchanges among four reporters for the Civil, Appellate, and Standing Committees, abetted by Reporter Capra in his capacity as uniformity czar. The many problems arise, as foreseen from the beginning, from the need to integrate the civil rules provisions that impose strict time limits on post-judgment motions with the need to reset appeal time when a timely post-judgment motion is filed.

A first question goes to the time when a motion to extend the time for a post-judgment motion must be made. Recent drafts have invoked Rule 6(b)(1)(A), which requires that the court act on its own, or that a party make a motion, "before the original time * * * expires." Apart from the special rules that apply to Rule 60(b) motions, that means within 28 days from the entry of judgment. That choice has not been questioned in the recent discussions.

The next question goes to the length of the extension. Tight limits might be maintained, as one draft had it, by limiting the extension to no more than 58 days after the entry of judgment. The extension could be more than 30 days if the motion was made, or the court acted, before the 28th day. But if a motion to extend is made on the 28th day, the longer the court takes to decide the motion the less time the movant will have to make any motion that the court authorizes. The basic rules reflect a purpose to work to finality, whether by failure to appeal or by appeal, in a short period. But emergency circumstances that may justify an extension deserve greater flexibility. Making a timely motion to extend informs all parties that repose or appeal may be deferred, and that they must remain alert for the events that reset appeal time. So the revised draft sets the limit at "a period of not more than 30 days after entry of the order."

The true complexities arise from integrating an emergency motion to extend the time for a post-judgment motion with the provisions of Appellate Rule 4(a)(4)(A) that reset appeal time when a timely motion is made under Civil Rules 50, 52, 59, and 60(b). Filing a timely notice of appeal is mandatory and jurisdictional. No excuse is allowed, not even if all parties choose to bypass any question of timeliness. This powerful approach to timeliness has generated repeated amendments of Rule 4 designed to protect the unwary against one pitfall after another as different difficulties have appeared. The agenda book draft reflects a Civil Rules-like approach to rule text, forgoing intricate drafting in favor of a

reliance on some measure of open-endedness and reliance on common sense application. That spirit cannot safely be followed in the vicinity of Rule 4, where, with apologies to Cardozo, it sometimes seems that the punctilio of drafting the most technical is required.

The upshot of extended and elaborate exchanges is reflected in the new version of Emergency Rule 6(b)(2).

The first sentence, now designated as subparagraph (A), remains unchanged. It simply copies regular Rule 6(b)(2), substituting "may * * * extend" for "must not extend."

The balance of Emergency Rule 6(b)(2) is recast as subparagraph (B), addressing the challenge of integrating emergency extensions with Appellate Rule 4(a), and subparagraph (C), the provision for the end of an emergency declaration noted above.

The appeal-time provisions of subparagraph (B) are divided into three items. Item (i) resets the time to appeal to run from the date of entry of an order denying the motion to extend. No complication there.

Item (ii) resets appeal time for the event that is more likely to follow an order granting an extension — a motion authorized by the emergency order is filed within the extended period. Appeal time is reset by stating that the authorized motion "is 'filed within the time allowed by' the Federal Rules of Civil Procedure for purposes of Appellate Rule 4(a)(4)(A)." When a motion under Rules 50, 52, or 59 is filed "within the time allowed by those rules," Rule 4(a)(4)(A) resets appeal time to run from the order disposing of the last such remaining motion. This is clear, even when the emergency order extends the time for more than one post-judgment motion, whether by the same party or by different parties. The same is true for a Rule 60 motion that meets an additional requirement discussed below.

Item (iii) resets appeal time for a perhaps less likely event — the court grants an extension, but no authorized motion is filed within the extended period. That may make sense — the purpose of seeking an extension may be to determine whether a persuasive motion can be made, and for that matter to decide whether the outcome of a persuasive motion is better than either appealing the original judgment or accepting or settling the judgment. Appeal time is reset to run from the expiration of the extended period.

All of these parts have seemed clear enough. The complications that beset clear rule text arise from motions under Rule 60(b). The time for these motions is set by Rule 60(c)(1):

> A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Paragraphs (1), (2), and (3) cover mistake, newly discovered evidence, or fraud or misrepresentation. They are the most likely grounds for Rule 60(b) motions. And they closely resemble grounds for relief under Rules 52 and 59 (judgment as a matter of law under Rule 50(b) is rather different). One result of the similarity is that motions that should be made under Rule 52 or 59 are often made within the 28 days allowed for Rule 52 or 59 motions, but captioned under Rule 60(b). They deserve to have the same effect in resetting appeal time as if they had been captioned under Rule 52 or 59, or even Rule 50. Resetting appeal time is also appropriate if the Rule 60 characterization is proper or uncertain. This result is accomplished by Appellate Rule 4(a)(4)(A)(vi), which resets appeal time for a Rule 60(b) motion "if the motion is filed no later than 28 days after the judgment is entered."

Alas, literal application of Rule 4(a)(4)(A)(vi), a result much to be feared with Rule 4, could cause difficulties when a court extends the time for making Rule 50, 52, or 59 motions. The Appellate Rules Committee is proposing to amend Rule 4(a)(4)(A)(vi) to reset appeal time if a Rule 60 motion "is filed within the time allowed for filing a motion under Rule 59." This amendment is designed to ensure that if the time for filing a Rule 59 motion is extended, then a Rule 60(b) motion made within the extended time period would have resetting effect.

So far, so good. But recall Rule 60(c)(1). All Rule 60(b) motions must be filed within a reasonable time, and no more than a year after judgment for paragraphs (1), (2), and (3). Determining whether a motion is made within a reasonable time is guided by the circumstances of a declared civil rules emergency, so why should Rule 60(b) be included at all? Life — and most certainly the drafting part of life — would be simpler if Emergency Rule 6(b)(2) were confined to extending the time to move under Rules 50, 52, and 59. But two rather distinct reasons have worked to retain Rule 60(b) motions, at least for this draft.

One concern is fear that a motion mistakenly captioned under Rule 60(b), whether in a motion to request an emergency extension or in a motion authorized by an emergency extension to move under Rule 50, 52, or 59, would not be counted in the world of Appellate Rule 4(a)(4)(A) as a Rule 50, 52, or 59 motion. That problem is encountered in ordinary practice often enough to anticipate that it may arise even in the circumstances of an emergency extension when all parties should be particularly attentive to what they are doing. Automatically counting a Rule 60(b) motion as if had been a Rule 59 motion protects against mistakes, and also protects appellate courts against the need to determine whether there has been a mistake.

A second concern is that there may be emergency circumstances that justify extending the time to move under Rule 60(b)(1), (2), or (3) beyond the one-year limit. One simple illustration: 50 weeks after judgment, and during a civil rules emergency, a party learns of circumstances that may support a Rule 60(b) motion, but cannot

reasonably learn enough in the two remaining weeks to decide whether to make the motion or to make a persuasive motion. A reasonable time may extend beyond one year in nonemergency circumstances, and Rule 60(c)(1) draws the line there, but a more lenient approach seems appropriate in a civil rules emergency.

**Rule 87. Civil Rules Emergency.**

(a) CONDITIONS FOR AN EMERGENCY. The Judicial Conference of the United States may declare a Civil Rules emergency if it determines that extraordinary circumstances relating to public health or safety, or affecting physical or electronic access to a court, substantially impair the court's ability to perform its functions in compliance with these rules.

(b) DECLARING AN EMERGENCY.

(1) *Content.* The declaration must:

(A) designate the court or courts affected;

(B) adopt all of the emergency rules in Rule 87(c) unless it excepts one or more of them; and

(C) be limited to a stated period of no more than 90 days.

(2) *Early Termination.* The Judicial Conference may ~~[modify or]~~[1] terminate a declaration for one or more courts before the termination date.

(3) *Additional Declarations.* The Judicial Conference may issue additional declarations under this rule.

(c) EMERGENCY RULES.

(1) *Emergency Rule 4*: The court may order service on any defendant described in Rule 4(e), (h)(1), (i), or (j)(2) — or on a minor or incompetent person in a judicial district of the United States — by a method that is reasonably calculated to give notice. An act authorized by the order may be completed [under the order] after the [emergency] declaration ends unless the court modifies or rescinds the order.

(2) *Emergency Rule 6(b)(2)*:

(A) Extension of Time to File Certain Motions. A court may by order apply Rule 6(b)(1)(A) to extend for a period of not more than 30 days after entry of the order the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(B) Effect on Time to Appeal. Unless the time to appeal would otherwise be longer,

(i) If the court denies an extension under this emergency rule, the time to file an appeal runs for all parties from the date of entry of the order denying the motion to extend.

(ii) If the court grants an extension under this emergency rule, a motion authorized by the court and filed within the extended period is

[1] None of the Appellate, Bankruptcy, or Criminal Rules Committees favors recognizing Judicial Conference authority to modify a declaration. This provision is deleted from this draft in the interests of uniformity. All advisory committees expect that the Judicial Conference can rely on additional declarations — for us, under Rule 87(b)(3) — as readily as by modifying an initial declaration.

Revised April 12, 2021

filed "within the time allowed by" the Federal Rules of Civil Procedure for purposes of Appellate Rule 4(a)(4)(A).

(iii) If the court grants an extension under this emergency rule and no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.

(C) Declaration Ends. An act authorized by order under this emergency rule may be completed [under the order] after the emergency declaration ends.

~~A motion authorized by the court and filed within the extended period has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion under Rule 50(b), 52(b), 59, and 60. If no motion authorized by the court is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.~~

~~(d) EFFECT OF A TERMINATION. An act not authorized by a rule but authorized under an emergency rule may be completed under the emergency rule after the declaration of emergency terminates when complying with the rule would be infeasible or work an injustice.~~

COMMITTEE NOTE

Subdivision (a) This rule addresses the prospect that extraordinary circumstances may so substantially interfere with the ability of the court and parties to act in compliance with a few of these rules as to substantially impair the court's ability to effectively perform its functions under these rules. The responses of the courts and parties to the COVID-19 pandemic provided the immediate occasion for adopting a formal rule authorizing departure from the ordinary constraints of a rule text that substantially impairs a court's ability to perform its functions. At the same time, these responses showed that almost all challenges can be effectively addressed through the general rules provisions. The emergency rules authorized by this rule allow departures only from a narrow range of rules that, in rare and extraordinary circumstances, may raise unreasonably high obstacles to effective performance of judicial functions.

The range of the extraordinary circumstances that might give rise to a rules emergency is wide, in both time and space. An emergency may be local — familiar examples include hurricanes, flooding, explosions, or civil unrest. The circumstance may be more widely regional, or national. The emergency may be tangible or intangible, including such events as a pandemic or disruption of electronic communications. The concept is pragmatic and functional. The determination of what relates to public health or safety, or what affects physical or electronic access to a court, need not be literal. The ability of the court to perform its functions in compliance with these rules may be affected by the ability of the parties to comply with a rule in a particular emergency. A shutdown

of interstate travel in response to an external threat, for example, might constitute a rules emergency even though there is no physical barrier that impedes access to the court or the parties.

Responsibility for declaring a rules emergency is vested exclusively in the Judicial Conference. But a court may, absent a declaration by the Judicial Conference, utilize all measures of discretion and all the flexibility already embedded in the character and structure of the Civil Rules.

A pragmatic and functional determination whether there is a rules emergency should be carefully limited to problems that cannot be resolved by construing, administering, and employing the flexibility deliberately incorporated in the structure of the Civil Rules. The rules rely extensively on sensible accommodations among the litigants and on wise management by judges when the litigants are unable to resolve particular problems. The effects of an emergency on the ability of the court and the parties to comply with a rule should be determined in light of the flexible responses to particular situations generally available under that rule. And even if a rules emergency is declared, the court and parties should explore the opportunities for flexible use of a rule before turning to rely on an emergency departure. Adoption of this Rule 87, or a declaration of a rules emergency, do not imply any limitation of the courts' ability to respond to emergency circumstances by wise use of the discretion and opportunities for effective adaptation that inhere in the Civil Rules themselves.

Subdivision (b) A declaration of a rules emergency must designate the court or courts affected by the emergency. An emergency may be so local that only a single court is designated. The declaration adopts all of the emergency rules listed in subdivision (c) unless it excepts one or more of them. An emergency rule supplements the Civil Rule for the period covered by the declaration.

A declaration must be limited to a stated period of no more than 90 days, but the Judicial Conference may terminate a declaration for one or more courts before the end of the stated period. A declaration may be succeeded by a new declaration made under this rule. And additional declarations may be made under this rule before an earlier declaration terminates. An additional declaration may modify an earlier declaration to respond to new emergencies or a better understanding of the original emergency. Changes may be made in the courts affected by the emergency or in the emergency rules adopted by the declaration.

Subdivision (c) Subdivision (c) lists the only Emergency Rules that may be authorized by a declaration of a rules emergency.

Emergency Rule 4. Emergency Rule 4 authorizes the court to order service by means not otherwise provided in Rule 4 by a method that is appropriate to the circumstances of the emergency declared by the Judicial Conference and that is reasonably calculated to give notice. The nature of some emergencies will make it appropriate to rely on case-specific orders tailored to the

particular emergency and the identity of the parties, taking account of the fundamental role of serving the summons and complaint in providing notice of the action and the opportunity to respond. Other emergencies may make it appropriate for a court to adopt a general practice by entering a standing order that specifies one or possibly more than one means of service appropriate for most cases. Service by a commercial carrier requiring a return receipt might be an example.

The final sentence of Emergency Rule 4 addresses a situation in which a declaration of a civil rules emergency ends after an order for service is entered but before service is completed. Service may be completed under the order unless the court modifies or rescinds the order. Modification to specify a method of service not within Rule 4, or rescission that requires service by a method within Rule 4, may provide for effective service. But it may be better to permit completion of service in compliance with the original order. For example, the summons and complaint may have been delivered to a commercial carrier that has not yet delivered them to the party to be served. Allowing completion and return of confirmation of delivery may be the most efficient course. Allowing completion of a method authorized by the order may be particularly important when a claim is governed by a statute of limitations that requires actual service within a stated period after the action is filed.

Emergency Rule 6(b)(2). Emergency Rule 6(b)(2) supersedes the flat prohibition in Rule 6(b)(2) of any extension of the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). The court may extend those times under Rule 6(b)(1)(A). Rule 6(b)(1)(A) requires the court to find good cause. Some emergencies may justify a standing order that finds good cause in general terms, but the period allowed by the extension ordinarily will depend on case-specific factors as well.

Rule 6(b)(1)(A) authorizes the court to extend the time to act under Rules 50 (b) and (d), 52(b), 59(b), (d), and (e), and 60(b) only if it acts, or if a request is made, before the original time allowed by those rules expires. For all but Rule 60(b), the time allowed by those rules is 28 days after the entry of judgment. For Rule 60(b), the time allowed is governed by Rule 60(c)(1), which requires that the motion be made within a reasonable time, and, for motions under Rule 60(b)(1), (2), or (3), no more than a year after the entry of judgment. The maximum extension is not more than 30 days after entry of the order granting an extension. If the court acts on its own, extensions for Rule 50, 52, and 59 motions can extend no later than 58 days after the entry of judgment. If an extension is sought by motion, an extension can extend no later than 30 days after entry of the order granting the extension. [An extension of the time to file a Rule 60(b) motion would be superfluous so long as the motion is made within a reasonable time, except for the circumstance in which a rules emergency declaration is in effect and the emergency circumstances make it reasonable to permit a motion beyond the one-year limit for motions under Rule 60(b)(1), (2), or (3).]

Special care must be taken to ensure that the parties understand the effect of an order granting or denying an extension on the time for filing a notice of appeal. Appeal time must be reset to support an orderly determination whether to order an extension and, if an extension is ordered, to make and dispose of any motion authorized by the extension. ~~The interface with Appellate Rule 4(a)(4) is addressed by the provision in Emergency Rule 6(b)(2) that a motion filed within the extended period has the same effect under Appellate Rule 4(a)(4)(A) as a timely motion made under the rules listed in Rule 6(b)(2).~~

Subparagraph 6(b)(2)(B) integrates the emergency rule with Appellate Rule 4(a)(4)(A) for three separate situations.

Item (B)(I) resets appeal time to run for all parties from the date of entry of an order denying a motion to extend. [The court may need some time to make a careful decision on the motion, although the time constraints imposed on post-judgment motions reflect the concerns that conduce to deciding as promptly as the emergency circumstances make possible.]

Item (B)(ii) resets appeal time after the court grants an extended period to file a post-judgment motion. Appellate Rule 4(a)(4)(A) is incorporated, giving the authorized motion the effect of a motion filed "within the time allowed by" the Federal Rules of Civil Procedure. If more than one authorized motion is filed, appeal time is reset to run from the order "disposing of the last such remaining motion."

These provisions for resetting appeal time are supported for the special timing provisions for Rule 60(b) motions by a parallel amendment of Appellate Rule 4(a)(4)(A)(vi) that resets appeal time on a timely motion "for relief under Rule 60 if the motion is filed within the time allowed for filing a motion under Rule 59." This Rule 4 provision, as amended, will assure that a Rule 60(b) motion resets appeal time for review of the final judgment only if it is filed within the 28 days ordinarily allowed for post-judgment motions under Rule 59 or any extended period for filing a Rule 59 motion that a court might authorize under Emergency Rule 6(b)(2). A timely Rule 60(b) motion filed after that period, whether it is timely under Rule 60(c)(1) or under an extension ordered under Emergency Rule 6(b)(2), supports an appeal from disposition of the Rule 60(b) motion, but does not support an appeal from the [original] final judgment.

The final sentence of Emergency Rule 6(b)(2) addresses a situation in which a declaration of a civil rules emergency ends after an order is entered, whether the order grants or denies an extension. The integration with the appeal time provisions of Appellate Rule 4(a)(4)(A) must be preserved. And if the order grants additional time to file a motion, that opportunity must be preserved. ~~It further provides that if no authorized motion is made within the extended period, the time to file an appeal runs for all parties from the expiration of the extended period.~~

~~Subdivision (d) An act may be commenced under an emergency rule but not be completed before the declaration of a rules emergency terminates. The emergency authority should expire when the act may be accomplished under the corresponding civil Rule without any real difficulty or unnecessary waste. But the act may be completed as if the declaration had not terminated when compliance with the applicable rule would be infeasible or work an injustice.~~

Emergency rules provisions were added to the Appellate, Bankruptcy, Civil, and Criminal Rules in the wake of the 2020-[?] COVID-19 pandemic. They were made as uniform as possible. But each set of rules serves distinctive purposes, shaped by different origins, traditions, functions, and needs. Different provisions were compelled by these different purposes.

**Rule 4. Appeal as of Right—When Taken**

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

* * *

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed ~~no later than 28 days after the judgment is entered~~ within the time allowed for filing a motion under Rule 59.

Committee Note

The amendment is designed to make Rule 4 operate smoothly with Emergency Civil Rule 6(b)(2) if that Emergency Civil Rule is ever in effect, while not making any change to the operation of Rule 4 at any other time. It does this by replacing the phrase "no later than 28 days after the judgment is entered" in Rule 4(a)(4)(A)(vi) with the phrase "within the time allowed for filing a motion under Rule 59."

Certain post-judgment motions—for example, a renewed motion for judgment as a matter of law under Civil Rule 50(b) and a motion for a new trial under Civil Rule 59—may be made in the district court shortly after judgment is entered. Recognizing that it makes sense to await the district court's decision on these motions before pursuing an appeal, Rule 4(a)(4)(A) resets the time to appeal from the judgment so that it does not run until entry of an order disposing of the last such motion.

Rule 4 gives this resetting effect only to motions that are filed within the time allowed by the Civil Rules. For most of these motions, the Civil Rules require that the motion be filed within 28 days of the judgment. See Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e). The time requirements for a Civil Rule 60(b) motion, however, are notably different. It must be filed "within a reasonable time," and for certain Civil Rule 60(b) motions, no more than a year after judgment. For this reason, Rule 4 does not give resetting effect to all Civil Rule 60(b) motions that are filed within the time allowed by the Civil Rules, but only to those Civil Rule 60(b) motions that are filed within 28 days of the entry of judgment. That is why most of the motions listed in Rule 4(a)(4)(A) are governed simply by the general requirement that they be filed within the time allowed by the Civil Rules, but Rule 4(a)(4)(A)(vi) adds the requirement that a Civil Rule 60(b) motion has resetting effect only if "filed no later than 28 days after the judgment is entered."

Significantly, Civil Rule 6(b)(2) prohibits the district court from extending the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). That means that when Rule 4 requires that a motion be filed within the time allowed by the Civil Rules, the time allowed by those Rules for motions under Rules 50(b) and (d), 52(b), 59(b), (d), and (e) will be 28 days—matching the 28-day requirement in Rule 4(a)(4)(A)(vi) applicable to Rule 60(b) motions.

However, Emergency Civil Rule 6(b)(2)—which would be operative only if the Judicial Conference of the United States were to declare a Civil Rules emergency under Civil Rule 87—authorizes district courts to grant extensions that they are otherwise prohibited from granting. If that Emergency Civil Rule is in effect, district courts may grant extensions to file motions under Civil Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b). For all these motions except Civil Rule 60(b) motions, Rule 4 works seamlessly. Rule 4 requires only that those motions be filed "within the time allowed by" the Civil Rules, and a motion filed within a properly granted extension is filed "within the time allowed by" those rules. An Emergency Civil Rule is no less a Civil Rule simply because it is operative only in a Civil Rules Emergency.

Without amendment, Rule 4 would not work seamlessly with the Emergency Civil Rule for Rule 60(b) motions because the 28-day requirement in Rule 4(a)(4)(A)(vi) would not correspond to the extended time to file other resetting motions. For this reason, the amendment replaces the phrase "if the motion is filed

no later than 28 days after the judgment is entered" with the phrase "within the time allowed for filing a motion under Rule 59."

At all times that no Civil Rules Emergency has been declared, the amended Rule 4 functions exactly as it did prior to the amendment. A Civil Rule 60(b) motion has resetting effect only if it is filed within the time allowed for filing a motion under Civil Rule 59—which is 28 days.

When a Civil Rules Emergency has been declared, however, if a district court grants an extension of time to file a Civil Rule 59 motion and a party files a Civil Rule 60(b) motion, that Civil Rule 60(b) motion has resetting effect so long as it is filed within the extended time set for filing a Civil Rule 59 motion. The Civil Rule 60(b) motion has this resetting effect even if no Civil Rule 59 motion is filed.

**COMMENT**
**to the**
**ADVISORY COMMITTEE ON CIVIL RULES**

# SEALING FATE: THE PROPOSAL TO RESTRICT JUDICIAL DISCRETION OVER SEALING CONFIDENTIAL INFORMATION WOULD IMPOSE UNWORKABLE STANDARDS ON THE COURTS, CONFLICT WITH STATUTORY PRIVACY RIGHTS, AND STOKE UNPRECEDENTED SATELLITE LITIGATION

March 24, 2021

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Advisory Committee on Civil Rules ("Committee") in response to Suggestion 20-CV-T[2], which asks the Committee to adopt a new Federal Rule of Civil Procedure ("FRCP") governing the sealing and unsealing of court records in civil cases.

## INTRODUCTION

Data privacy and cybersecurity are the focus of tremendous political and public policy attention today—and for good reason. The "information age" accumulation of proprietary and personal data is raising extremely important questions about the proper collection, storage, and protection of information. As more and more business, personal communications, and healthcare are conducted online,[3] the strong tide of public opinion and policy development favors adding protections for proprietary and personal data, including notable laws in Europe, California, and many other jurisdictions. Meanwhile, federal courts continue to enforce a strong presumption in favor of disclosure, granting sealing orders sparingly. Amidst this debate, Suggestion 20-CV-T urges the Committee to displace established precedent and create a rule governing the sealing of documents in order to establish an even stronger policy preference for forcing litigants (and non-parties) to expose private information to the public—and in doing so, inventing an expansive

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal procedural 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] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).
[3] See https://www.pwc.com/us/en/services/consulting/library/consumer-intelligence-series/cybersecurity-protect-me.html.

new role for federal courts as the general public's clearinghouse for accessing private information.

The complexity of this issue is well known to the Committee and the Standing Committee due to prior work on the topic,[4] and is also evidenced by the legislative history of related proposals[5] and the testimony of federal judges and litigants.[6] Almost without exception, serious efforts to devise a new standard for balancing the competing interests regarding sealing have concluded that the current rules are working. For example, in testimony before the House Judiciary Committee, Judge Richard W. Story of the U.S. District Court for the Northern District of Georgia described the present system for sealing documents as an efficient case management tool.[7] When members of the media advocated for stricter requirements on sealing documents by pointing to a Sixth Circuit decision admonishing a judge for improperly sealing documents,[8] the take-away lesson was that federal appellate courts are easily able to address the matter within the current legal framework.[9]

Suggestion 20-CV-T is not only unneeded, but also unworkable. The proposed rule would: (1) require courts to make "particularized findings" before sealing documents; (2) allow "any member of the public" to contest sealing orders "at any time"; and (3) automatically terminate all sealing orders just 60 days after case disposition. These provisions would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring ancillary proceedings. Meanwhile, the proposed rule would require judicial reconciliation of numerous conflicts with well-established sources of law, including federal statutes (such as whistle-blower protection laws), the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, federal rules protecting third parties, federal district court local rules, and Supreme Court precedent. By placing enormous additional burdens on a civil justice system that is already overworked and under-resourced, Suggestion 20-CV-T would create the very "inconsistencies and uncertainties in the justice system"[10] that its supporters claim it would reduce.

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[4] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 49 (Dec. 9, 2020) ("Around 15 years ago, the Standing Committee appointed a subcommittee made up of representatives of all Advisory Committees that responded to concerns then that federal courts had 'sealed dockets' in which all materials filed in court were kept under seal. The FJC did a very broad review of some 100,000 matters of various sorts, and found that there were not many sealed files . . .").

[5] *See id*. (discussing the failure of Congress to pass a Sunshine in Litigation Act).

[6] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 16-18 (2019) (testimony of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[7] *Id*.

[8] *See generally The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 39-40 (2019) (testimony of Daniel R. Levine, Legal Correspondent, Thomas Reuters Corporation).

[9] *See* ROBERT TIMOTHY REGAN, CONFIDENTIAL DISCOVERY: A POCKET GUIDE ON PROTECTIVE ORDERS at 15-16 (Federal Judicial Center) (2012) (discussing the process for appealing protective orders in various circuits); *see also* ROBERT TIMOTHY REGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE at 18 (Federal Judicial Center) (2010) (discussing the same for orders to seal).

[10] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

If the Committee undertakes to draft a new national standard, it should set aside Suggestion 20-CV-T and instead fashion a rule that provides pragmatic guidance for courts and parties balancing the legitimate need for litigants to seal proprietary information with the public interest in oversight of the judicial process. Any new rule should reflect the fact that, in many cases, the information held by companies, governments, hospitals, and non-profits includes customer data, financial histories, patient charts, and employment records is not only proprietary but also pertains to individuals. It also should contemplate that, in today's discovery practices, parties commonly exchange information about their data infrastructure, including the design and operation of their computer systems—information that does not go to the merits of any legal dispute but whose disclosure opens serious risks by providing a roadmap to hackers, competitors, and state sponsors around the world who conduct daily cyber espionage and cyber attacks. Any new rule should: (i) clearly distinguish between discovery and court-filed documents; (ii) allow parties to stipulate to protection of discovery information; (iii) apply the presumption of public disclosure only to documents that are important to the determination of case merits; (iv) provide a mechanism to ensure information exchanged during discovery is appropriately protected from cybersecurity threats; and (v) establish a procedure for parties and courts to minimize the amount of potentially confidential information that gets filed with courts in the first place. Such a rule, unlike Suggestion 20-CV-T, could be "worth the candle" given the many difficulties the Committee will have to tackle when drafting a new rule on this topic.

## I. A NEW RULE IS UNNECESSARY BECAUSE THE SEALING OF RECORDS IS RARE AND TYPICALLY GOVERNED BY STATUTE

Presently, litigants must provide a compelling reason for a document to be sealed in the federal courts.[11] The current policy was explained by the then-director of the Administrative Office of the Courts in a recent press release addressing a serious cybersecurity breach in the federal courts:

> "The federal Judiciary has long applied a strong presumption in favor of public access to documents," Duff said. "Court rules and orders should presume that every document filed in or by a court will be in the public domain, unless the court orders it to be sealed, and that documents should be sealed only when necessary," Duff said in his January 6 memo to the courts.[12]

Courts ruling on sealing motions enter findings in accordance with Supreme Court and circuit precedent by balancing the public right of access with the various privacy interests.[13] By most accounts from judges and litigants, this system functions as it is intended to, primarily due to judges' discretion and their proximity to the facts and issues of a specific case.[14]

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[11] *The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Hearing Before the H. Comm. on the Judiciary* 117th Cong. 4 (2019) (written statement of The Honorable Richard W. Story, Senior Judge, United States District Court for the Northern District of Georgia).

[12] Available at Judiciary Addresses Cybersecurity Breach: Extra Safeguards to Protect Sensitive Court Records | United States Courts (uscourts.gov).

[13] In re Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981).

[14] *See id*. ("Because of the difficulties inherent in formulating a broad yet clear rule to govern the variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court.").

The complete sealing of civil cases is, in fact, extremely rare.[15] The Federal Judicial Center's analysis of sealed cases shows that, in a one-year period, only 576, or 0.2% of the 245,326 civil cases filed were sealed.[16] The majority of sealing orders were entered to protect whistleblowers, government cooperators, and the identity of minors. Specifically, *qui tam* actions accounted for 182 of those cases,[17] 30 cases were *habeas corpus* and prisoner actions that were sealed because the actions involved cooperators or juveniles,[18] and 24 non-habeas cases were sealed to protect the identity of minors.[19] Only 16 cases were found to be sealed in error.[20] The FJC's report also shows that the number of orders protecting or sealing certain documents (rather than the entire case) is also small. According to the FJC, the number of cases involving protective orders never exceeded 10% in the three districts surveyed.[21] Moreover, protective orders were denied 34% of the time,[22] rebutting the narrative that judges are merely rubber stamping motions for protective orders.

Many case sealing orders are required by statute. For example, the False Claims Act states that complaints filed by a private citizen must be filed in camera and remain under seal for at least sixty days.[23] It also provides that any motion to extend that time, together with any supporting evidence, must be filed in camera as well.[24] Similar rules apply for federal funding arising out of State False Claims Act claims.[25] Statutes also require sealing of specific types of documents. The Trademark Act of 1946 requires courts to keep under seal any order to prevent further infringement and all supporting documents, until the person against whom the order would be granted has an opportunity to contest the order.[26] Numerous federal statutes require that information with national security implications remain under seal when submitted to a court, including electronic surveillance authorizations made by the President without a court order, *ex parte* requests by the U.S. government to seal information regarding a party's material support to a foreign terrorist organization, and authorization for the acquisition of foreign intelligence regarding people outside the United States.[27] Arbitration agreements are also required to be sealed when filed with the district court so that a party who wants to request a trial *de novo* can have confidence that the result of the arbitration proceedings "shall not be made known" to the

[15] *See* GEORGE CORT & TIMOTHY REGAN, SEALED CASES IN FEDERAL COURT 4 (Federal Judicial Center) (2009) (describing the results of an empirical investigation into the sealing of cases in federal courts).
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *See* ELIZABETH C. WIGGINS, MELISSA J. PECHERSKI, AND GEORGE W. CORT, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 3 (Federal Judicial Center) (1996) (describing an empirical study conducted to track protective order activity in the District of Columbia, District of Michigan, and the Eastern District of Pennsylvania).
[22] *Id*. at 6.
[23] 31 U.S.C.A. § 3730(b)(2).
[24] 31 U.S.C.A. § 3730(b)(3).
[25] 42 U.S.C.A. § 1396h(b)(3).
[26] 15 U.S.C.A. § 1116(d)(8).
[27] 50 U.S.C.A. § 1805b; 18 U.S.C.A. § 2339B; 50 U.S.C.A. § 1802.

judge assigned to the case until the court has entered final judgment.[28] These examples show that most sealing orders in federal courts are governed by statute rather than procedural rules.

## II. THERE IS NO RIGHT TO GREATER DISCLOSURE; IN MANY INSTANCES, PRIVACY INTERESTS OUTWEIGH PUBLIC ACCESS

Although critics may proclaim a desire for increased access to litigants' private information, there is no constitutional or common law right to any greater public access to such information than what is available under current rules. A litigant "does not in fact surrender (or 'forfeit') the confidentiality of its information by seeking judicial review."[29] While courts recognize a presumptive right of access to information that facilitates public oversight of judicial performance and the justice system, "an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power."[30] Many are irrelevant or unreliable, which is why "[t]he universe of documents that can be considered judicial records is not limitless."[31] Federal courts of appeal[32] have found a qualified right to access only as to a subset of judicial records in civil matters.[33] A significant body of caselaw provides a balanced approach[34] that puts the burden on parties seeking protection.[35]

Despite the high bar for confidentiality, there are important areas in which privacy interests clearly outweigh public access, including where judicial records may be used "as sources of business information that might harm a litigant's [or third party's] competitive standing."[36] Courts appropriately use their discretion to deny access to trade secrets and confidential business information in a variety of circumstances[37]—notably including where such information could

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[28] 28 U.S.C.A. § 657(b).
[29] *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 671 (D.C. Cir. 2017).
[30] *U.S. v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).
[31] *Giuffre v. Maxwell*, No. 15 CIV. 7433 (LAP), 2020 WL 133570, at *4 (S.D.N.Y. Jan. 13, 2020), *reconsideration denied*, No. 15 CIV. 7433 (LAP), 2020 WL 917057 (S.D.N.Y. Feb. 26, 2020). *See also Newsday LLC v. County of Nassau*, 730 F.3d 156, 167 n.15 (2d Cir. 2013) (emphasizing that "the category of 'judicial documents' should not be readily expanded").
[32] The U.S. Supreme Court has not explicitly ruled on whether a First Amendment right of access extends to civil proceedings and records. *Courthouse News Serv. v. Planet,* 947 F.3d 581, 590 (9th Cir. 2020).
[33] *See*, *e.g., id.* (finding qualified First Amendment right of access to newly filed, nonconfidential complaint); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119–20 (2d Cir. 2006) (specific documents attached to summary judgment motion in civil RICO action are "judicial documents" subject to qualified First Amendment right of access).
[34] *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*., 800 F.2d 339, 344 (3d Cir. 1986) ("Just as the right of access is firmly entrenched, so also is the correlative principle that the right of access, whether grounded on the common law or the First Amendment, is not absolute.").
[35] *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (the common-law presumption of access can be rebutted "if countervailing interests heavily outweigh the public interests in access."). Where there is a qualified First Amendment right of access, "documents may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Lugosch*, 435 F.3d at 119-20. *In re Knoxville News-Sentinel, Co., Inc.*, 723 F.2d 470, 474 (6th Cir. 1983).
[36] *Nixon*, 435 U.S. at 598.
[37] *See*, *e.g.*, *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. App'x 603, 609 (9th Cir. 2017) (upholding sealing order where documents at issue included trade secrets, privileged attorney-client communications and work product information, and confidential whistleblower information); *Apple Inc. v. Samsung Elecs. Co*., 727 F.3d 1214,

impede U.S. companies' ability to protect trade secrets from international competitors and might implicate Export Controls restrictions. There is also a rapidly growing array of federal, state, and global privacy laws that require confidentiality concerning specific categories of personal information in order to protect individuals' privacy interests.[38] Because much of the information held by public and private organizations reflects data about individual consumers, patients, and tax payers, many institutions, including companies, governments, hospitals, and non-profits, are investing significantly in appropriate technology, staff, procedures, and training to keep up with evolving legal obligations.[39] Some of those laws are already causing tension with civil discovery obligations, even with the courts' current discretion to resolve motions regarding the sealing and unsealing of documents in a way that best balances the public interest in access with competing privacy interests. The suggestion to develop a new, nationwide rule governing sealing orders that would even more strongly favor public disclosure risks eroding the very flexibility and discretion required for courts to navigate legal requirements, while balancing legitimate privacy interests against the need for public access to information concerning the functioning of the judiciary. This is particularly the case where the rights at issue are held by people who are not parties to any case.

## III. SUGGESTION 20-CV-T IS UNWORKABLE

### A. Requiring Courts to Make "Particularized Findings" Would Burden Courts with A Novel Standard That Is Inconsistent with Supreme Court Precedent

Suggestion 20-CV-T would require courts to detail the basis of all orders to seal with "particularized findings."[40] To comply with that mandate, courts would be forced to make fact-intensive inquiries and complicated determinations about potentially thousands of documents

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1221 (Fed. Cir. 2013) (district court in patent infringement case abused its discretion in refusing to seal confidential business information); *In re Elec. Arts, Inc.,* 298 F. App'x 568, 570 (9th Cir. 2008) (trial court committed clear error in refusing to issue a sealing order protecting a litigant's confidential and commercially sensitive information used as trial exhibit in licensing dispute); *Crane Helicopter Servs., Inc. v. United States*, 56 Fed. Cl. 313, 327 (2003) (trade secrets of nonparty helicopter manufacturer would remain sealed after trial where release of the information might significantly damage manufacturers' competitive advantage).

[38] The United States has not adopted a comprehensive federal approach to data protection, instead taking a sector-specific approach in areas such as securities, health, consumer lending, and children's online privacy. *See* Michael L. Rustad & Thomas H. Koenig, Towards A Global Data Privacy Standard, 71 Fla. L. Rev. 365, 381 (2019) (summarizing U.S. federal legal regime governing data privacy). States are enacting their own laws governing privacy obligations, such as the California Consumer Privacy Protection Act. Cal. Civ. Code §§ 1798.100-.199 (effective Jan. 1, 2020) (creating new privacy rights to give consumers control over their personal information). Multinational companies are subject to individual countries' privacy laws and are likely to be subject to European Union law barring the "processing" or public disclosure of personal information, including names and contact information, without the individual's consent. *See*, *e.g.*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[39] *See* Corporate Data Privacy Today: A Look at the Current Readiness, Perception, and Compliance (FTI Consulting, May 2020) (report of survey of over 500 large U.S.-based companies' data privacy activities; 75 percent of respondents changed their data privacy efforts in the preceding 12 months and 97 percent plan to increase their data privacy spending in the next year, most by 50 percent), *available at* https://static2.ftitechnology.com/docs/white-papers/FTI%20Consulting%20White%20Paper%20-%20Corporate%20Data%20Privacy%20Today.pdf (reg. required).

[40] Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH (Aug. 7, 2020).

that implicate parties' trade secrets, confidential business information, and other sensitive data. This would require judges to review pre-trial discovery documents, read extensive briefing and affidavits, hold hearings, and write detailed opinions—all of which would divert judicial resources,[41] cost parties considerable expense, and prolong law suits.

The term "particularized findings" would be a brand new standard for the FRCP.[42] No current rule imposes on courts a burden to make specific or particularized findings.[43] Indeed, there are few places in the FRCP that even require courts to make "findings." Rule 52(a)(1) requires a court to enter findings of fact and conclusions of law after a bench trial,[44] and Rule 23(b)(3) states that class certification should occur only if a court finds the standard for class verification is met.[45] These provisions cannot be analogized to orders to seal and protective orders, which are widely understood to be litigation management tools.[46] The term "particularized findings" also does not appear in any of the 94 local rules governing orders to seal.[47] Even the local rule for the Western District of North Carolina cited in support of Suggestion 20-CV-T merely requires the court to "state its reasons with findings supporting its decision."[48]

Moreover, the "particularized findings" standard begs the question: particularized findings of *what*? Suggestion 20-CV-T would establish a four-part test, including whether the rationale for sealing "overcome[s] the common law and First Amendment right of access."[49] This means that, for every sealing order, judges must explicitly elaborate the reasons why the order does not violate an entire body of caselaw and First Amendment jurisprudence. Such a rule would starkly contrast with the Supreme Court's *Nixon v. Warner Communications*[50] holding that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[51] The high burden and

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[41] The Committee regularly weighs the burdens of a proposed rule against its utility. *See* Advisory Cmty. On Civil Rules, April 2020 Minutes 32 (Apr. 1, 2020) (discussing pragmatic considerations, including the burdens imposed by Rule 17(d)); Advisory Cmty. On Civil Rules, Report to the Standing Cmty. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts). The federal judiciary is presently rife with overburdened courts, overloaded dockets, and overworked judges and court staff. *See generally* Peter S. Menell & Ryan Vacca, Revisiting and Confronting the Federal Judiciary Capacity "Crisis": Charting a Path for Federal Judiciary Reform, 108 CALIF. L. REV. 789 (2020). An empirical study tracking federal caseloads since 1970 found a 145% increase in the number of actions filed, with the majority of the increase attributable to increased civil litigation. *Id*. at 844. During the same period, caseloads per judge increased by 90%, and the average time from the filing of a case to disposition rose from 152 to 272 days. *Id.* at 848, 851.

[42] *See generally* Fed. R. Civ. P.

[43] *See, e.g.,* Fed. R. Civ. P. 9(b) (requiring that "fraud or mistake" be plead with "particularity"); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[44] Fed. R. Civ. P. 52(a)(1); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[45] Fed. R. Civ. P. 23(3)(b); *see also* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020).

[46] *See* Statement of the Honorable Judge Richard W. Story, *supra* notes 6-7 (discussing the utility of orders to seal and protective orders as a case management tool).

[47] *See generally* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (quoting numerous local rules with no instances of the term "particularized findings").

[48] W.D.N.C. L. Civ. R. 6.1 (f).

[49] *See* Suggestion 20-CV-T, Letter by PROFESSOR EUGENE VOLOKH at 2 (Aug. 7, 2020) (outlining the proposed rule).

[50] 435 U.S. 589 (1978).

[51] Warner Communications, 435 U.S. at 599.

attendant uncertainties of such a rule overwhelm any possible benefit, especially given that the current standard has a proven record of helping judges balance litigants' privacy rights with the public's right to access information related to the functioning of our courts.[52]

### B. Allowing "Any Member of The Public" To Challenge Sealing Orders "At Any Time" Would Vastly Expand the Judiciary's Role and Workload

The proposal to allow "any member of the public" to challenge sealing orders and motions to seal "at any time" would invent a bold, new role for the federal judiciary as the "information clearinghouse"[53] for access to confidential information. Suggestion 20-CV-T would effectively nullify Rule 24(b) and corresponding caselaw by doing away with intervention standards for non-parties who wish to challenge court orders on sealing.[54] Instead, any "member of the public"[55] would be allowed into court without any showing of interest in the case or even the contents of the sealed filing. When handling a member of the public's challenge to a sealing motion or its own sealing order, the court's role would change from that of adjudicator and manager of the case to that of referee and reconciler of differing public policy viewpoints. And the proposal would allow such challenges "at any time" without regard to the procedural posture of the case (even during trial or after the case is closed), including unlimited re-litigation of sealing orders that have already been entered with particularized findings under the new four-part test. This would be the first FRCP provision with a time period of "forever,"[56] opening up novel jurisdiction issues and a strong likelihood that the unsealing of records will occur without notice to former litigants and non-parties.

Inevitably, Suggestion 20-CV-T would flood the federal civil docket with a new workload of motions that rarely, if ever, relate to the merits of cases. Each motion would lead to lengthy delays as documents are reviewed, briefs are written and read (with supporting affidavits and other evidence), a hearing is held, and a written opinion with "particularized findings" is drafted and issued from the court. This burden would be particularly heavy in complex civil cases, where confidential documents frequently number in the thousands or even millions.[57] The costs

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[52] *Id*. *See also* Siedle v. Putnam Invs., Inc., 147 F.3d 7, 10 (1st Cir. 1998) ("The trial court enjoys considerable leeway in making decisions of this sort."); San Jose Mercury News v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999); United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997).

[53] Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 487 (1991); *cf. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989) (rejecting the use of an executive agency as an information clearinghouse).

[54] *See* 8A Fed. Prac. & Pro. § 2044.1.

[55] This term is ambiguous and would need definition if incorporated into the FRCP. For example, would it be limited to U.S. citizens or permanent residents? Would government, corporate, and non-profit entities qualify, and if so, how about foreign-owned or foreign-registered entities and international non-governmental organizations?

[56] *Cf.* Fed. R. Civ. P. 60(c)(1) (limiting time for relief from judgment to "a reasonable time" and for relief due to mistake, newly discovered evidence, or fraud to one year).

[57] *See* Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999) ("We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge."); *see also* Am. Nat'l Bank Trust Co. of Chicago v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 WL 1067696, at *6 (N.D. Ill. May 28, 2002) ("In a case involving thousands of documents, such as this one, the court need not make a finding of good cause on a document-by-document basis.").

and delays inherent in such a process (including interruptions during trial) would trammel any hope of securing the "just, speedy, and inexpensive determination" of affected cases.[58]

Evaluating these burdens puts a fine point on how strongly Suggestion 20-CV-T favors one public policy outcome over another. While the proposal would sacrifice much in order to give any member of the public the right to *oppose* a motion or order to seal, it does not permit the public or an individual who would be harmed by disclosure to *move for* or *support* a sealing order. This gaping omission belies the presumption that Suggestion 20-CV-T would always serve the public interest; it would do so only when public disclosure is good, not when it's harmful. If the burdens contemplated by the proposal would be justified when members of the public advocate on *one side* of sealing questions, wouldn't it also be worthwhile to allow the public to advocate on the *other side* as well?

### C. The Automatic Unsealing of Protected Documents Would Cause Pointless Re-Litigation

Despite establishing the very high bar of "particularized findings" under its four-part test, Suggestion 20-CV-T nevertheless would automatically terminate all court sealing orders, without judicial review, 60 days after the final disposition of the case.[59] There is no rationale provided as to why this is appropriate—especially for court orders required by statute—or why judges should be denied the discretion to set a different duration to fit the needs of a particular case.[60] No doubt, motions to renew sealing orders would be filed in almost every case because the need for confidentiality is unlikely to change within such a short time[61]—especially because Suggestion 20-CV-T would require such motions to be filed 30 days after final disposition (within 30 days of the expected unsealing date). Not only would the automatic unsealing provision cause a significant increase in post-resolution litigation, with its attendant burdens on judicial time, but it would also create a substantial risk of unlimited public access to documents that have been adjudicated private, sensitive, and confidential. As written, the proposed rule suggests that if a motion to renew sealing is not filed within 30 days of the final disposition, not even the court would have the power to keep the documents under seal.

### D. The Proposed Rule Would Overwhelm Court Clerks Offices

Implementing the requirements of Suggestion 20-CV-T, including the sealing and unsealing of pleadings, evidence, and orders and abiding by the various timelines for each, would likely

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[58] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (questioning the burden that the proposed rule for sealing documents would impose on courts).

[59] *Cf.* N.D. Tex. L.R. 79.4 (district court local rule cited by Professor Volokh to support this proposed provision, which states that "all sealed documents *maintained on paper* will be deemed unsealed 60 days after the final disposition of a case") (emphasis added).

[60] *Cf.* W.D.N.C. L. Civ. R. 6.1 (district court local rule cited by Professor Volokh, which provides that sealed documents "may be subject to unsealing *by the Court* upon the close of the case") (emphasis added).

[61] *Cf.* district court local rules cited by Professor Volokh, including D. Kan. R. 79.4 (automatic unsealing after 10 years); N.D. Ca. R. 79-5 (automatic unsealing after 10 years); 3d Cir. R. 106.0(c)(2) (automatic unsealing after 5 years); E.D. Pa. R. 51.5 (automatic unsealing after 2 years); S.D. Flor. R. 5.4 (automatic unsealing after 1 year).

overload court clerks offices.[62] It could require changes to document management systems and practices, as well as the creation and management of a centralized website.[63] Of course, the main source of new burdens would be complex civil cases[64] because the proposed rule would bar the use of stipulated protective orders where parties agree to file agreed-upon categories of records under seal, which today are widely employed in large disputes, including multi-district litigation, to "expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."[65] The document-by-document adjudication the proposed rule will require in such cases is highly likely to overwhelm the current capabilities of clerks offices, even in the largest and busiest districts.

### E. The Proposed Rule Would Disrupt Rule 45's Well-Balanced Protections That Enable Discovery from Non-Parties

Rule 45 protects non-parties from undue burdens, including subpoenas that might require disclosure of confidential information, in order to enable discovery from people and entities who have no stake in the litigation.[66] It does so by giving parties an affirmative duty to avoid imposing "undue burden or expense" on non-parties and mandating that courts "must" enforce that duty by imposing sanctions for failure to meet it.[67] Rule 45 requires courts to modify or quash subpoenas when compliance would subject non-parties to undue burdens,[68] and specifically allows courts to quash or modify subpoenas that would result in "disclosing a trade secret or other confidential research, development, or commercial information."[69] Finally, Rule 45 obligates courts to impose cost-shifting (when certain requirements are met) to protect non-parties from "significant expense resulting from compliance" with subpoenas.[70] These provisions are designed to streamline the process to allow parties to obtain third-party discovery while simultaneously protecting third parties from the burdens of being involuntarily brought into litigation.

Unfortunately, Suggestion 20-CV-T would fatally disrupt Rule 45's careful balance. By banning stipulated sealing and protective orders, Suggestion 20-CV-T would preclude parties from obtaining confidential documents from non-parties without imposing the significant burden and

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[62] *See* ADVISORY CMTY. ON CIVIL RULES, REPORT TO THE STANDING CMTY. 50 (Dec. 9, 2020) (highlighting the possible burdens associated with requiring particularized findings).
[63] *Id*.
[64] *See* MANUAL FOR COMPLEX LITIGATION 4th § 11.432, at 64 (Federal Judicial Center) (2004) ("[c]omplex litigation will frequently involve information or documents that a party considers sensitive").
[65] *Id*.
[66] *See generally* The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition*, 22 SEDONA CONF. J. 1, 42-77 (forthcoming 2021); *See also* In re Northshore Univ. Health Sys., 254 F.R.D. 338, 343-44 (N.D. Ill. 2008) ("Thus, as this case demonstrates, if a non-party is not fearful of public disclosure of their proprietary documents due to the protection gained from a protective order, they will likely be more forthcoming. As a result, cases will be able to proceed more efficiently through the discovery phase.").
[67] Fed. R. Civ. P. 45(d)(1); Voice v. Stormans Inc., 738 F.3d 1178, 1184 (9th Cir. 2013) (finding that Rule 45 requires courts to enforce cost shifting when an undue burden would be placed on a third party receiving a subpoena). *See also* Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001); Iowa Pub. Emples. Ret. Sys. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., No. 17-6221, 2019 WL 7283254 (S.D.N.Y. Dec. 26, 2019).
[68] Fed. R. Civ. P. 45(d)(3).
[69] *Id.*
[70] Fed. R. Civ. P. 45(d)(2)(B)(ii)

expense on those non-parties of demonstrating the need for sealing by satisfying the rule's four-part test with "particularized findings," and then defending against any number of challenges and motions to unseal brought by any member of the public at any time in the proceedings. Perhaps even worse, the automatic termination of sealing orders 60 days after final case disposition would impose additional, ongoing burdens and expenses on non-parties who likely have had no involvement in the litigation and might have no knowledge about the resolution of the case. Does a party's Rule 45 duty to avoid imposing undue costs and burdens apply to the increased motion costs that will result from Suggestion 20-CV-T, and does that duty continue after resolution of the case, including non-party eligibility for cost-shifting? Will the court be required to notify non-parties regarding the pending expiration of the sealing at case conclusion? Because non-parties do not affirmatively place their confidential information into the public record,[71] but instead are obligated to comply with subpoena requests, the proposed rule does not sufficiently address the implications to Rule 45 and the protections it affords.[72]

### F. The Proposed Rule's Implementation Would Be Confused by Its Inconsistency with Numerous Federal Statutes

Suggestion 20-CV-T is inconsistent with numerous federal statutes that specifically require or permit the sealing of documents in certain situations.[73] Although it purports to exclude situations governed by such statutes from its presumption that all filed documents "shall be open to the public," the proposed rule does not allow such exceptions from its other terms. For example, the proposed rule would permit "any member of the public" to file a motion to unseal documents "at any time," even when the sealing of those documents is required by statute. Similarly, the proposed rule would automatically terminate all sealing orders 60 days after final disposition of a case, making no exception for orders entered pursuant to statutes barring disclosure of information that endangers specific individuals or national security. By running directly counter to laws requiring confidentiality, the proposed rule creates confusion and, at the very least, unnecessary and inappropriate litigation. This is a profound flaw, and the solution should not be to assume that courts will simply ignore the rule when needed.

### G. The Proposed Rule Would Affect the Scope of Discovery by Complicating Rule 26's Proportionality Requirement

Suggestion 20-CV-T would have unintended consequences on the scope of parties' discovery obligations because it would cause new and recurring motion practice that would impose significant burdens and expense. Achieving proportionality under Rule 26(b)(1) is "critically

[71] *See* U.S. v. Bazaarvoice, Inc., No. 13-cv-00133, 2014 WL 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting third parties' motions to seal and stating, with respect to the protected confidential information, "the third parties did not voluntarily put it at issue in this litigation").

[72] *See, e.g., id.* at *1 (in case where thousands of documents were subpoenaed from third parties, granting third parties' motions to seal because the "information contains pricing and competitive information that could cause damage to the third parties if made public"); In re Northshore Univ. Health Sys., 254 F.R.D. at 342-44 (in ruling on protective order, stating that "[d]eference should be should be paid to the interests of non-parties who are requested to produce documents or other materials that contain confidential commercial information or trade secrets").

[73] *See* Part I, *supra*.

important" to ensuring the "just speedy and inexpensive resolution" of civil disputes.[74] The key to proportionality is "whether the burden or expense of the proposed discovery outweighs its likely benefit."[75] By disallowing stipulated protective orders, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders after 60 days following resolution, Suggestion 20-CV-T would materially change this calculus, particularly in complex litigation where the confidentiality of thousands of documents could be continually in dispute. Even after the court finds a compelling basis for sealing under the proposed rule's four-part test, and articulates "particularized findings" supporting its decision, the proposed rule still provides an open door to unlimited motions challenging the court's order, which the producing party would need to defend. The burden for proportionality purposes would not only include the expense of motions practice, but also the risks of public disclosure of the party's sensitive and proprietary information. Inevitably, these burdens will alter the outcome of proportionality analysis, leading to the conclusion that any discovery benefit of certain documents is outweighed by the additional burden and expense of litigating and re-litigating their confidentiality under the proposed rule's standards.

### H. The Proposed Rule Would Chill Meritorious Litigation

The Supreme Court recognizes that requiring parties to produce sensitive information can have a chilling effect on meritorious litigation, noting that "rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims."[76] *A fortiori*, the regime that Suggestion 20-CV-T would impose—striping courts of their discretion to make sealing determinations, allowing "any member of the public" to challenge sealing orders "at any time," and automatically terminating all sealing orders 60 days following case disposition—would no doubt cause companies, governments, hospitals, individuals, and non-profits to forego litigating their just claims and defenses in federal courts. The rule would also discourage parties from appealing arbitration awards under the Federal Arbitration Act because of the consequence that otherwise confidential and non-discoverable records in the arbitration will be subject to public disclosure in the federal court action under this rule.

### I. The Proposed Rule Would Conflict with the Federal Rules of Appellate Procedure while Burdening Circuit Courts with New Sealing Motions

Adopting Suggestion 20-CV-T would result in conflict with the approaches taken by federal appellate courts and require changes to the Federal Rules of Appellate Procedure ("Appellate Rules"). Currently, the Appellate Rules do not govern sealing of the appellate record, leaving that determination to each circuit. By establishing a new four-part test for district courts, imposing the requirement of "particularized findings," and automatically terminating all sealing orders 60 days after case disposition, Suggestion 20-CV-T would change the standards for the district courts in all circuits while also forcing appellate courts to consider many more motions to seal pending appeal. The resulting inconsistency and confusion amid a higher volume of

[74] *See generally* The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 147 (2017).
[75] Fed. R. Civ. P. 26(b)(1).
[76] Seattle Times Co. v. Rhinehart, 467 U.S. 20, n.22 (1984).

motions would almost certainly require the Advisory Committee on Appellate Rules to consider rule amendments.

## IV. IF A NEW FEDERAL RULE IS CONSIDERED, IT SHOULD DISTINGUISH BETWEEN DOCUMENTS THAT ARE NECESSARY TO DISPOSITIVE MOTIONS AND DOCUMENTS THAT DO NOT NEED TO BE FILED WITH THE COURT

### A. Any New Sealing Rule Should Apply Only to Documents Filed with The Court, Not Discovery Materials

If, despite the shortcomings of Suggestion 20-CV-T described above, the Committee proceeds to consider a new federal rule governing sealing, it should limit any new provision only to documents filed with the court, and not interfere with confidentiality agreements relating to discovery. Information exchanged during discovery is not subject to a First Amendment or common-law public right of access.[77] Litigants often enter into protective agreements and proposed protective orders to guide the access to and use of confidential, proprietary, or trade secret information that is exchanged during discovery. Many federal courts provide useful tools and resources, such as model or standard protective orders, to help parties agree on efficient and effective procedures.[78] New restrictions on such protective orders are not warranted and would impair parties' ability to obtain and protect sensitive information. While the distinction between protecting discovery documents and sealing documents filed with the court may be obvious to the Committee, not all practitioners and stakeholders understand the important difference. Any rule draft should explicitly separate these two very different concepts to ensure that courts, counsel, and parties do not wrongfully assume that documents exchanged in discovery should be subject to the same presumptions and procedures as court filings.[79]

### B. Any New Rule Should Distinguish Between Documents That Are Necessary for Dispositive Motions and Less Important Documents

While federal courts generally recognize a presumption of public accessibility to "judicial documents,"[80] a lower presumption applies to documents related to non-dispositive proceedings,

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[77] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) ("pretrial depositions and interrogatories are not public components of a civil trial"); *Cipollone v. Liggett Group, Inc*., 785 F.2d 1108, 1118–20 (3d Cir. 1986) (the standard for issuing a discovery protective order is good cause; First Amendment concerns are not a factor); *In re Gannett News Serv., Inc.*, 772 F.2d 113, 116 (5th Cir. 1985) ("The results of pretrial discovery may be restricted from the public."); *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public."); *Pintos v. Pacific Creditors Assoc*., 565 F.3d 1106, 1115 (9th Cir. 2009) ("[discovery] documents are not part of the judicial record"); *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.").

[78] *See*, *e.g.,* https://www.cand.uscourts.gov/forms/model-protective-orders/, https://nysd.uscourts.gov/model-protective-order-0, https://www.insd.uscourts.gov/forms/uniform-protective-order.

[79] https://www.americanbar.org/groups/litigation/publications/litigation-news/practice-points/a-protective-order-doesnt-guarantee-sealing/.

[80] Most, if not all, circuits apply a higher standard to overcome the presumption of public accessibility to "judicial documents." *See*, *e.g.*, *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016);

such as discovery motions.[81] This two-tiered approach is appropriate to balance the public's interest in court records against the parties' right to confidentiality.[82] Although courts differ as to what constitutes a "judicial document" subject to the public access presumption,[83] drawing a line is important because parties often include confidential documents as exhibits merely as background information, for provocative effect, or to illustrate an ancillary point that has no ultimate bearing on the court's decision. If a party's confidential documents are not important to the court's determination of a dispositive motion or are otherwise unrelated to the merits of the case, they should not be treated as "judicial documents" whose public disclosure is presumed.

It would make sense for a sealing rule to define first-tier documents to include dispositive motions and judicial documents relied upon or directly relevant to the court's merit-based decision; these would be subject to the presumption of access. Second-tier documents—those filed with non-substantive motions, or documents that are not relevant to the court's decision[84] or the case merits—should be subject to a more lenient standard for sealing (such as a certification by counsel as addressed below). Such a framework would free judicial resources that would otherwise be spent on document-by-document sealing determinations regardless of the records' importance. Similarly, it would allow courts to dispose of requests to seal second-tier documents filed in relation to non-substantive motions efficiently without extensive evaluation of the various interests in public access to the documents. Of course, this approach also saves parties from spending significant time and resources preparing motions and gathering supporting evidence to seal confidential documents that have little or nothing to do with the merits of the case.

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*Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 139-40 (2d Cir. 2016); *United States v. Kravetz*, 706 F.3d 47 (1st Cir. 2013); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007); *Leucadia v. Applied Extrusion Technologies*, 998 F.2d 157, 164 (3d Cir. 1993).

[81] *See Brown v. Maxwell*, 929 F.3d 41, 50 (2d Cir. 2019) ("Although a court's authority to oversee discovery…surely constitutes an exercise of judicial power, we note that this authority is ancillary to the court's core role in adjudicating a case. Accordingly, the presumption of public access in filings submitted in connection with discovery disputes or motions in limine is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment."); *see also Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312-13 (11th Cir. 2001) ("The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold."); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("there is no presumptive first amendment public right of access to documents submitted to a court in connection with discovery motions").

[82] *Newsday LLC v. County of Nassau*, 730 F.3d 156, 166-67 (2d Cir. 2013).

[83] *Compare Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013) (whether public access presumption applies depends on the "degree of judicial reliance on the document in question and the relevance of the document's specific contents to the nature of the proceeding") *with United States v. Kravetz*, 706 F.3d 47, 58-59 (1st Cir. 2013) (public access presumption not dependent on whether the documents actually played a role in the court's deliberations; rather presumption applies to "relevant documents which are submitted to, and accepted by, a court"); *see also Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1099 (9th Cir. 2016) (holding a party must satisfy the higher, "compelling reasons" standard when the motion to which the documents are attached is more than tangentially related to the underlying cause of action).

[84] Second-tier documents would also include materials that are not relied upon by the court or relevant to the determination of the proceeding, as such documents are not considered "judicial documents."

### C. For Second-Tier Documents, A Certification by Counsel That Documents Are Confidential Should Suffice for A Sealing Order

Because the sealing standards for "judicial documents" differ from those for less-important documents, any new rule should differentiate between the procedures for each category. A party seeking to seal records related to a discovery motion in which the public has no heightened interest should not have to file a fulsome declaration substantiating on a document-by-document basis why the documents should be sealed. For such motions, a certification of counsel affirming that the records are confidential should suffice. Such a certification procedure would save judicial resources while also minimizing the parties' costs and burdens of litigating sealing motions for documents that have no bearing on a dispositive issue.

### D. Any New Rule Should Require Certification that Documents Filed with The Court Are Necessary

One of the best ways to reduce litigation over sealing would be to reduce the number of confidential documents that are filed unnecessarily. Unfortunately, private information is sometimes filed to give tangential background color or just for "the sake of filing." Even worse, confidential documents are sometimes filed out of gamesmanship or improper motive (perhaps even for the purpose of inviting press attention). Any new rule for the efficient handling of sealing motions should not presume that all filed documents are necessary to the proper determination of the motion or issue at hand. It should do so by requiring the party seeking to file documents to certify they are necessary.[85] Such a certification would relieve the court from having to make decisions on sealing documents that are not pertinent to the filing, reduce the number of documents a party would need to prove up for sealing, and allow everyone to focus attention on the merits and substantive issues in the case.

### E. Any New Rule Should Require Notice of Intent to File Documents

To avoid unnecessary judicial attention to, and litigation over, sealing disputes, any new rule should require parties to provide notice before filing documents that could be subject to a sealing order. Unfortunately, parties (and non-parties) are often caught by surprise when documents they consider confidential or proprietary are filed with the court, usually in conjunction with a motion. Advanced notice of such filings would allow parties to avoid disputes by conferring about documents that are subject to sealing and important to any motion. It would also provide

[85] According to the Fourth Circuit, the right of public access to judicial documents "derives from two independent sources: the First Amendment and the common law," and accordingly, the Fourth Circuit applies two tests when considering whether any specific document may be filed under seal (or unsealed). *United States v. Appelbaum*, 707 F.3d 283. The threshold inquiry under the common law test is whether the document at issue qualifies as a "judicial record." The Fourth Circuit has explained that it is "commonsensical that judicially authored or created documents are judicial records," including court orders. *Id* at 290. Documents filed with the court, including motions and exhibits, qualify as judicial records "if they play a role in the adjudicative process, or adjudicate substantive rights." *Id.*; *see also In re: Policy Mgmt. Sys. Corp*., 1995 U.S. App. LEXIS 25900, at *13 ("we conclude that a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach"). In *In re: Policy Mgmt. Sys. Corp*., the Fourth Circuit found that documents attached to a motion to dismiss "played no role in the court's adjudication of" the motion, and therefore, "did not achieve the status of judicial documents to which the common law presumption of public access attaches." *Id*.

the party seeking to seal such documents adequate time to file the necessary motion papers—and this is especially important when a party is filing confidential documents produced in discovery by someone else. In such situations, the filing party often does not know the facts that support sealing, merely stating that the producer designated the documents as confidential. The surprised producing party is frequently forced to scramble on short notice to put together a detailed pleading supported by evidence satisfying the applicable sealing requirements—or face denial of the filing party's motion for failure to meet the applicable standards. A rule providing notice of the intent to file[86] would allow the producing party to file the motion to seal, along with supporting documentation, at the same time as the underlying motion.

## CONCLUSION

The Supreme Court has concluded that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[87] There is a comprehensive and effective legal framework already in place to govern the sealing of documents, including Rule 5.2, district court local rules, and an extensive body of caselaw. There is no reason for the Committee to re-visit this complicated issue, which it has examined repeatedly, concluding each time that no action is needed.

Suggestion 20-CV-T reflects a strongly one-sided perspective of an important public policy debate and asks that the FRCP be tilted sharply to its side. Its means of producing that outcome are unworkable. By stripping court discretion and imposing a duty to make "particularized findings" under a new four-part test, allowing "any member of the public" to litigate sealing orders "at any time," and automatically terminating all sealing orders, the proposed rule would inevitably consume significant judicial, private, and public resources by inviting new, time-intensive, and recurring litigation. It would also require judicial resolution of numerous conflicts with federal statutes, the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, local district court rules, and an entire body of caselaw. The proposal would invent a bold, new role for the federal judiciary as the information clearinghouse for access to private information, and would become the first FRCP provision with a time period of "forever." The proposal should be rejected.

If, however, the proposal convinces the Committee to undertake creation of a new national standard for sealing orders, that effort should be premised on the understanding that companies, hospitals, schools, governments, employers, and other entities hold proprietary information that should be protected from public disclosure—particularly when it relates to individual customers, patients, students, taxpayers, and employees. Any new rule should reflect that today's discovery exchanges commonly include information about data infrastructure that is irrelevant to any legal dispute but whose disclosure risks providing a roadmap to nefarious actors who commit cyber

[86] A party should serve a "Notice of Intent to File" 21 days prior to filing documents that may be subject to sealing, which would be consistent with other FRCP rules that provide similar time frames for notice, responses, objections, and deadlines. *See, e.g.*, Fed. R. Civ. P. 33, 34, and 36 (providing for a 30-day response period for Interrogatories, Requests for Production and Requests for Admission); *see also* Fed. R. Civ. P. 12 (in general, "unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows….").
[87] Warner Communications, 435 U.S. at 599.

espionage and cyber attacks. Finally, any new rule should distinguish between documents that are important to the determination of merits issues and those that are not, and provide a fair mechanism for minimizing the number of potentially confidential documents filed with the courts in the first place.

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October 17, 2020

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544
**BY ELECTRONIC MAIL**: *rulescommittee_secretary@ao.uscourts.gov*

**Re: Rule 12(a) shortened summonses / Rule 5(d) *pro se* electronic filing**

Dear Judge Dow and members of the Committee:

In light of the uncertainty[1] of the Committee at yesterday's meeting on how to proceed with the proposal to clarify Rule 12(a) in the context of statutes setting a reduced answer time, I wanted to advise the Committee that the problems raised in Daniel Hartnett's 19-CV-O suggestion are not unique to him nor to the Northern District of Illinois, and appear to be commonly encountered by FOIA litigants. As much of the Committee's discussion appeared to be premised on whether this was a problem worth fixing, and how often it occurred, I hope this narrative is useful.

I filed a FOIA action in D. Massachusetts[2] in early 2020, and in reviewing the rules and statute, immediately had to grapple with this problem.
**I analyzed recent FOIA litigation in my district and found**:

1. FOIA litigants issued 60-day summonses and did not press the issue; DOJ did not respond in accordance with the shortened timeframe of the statute. *E.g.* 19-cv-10916.
2. FOIA litigants were issued 60-day summonses and did not press the issue, and DOJ **did** timely answer within 30 days of service. *E.g.* 19-cv-10690.
3. FOIA litigant sought 30-day answer deadline by motion filed simultaneous with the complaint. Motion was not timely adjudicated, but DOJ answered within 35-days of filing (date of service is unclear). 19-cv-12564.

[1] "The *status quo* was affirmed by an equally divided Committee." I laughed out loud.

[2] One aspect of confusion is that different districts handle the issuing of summonses differently. In some districts, such as my own, summonses are issued immediately or within minutes of the filing of the complaint. In other districts, a plaintiff submits proposed summonses to the Court, which then reviews and issues them, typically a day or two later. Anecdotally, I understand that Districts that deal in a higher volume of FOIA cases (*e.g.* D.D.C.) have more effective procedures for obtaining 30-day summonses.

4. FOIA litigant sought 30-day answer deadline by motion 23 days after filing. Motion granted the same day; DOJ timely answered 29 days after service. 19-cv-12539.
5. FOIA litigant moved, 15 days after filing, to re-issue a 30-day summons. Motion allowed; DOJ moved for an extension of time to answer 35 days after service of the initial 60-day summons. 19-cv-12440.

In light of this landscape, it seemed clear that either re-issuing the summons or attempting to convince the Clerk's Office to issue a shorter summons (similar to Daniel Hartnett's experience, staff declined to do so initially) would likely take days, delaying 30 days to 35 or 40 or more. Instead I moved, simultaneously with filing of the complaint, to set a 30-day answer deadline, and notified defendants with a cover letter accompanying service of the summons, complaint, and motion.

**Result**: motion denied without prejudice, as it "requests an order directing respondents to follow the requirements of a federal statute." DOJ then timely moved for an extension of time to answer, 29 days after service of the initial 60-day summons.

**Conclusion**: The interplay between the Rule and the FOIA statute is confusing to Clerks' staff, and attempting to make statutory arguments to intake/operations staff is unlikely to work smoothly. There is judicial economy in avoiding motions to re-set CMECF to account for statutory deadlines, and the result of that motion practice is uncertain anyhow. All would benefit from a Rule 12 clarification leading to better uniformity.

In the alternative, perhaps the operational issue could be referred to CACM?

**Unrelatedly, on the topic of *pro se* electronic filing, Rule 5(d)(3):** I recently became aware that some districts by standing order unconditionally bar non-attorney *pro se* litigants from even seeking electronic filing privileges and routinely deny their motions, a sharp contrast from the prevailing practice nationwide. N.D. Ga. Standing Order 19-01 ¶5; LR App.H I(A)(2), III(A). *See Perdum v. Wells Fargo Home Mortg.*, No. 17-cv-972-SCJ-JCF, ECF No. 61 (N.D. Ga., April 12, 2018) (collecting cases). *See also Oliver v. Cnty. of Chatham*, 2017 U.S. Dist. LEXIS 90362, No. 4:17-cv-101-WTM-BKE (S.D. Ga., June 13, 2017).

The Committee might recommend language in Rule 5 discouraging such blanket bans, and perhaps even that leave should be freely given (such courts have found a "good cause" standard is not met, although it is unclear why. *Oliver* at *1). It seems an easier lift than removing the motion requirement, and goes to administrative fairness.

Very truly yours,

*/s/ John A. Hawkinson*
John A. Hawkinson

Postscript: I thank the Committee and its staff for allowing public video access to Friday's meeting. It was educational.

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April 16, 2021

Advisory Committee on Civil Rules
Honorable Dennis R. Dow, Jr., Chair

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**BY ELECTRONIC MAIL**: *rulescommittee_secretary@ao.uscourts.gov*

**Re: Rule 12(a) shortened summonses in FOIA cases**

Dear Judge Dow and members of the Committee:

I write to supplement my letter of Oct. 17, 2020 (20-CV-EE) regarding the practical ramifications of Daniel Hartnett's 19-CV-O suggested change to Rule 12's answer time language as applied to Freedom of Information Act (FOIA) cases.

I thought it would be a fun research project, so I solicited an academic partner (Rebecca Fordon of UCLA School of Law) and we applied for a PACER Fee Exemption to study whether the Department of Justice typically responds within the FOIA statute's 30-day requirement, looking at 2018 through 2021. Although that analysis is not yet complete[1], I have some preliminary results for the Committee's consideration.

**It is indeed common for 60-day summonses to be issued in FOIA cases, and DOJ does not have a practice of replying within the statutory 30 days.**

**Of the 2,536 FOIA actions filed after Jan. 1, 2018 in the 87 district courts that we reviewed, 66% of cases received responses[2] outside 30 days, the time required under the FOIA statute. The mean time was 42.1 days and the median time was 30 days. For those within 30 days, the mean was 22.4 days and the median was 24 days. For those exceeding 30 days, the mean was 62.1 days and the median was 48 days.**

[1] Our automated preliminary analysis of Nature of Suit 895 cases — FOIA — excludes those where the plaintiff sought *in forma pauperis* status, and does not attempt to determine whether the Department of Justice filed a motion to extend its answer time prior to the expiration of the 30 day period. It does not attempt to account for the government shutdown of early 2019, and it may double-count cases that are transferred between districts. In some cases, the docket text may not clearly identify the date of service, in which case the analysis software estimates service took place 20 days after filing, the average from the remainder of the corpus (1480 cases).

[2] We count answers, Rule 12(b) motions to dismiss, and Rule 56 summary judgment motions. But we also count stipulations and joint motions, as they more-often-than-not appear to represent meaningful engagement in the case by the parties, unlike rote motions to extend the time for filing an answer.

The districts omitted from our analysis due to the lack of a fee waiver[3] would have contributed merely 35 cases as of Dec. 31, 2020, according to the FJC's Integrated Database (IDB), or 1.36% of the study corpus.

| | | |
|---|---|---|
| E.D.N.Y. | 17 cases | 0.66% |
| S.D. Texas | 11 cases | 0.43% |
| D. Wyoming | 3 cases | 0.12% |
| N.D. Alabama | 2 cases | 0.08% |
| D. Guam | 1 case | 0.04% |
| S.D. Iowa | 1 case | 0.04% |

It's worth noting that much of this varies based on district. Although most districts lack a practical mechanism for obtaining 30-day summonses in FOIA actions, the District of Columbia has such a mechanism, and it represents 62% of the corpus (1569 cases before exclusions). Unsurprisingly, its mean and median are nearly the same as the overall corpus — its mean was 40.2 days and its median 31 days. Looking at all districts *other than D.D.C.*, the mean time to answer was 46.0 days and the median was 30 days.

A handful of U.S. Attorney's offices appear to have a practice of responding within 30 days in FOIA actions, despite receiving 60-day summons. They seem to be a small minority.

The minutes suggest the Committee's interest in other statutes that might specify an answer time. I was able to find one such[4].

I anticipate having a more final analysis and report over the summer, which I will make available to the Committee. This work was originally intended to be complete prior to the April Agenda Book deadline, however it slipped.[5]

At the October meeting, the Committee appeared to be wrestling with the question of whether the problem of Rule 12's language conflicting with statutes was a problem in practice. After reviewing hundreds of FOIA dockets by eye and thousands with automation, I can confirm there is a real problem. All but a few districts issue the standard 60-day summons, and DOJ frequently hews to the date in the summons, not the date in the statute.

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[3] It is now apparent that lack of the fee waiver is no real obstacle to including these dockets, given their small numbers.

[4] 16 USC § 1855(f)(3)(A), part of the Magnuson-Stevens Fishery Conservation and Management Act, specifies 45 days for the Secretary of Commerce to respond to § 1855(f)(1) petitions, which appear to be filed in the district court in at least some instances. To my inexpert eye, it only involves official-capacity defendants, so does not implicate Rule 12(a)(3).

[5] The multi-court fee exemption process is not efficient, and I failed to accurately predict how long it would take. Our application was filed with the AOUSC on Nov. 11, 2020 and the AO distributed it to all district courts on Dec. 4, 2020 with the recommendation that it be approved. We were approved by approximately 32 courts within the first week, 7 during January, and 2 during February. Some courts never received the AOUSC's recommendation, and others lost track of the request. After numerous individual follow-up inquiries, our exemption was granted in 87 of the 94 district courts, the most recent in early April. None have been denied, per se.

If the Committee has any questions regarding this work, I would be pleased to answer them. I will also be present during the April 23 virtual meeting; although members of the public are directed by the AO not to raise our virtual hands, I will be available if the Committee wishes to hear from me.

Very truly yours,

*/s/ John A. Hawkinson*
John A. Hawkinson

encl: Appendix: summary of FOIA answer times, broken down by district.

cc: Rebecca L. Fordon, Daniel T. Hartnett

16 April 2021

Preliminary analysis of FOIA case (NOS 895) response times across 87 courts, excluding *in forma pauperis* cases. This version makes no attempt to account for motions to extend the time for answers.. The clock is stopped by an answer, a motion to dismiss (Rule 12), a motion for summary judgment (Rule 56), a joint filing, or a stipulation. Cases whose date of service precedes date of filing likely reflect transfered cases, and have been removed. Where date of service is unavailable in CMECF, it is presumed to be 20 days from filing. This analysis is preliminary and subejct to revision.

| **Court** | **Count** | **Mean days** | **Median days** | **Minimum days** | **Maximum days** | |
|---|---|---|---|---|---|---|
| | | | | | | |
| **ALL** | 2115 | 42.14 | 30 | 0 | 974 | |
| **<=30** | 1064 | 22.44 | 24 | 0 | 30 | |
| **>30** | 1051 | 62.08 | 48 | 31 | 974 | |
| **NOT dcd** | 724 | 45.94 | 30 | 0 | 974 | |
| | | | | | | |
| akd | 5 | 57.6 | 56 | 18 | 106 | |
| azd | 10 | 34.2 | 30.5 | 10 | 77 | |
| cacd | 34 | 29.85 | 24 | 3 | 116 | |
| caed | 7 | 28 | 29 | 7 | 50 | |
| cand | 108 | 24.19 | 19 | 2 | 163 | |
| casd | 15 | 55.33 | 34 | 13 | 212 | |
| cod | 25 | 57.56 | 30 | 10 | 485 | |
| ctd | 4 | 23.25 | 22 | 20 | 29 | |
| dcd | 1391 | 40.16 | 31 | 0 | 704 | |
| ded | 1 | 33 | 33 | 33 | 33 | |
| flmd | 10 | 47.9 | 33 | 11 | 120 | |
| flsd | 20 | 87.25 | 43 | 14 | 709 | |
| gamd | 1 | 43 | 43 | 43 | 43 | |
| gand | 19 | 64.11 | 59 | 2 | 125 | |
| hid | 1 | 105 | 105 | 105 | 105 | |
| iand | 1 | 46 | 46 | 46 | 46 | |
| idd | 8 | 30.38 | 28 | 13 | 65 | |
| ilnd | 19 | 121.58 | 74 | 16 | 974 | |
| ilsd | 2 | 22.5 | 22.5 | 14 | 31 | |
| insd | 3 | 35 | 26 | 1 | 78 | |
| ksd | 1 | 35 | 35 | 35 | 35 | |
| kyed | 1 | 21 | 21 | 21 | 21 | |
| kywd | 1 | 128 | 128 | 128 | 128 | |
| laed | 3 | 23 | 21 | 17 | 31 | |
| lawd | 1 | 77 | 77 | 77 | 77 | |

| Court | Count | Mean days | Median days | Minimum days | Maximum days | |
|---|---|---|---|---|---|---|
| mad | 19 | 51.58 | 45 | 6 | 116 | |
| mdd | 21 | 110 | 61 | 33 | 581 | |
| med | 4 | 34.5 | 32 | 21 | 53 | |
| mied | 6 | 35.83 | 36 | 22 | 50 | |
| miwd | 9 | 42.78 | 38 | 15 | 133 | |
| mnd | 12 | 32.08 | 17 | 0 | 99 | |
| mowd | 5 | 129.4 | 125 | 0 | 318 | |
| msnd | 1 | 127 | 127 | 127 | 127 | |
| mssd | 2 | 70.5 | 70.5 | 41 | 100 | |
| mtd | 7 | 18.57 | 15 | 13 | 37 | |
| nced | 3 | 115.33 | 62 | 33 | 251 | |
| ndd | 2 | 35.5 | 35.5 | 28 | 43 | |
| nhd | 1 | 210 | 210 | 210 | 210 | |
| njd | 8 | 66.5 | 55.5 | 26 | 117 | |
| nmd | 7 | 34.14 | 35 | 7 | 69 | |
| nvd | 1 | 30 | 30 | 30 | 30 | |
| nynd | 2 | 60 | 60 | 60 | 60 | |
| nysd | 150 | 39.41 | 32 | 1 | 283 | |
| nywd | 8 | 36.38 | 32.5 | 14 | 70 | |
| ohnd | 3 | 40 | 37 | 21 | 62 | |
| ohsd | 2 | 88.5 | 88.5 | 31 | 146 | |
| ord | 18 | 45 | 31.5 | 13 | 193 | |
| paed | 7 | 57.14 | 19 | 11 | 222 | |
| pawd | 5 | 64.6 | 63 | 17 | 106 | |
| rid | 1 | 42 | 42 | 42 | 42 | |
| scd | 8 | 41.25 | 30 | 15 | 84 | |
| sdd | 2 | 70 | 70 | 23 | 117 | |
| tned | 3 | 36.67 | 19 | 14 | 77 | |
| tnmd | 1 | 67 | 67 | 67 | 67 | |
| txed | 3 | 72.33 | 91 | 35 | 91 | |
| txnd | 17 | 35.82 | 37 | 17 | 61 | |
| txwd | 9 | 28 | 27 | 2 | 60 | |
| utd | 3 | 32.67 | 29 | 29 | 40 | |
| vaed | 14 | 45.71 | 33.5 | 14 | 109 | |
| vawd | 5 | 20 | 14 | 13 | 43 | |
| vtd | 4 | 59 | 46.5 | 21 | 122 | |
| waed | 1 | 13 | 13 | 13 | 13 | |
| wawd | 45 | 34.04 | 19 | 11 | 163 | |
| wied | 2 | 58 | 58 | 29 | 87 | |
| wvnd | 2 | 67 | 67 | 15 | 119 | |
| wvsd | 1 | 64 | 64 | 64 | 64 | |